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1938

# JUDGES OF THE HIGH COURT.

## JULY—DECEMBER, 1938.

*Chief Justice.*

The Hon'ble Sir Alfred Henry Lionel Leach (*Barrister-at-law*).

*Puisne Judges.*

The Hon'ble Mr. Justice C. Madhavan Nair (*Barrister-at-law*).
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*The Advocate-General.*

Sir Alladi Krishnaswami Aiyar, *Kt.*, B.A., B.L. (Diwan Bahadur).

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THE

# Madras Law Journal Reports.

II] JULY [1938

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Musammat Ali Begam (since deceased) now represented by Saiyed Mohammad Raza and others .. *Appellants**

*v.*

Badr-ul-Islam Ali Khan and others .. *Respondents.*

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Mt. Ali Begam *v.* Badr-ul-Islam Ali Khan.

*Mahomedan Law—Wakf—Dedication of properties by will for public and charitable purpose—Right of residence given to members of family—Direction for payment of debts of testator—Dedication regarding certain properties taking effect at future time—Whether opposed to principles of Shiah Law—Civil Procedure Code (V of 1908), S. 92—Representative suit—Procedure—Sanction given to three persons—Two persons whether can file suit—Right to appeal.*

A testator by his will disposed of five items of property for a public charitable purpose well-known and highly esteemed as pious by the Mahomedan Law. He not only used the word "wakf" but expressed his intention to benefit the general public and directed that the properties should be excluded from the rights of relations. At the same time he made a provision conferring on the testator's brother, who was appointed manager of the wakf, and on that brother's heirs who should be his descendants, the right of private residence in the sarai. There was nothing to show that the right of residence so conferred was intended or was likely to exhaust the accommodation of the sarai, or could in law be insisted on to the exclusion of the charity. The will again contained provisions as to details of expenses to be incurred and also a general direction for the payment of the testator's debts. The testator by the same will gave the income from two other properties to *M.B.* and *M.A.* for life. He made directions as to the interests in remainder, the effect of which was that, on the death of *M.B.* or *M.A.* the

* P. C. Appeal No. 120 of 1936. 29th March, 1938.

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properties, or in the event of their sale during their lifetime, the proceeds of sale, should be "attached to the sarai".

*Held*, that there was a valid and effective dedication of the five properties for the purposes specified, and the fact that the right of residence in the sarai was conferred on certain persons, or that the manager was given a certain power of disposal of the properties, would not affect the dedication for the wakf.

*Held, however*, that in respect of the other two items of property the testator did not intend them to be wakf properties until the death of the life tenants or their sale, that such a disposition was invalid as infringing the principle of Shiah law to the effect that an appropriation of property for wakf as from a future date is invalid. While the above principle is to some extent mitigated by the decision in *Baker Ali Khan* v. *Anjuman Ara Begam*, (1903) L.R. 30 I.A. 94: I.L.R. 25 All. 236 (P.C.), that a Shia may create a wakf by will, the principle is not thereby abrogated for all purposes in the case of testamentary disposition; nor is it necessary for the application of the principle that the passing of the property to the endowment should be made to depend on an event which is both problematical and future.

*Muhammad Ahsan* v. *Umardaraz*, (1906) I.L.R. 28 All. 633, disapproved.

Where in respect of a suit under S. 92, Civil Procedure Code, the consent in writing of the Advocate-General or Collector has been given to three persons as plaintiffs, the suit cannot validly be instituted by two only. The suit as instituted must conform to the consent. On the other hand, if the three persons join as plaintiffs and two of them die pending suit, the suit does not become defective or incompetent. There is no provision whatever in the Code for recourse being had to the Advocate-General or Collector during the course of a suit or of any proceedings in appeal. When once validly instituted, it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular. Consequently one of several plaintiffs can prefer an appeal in such a case on the same terms and conditions as are applicable to suits in general.

Appeal from a judgment dated 14th January, 1935, of the High Court, Lahore (Jai Lal and Skemp, JJ.) reversing a judgment and decree, dated 2nd January, 1929, of the Senior Subordinate Judge, Amritsar.

*A. M. Dunne, K.C.* and *J. M. Parikh* for Appellants.—In the first place, it is submitted that the appeal to the High Court was incompetent, because all the plaintiffs in the suit which had been dismissed were not made parties to it. Further, that being so, the defect was not cured by taking the fifth plaintiff, who had been made a respondent, and making him an appellant during the argument. The will, on its true construction, did not create any wakf in respect of the sarai or any other properties. It is significant, for example, that the properties alleged to have been made wakf are subject to the payment of the testator's debts and to certain other charges. He would not have encumbered the properties had he wished to make them wakf. Again, if the will does effect a wakf, the wakf is rendered invalid by the provision

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in the will giving the testator's brother and his heirs right of residence in the sarai, such a right in respect of the sarai being inconsistent with its being wakf. With regard to the Mess Kothi and Small Kothi properties, assuming that the will meant to create a wakf, such a wakf would be invalid in respect of them because it would not conform with Shia principles. It is permissible to effect wakf by will, but it is not on that account permissible to dedicate the properties as from a future or uncertain event, as has been done here.

*L. P. E. Pugh, K.C.* and *H. R. Abdul Majid* for Respondents.—As to the preliminary objection in respect of the appeal to the High Court, it was quite open to four out of the five plaintiff-respondents to prosecute the appeal themselves, without the fifth. The wakf in respect of the sarai and other properties which, it is submitted, the will undoubtedly effects, is validly made according to the principles of Shia Mahomedan law. The whole tenor of the will supports a construction of it as being intended to effect wakf in respect of the properties in question. There is nothing contrary to Shia law in the reservation of a right of residence in the sarai to the testator's brother, as manager, and his heirs. And that right to residence in a portion of the sarai cannot be said to be inconsistent with the dedication.

29th March, 1938. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—On the 25th May, 1887, Agha Kalb Abid Khan, a Shia Mussulman of Persian origin, died at Amritsar leaving as his heirs a brother Kalb Ali Khan and a sister Mussammat Hussaini Khanum. On the 3rd March, 1887, he had made a will the true construction and effect whereof is the subject of this appeal. He was possessed of a half share in certain immovable property in the district of Farrukhabad which he had inherited from his father and of which the income was expended on an Imambara and other religious purposes at Fatehgarh. In addition thereto he was possessed of immovable property at Amritsar and Lahore valued by him in his will at Rs. 1,73,000, and thereby described, valued and disposed of in detail. Of his properties at Lahore valued by him at about Rs. 60,000, three, of a total value of Rs. 36,200, were given by the will to his brother Kalb Ali, and one, valued at Rs. 18,000, to his sister Hussaini Khanum. There remained two parcels of land at or near Lahore—one measuring 45 bighas and valued at Rs. 4,000, the other measuring 16 bighas and valued at Rs. 2,000. By

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his will the testator gave the former to a lady called Mussammat Buti and her son Ismail Hussain for their lives, and the latter to one Musaffar Ali for his life. The interests in remainder he disposed of by directions that they should be " attached " to the sarai hereinafter mentioned: the validity and effect of these directions need not now be considered, as it is not, in the events that have happened, possible on this appeal to pronounce any binding decision thereon or to give relief in respect thereof. The properties at Amritsar, to which the dispute in the present suit is now confined, are valued in the will at Rs. 1,13,000. This figure includes two properties in Amritsar Cantonment—one called the Mess Kothi (valued at Rs. 2,000) and the other called the Small Kothi (valued at Rs. 1,000). The income from the former was given by the will to Mussammat Buti and her son Ismail Hussain for their lives upon certain conditions. The income of the latter was given to Musaffar Ali for his life upon certain other conditions. A question arises as to the validity of the testator's directions as regards the interests in remainder, which question their Lordships will deal with in due course.

In addition to these two small properties the will includes as an item of the testator's property at Amritsar, " promissory notes value Rs. 36,000 income Rs. 1,490." These promissory notes are included in the figure of Rs. 1,10,000 hereinafter mentioned: the two small properties are not.

The main disposition made by the testator in his will is that whereby five properties at Amritsar (in addition to the promissory notes already mentioned)—total value Rs. 1,10,000 —are characterised as "pertaining to the sarai", "built and attached to the serai", "built in connection with the new serai." These are (1) a house in the Civil Lines occupying with garden, etc., 25 bighas—Rs. 15,000; (2) cultivated land nearby—Rs. 5,000; (3) plots near the church and dak bungalow—Rs. 1,000; (4) Begum Sahiba's land and garden—Rs. 3,000; (5) "the sarai under construction"—Rs. 50,000. The main question upon this appeal is whether the true construction and effect of the will is to make these properties wakf for the purposes of a sarai.

Soon after the death of the testator, his brother, Kalb Ali, was entered in the revenue records as owner of the lands

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at Amritsar. On the 12th May, 1892, mutation of the Amritsar property was effected in favour of the sarai. In 1895, Kalb Ali died leaving a widow Mussammat Bismillah Khanum, a son Kalb Haidar and a daughter Mussammat Ali Begum (defendant No. 1). On the 14th May, 1896, mutation of the Amritsar property was effected in the name of the sarai under the management of Kalb Haidar. On the 13th May, 1907, for Rs. 15,500 Kalb Haidar sold to one Sundar Singh five plots of the Amritsar property above set forth (in all 39 kanals 3 marlas) reciting that he had been in possession thereof as proprietor under his uncle's will of the 3rd March, 1887. He died in 1909, and on the 11th September of that year the Amritsar land was recorded in the name of the sarai under the management of Mussammat Bismillah. In 1921, Mussammat Bismillah leased 12 kanals of the lands at Amritsar to one Piara Singh (original defendant No. 3) for 50 years at an annual rent of Rs. 200. Mussammat Bismillah died in 1922, and her daughter, Mussammat Ali Begum took possession of the Amritsar property as her heiress. Mussammat Ali Begum has at all times claimed to hold it as absolute owner and has not at any time acknowledged any wakf or dedication. On the 7th April, 1926, she sold to Nizam-ud-din (defendant No. 2) 12 kanals 4 marlas of the land at Amritsar.

On the 30th June, 1926, the present respondents, Nos. 1 to 5, with the sanction of the Collector under Ss. 92/93 of the Code of Civil Procedure, brought in the Court of the Senior Subordinate Judge at Amritsar the suit out of which this appeal arises. The plaint treating Mussammat Ali Begum as *de facto* mutawalli asked that she be removed from that office and made to account for the wakf property and for the proceeds of the various sales and of the lease to Piara Singh; also that a scheme be framed for the wakf. The trial Judge dismissed the suit (2nd January, 1929), holding that, though Kalb Abid had dedicated the suit lands for the purposes of a sarai in his lifetime, the dedication was invalid as he had retained possession; that he had not made a dedication thereof by his will; that, if his will did purport to effect a dedication, that also was invalid having regard to certain provisions in the will as to the testator's heirs. Four of the five plaintiffs appealed to the High Court at Lahore, making the remaining plaintiff a respondent to the appeal. The High Court, having at the

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hearing made this plaintiff an appellant instead of a respondent, held that a valid wakf of the sarai was created by the will of Kalb Abid, set aside the decree of the Subordinate Judge and remanded the case to him in order that he might decide whether Mussammat Ali Begum should be mutawalli, prepare a scheme, take accounts and give other directions as necessary. From this decree (14th January, 1935), Mussammat Ali Begum appealed to His Majesty, and on her death her representatives have been duly substituted as appellants.

In view of the observations made by the learned Judges in the High Court, Mr. Dunne for the appellants has very properly raised before their Lordships the question whether the appeal as brought to the High Court was competent and, if not, whether the defect was cured by making the respondent plaintiff an appellant. As it appears that the appeal was brought with this plaintiff's concurrence and that he was made a respondent only because he had gone on business to another province, it is difficult to discern any substance in the preliminary objection. Where the consent in writing of the Advocate-General or Collector has been given to a suit by three persons as plaintiffs, the suit cannot validly be instituted by two only. The suit as instituted must conform to the consent. On the other hand, if the three persons join as plaintiffs and two of them die pending suit, the suit does not become defective or incompetent (*Raja Anand Rao* v. *Ramdas Daduram*[1]). There is no provision whatever in the Code for recourse being had to the Advocate-General or Collector during the course of a suit or of any proceedings in appeal. As sub-S. (2) of S. 92 sufficiently shows, the consent in writing is a condition of the valid institution of a suit and has no reference to any other stage. When once validly instituted, it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular. Their Lordships cannot accept the doctrine of Jai Lal, J., in the present case that the persons who have instituted the suit with the leave of the Collector are to be deemed to be one plaintiff, nor do they see any reason why one of several plaintiffs in such a suit should not appeal on the same terms and conditions as are applicable

1. (1921) L.R. 48 I.A. 12: I.L.R. 48 Cal. 493 (P.C.).

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to suits in general. In the present case, the appeal was, in their Lordships' view, competent and regular as originally brought: the amendment though unobjectionable was not necessary.

On the main question, their Lordships, in agreement with the High Court, consider that upon the true construction of the will of Kalb Abid the five Amritsar properties above-mentioned were made wakf for the purposes of a sarai and for the specified purposes subsidiary thereto. They are further of opinion that the dedication thereof is valid and in accordance with Shia law. The properties are described as "pertaining to the sarai" in the same sense as the properties given by the will to the testator's brother and sister are described as "pertaining to my brother" and "pertaining to my sister." It is not in doubt that the testator had obtained a plot of land from Major Warburton for the very purpose of being used for a sarai. There are repeated references to this sarai throughout the will, and one of the five plots of land now in question (value about Rs. 50,000) is thus described:—

The sarai under construction which is about to be completed. The building operations are going on. It was built with the intention of Waqf for the benefit of the general public and for performance of religious ceremonies, such as Ashura, prayers on both the Ids, Muharram and Nauroz, etc., and for the comfort of every man, without charging any rent, etc., and is excluded from the rights of relations, etc. But my brother Kalb Ali Khan and his heirs who are his descendants have the right of private residence in it.

The will concludes as follows:—

"It is to be noted that I have given Mirza Kalb Ali Khan, my real brother, the powers for the management of the entire property, left by me, and the power of disposal as owner of every kind like myself. He should use all these powers in obedience to the directions given in this will. He should continue the maintenance allowance of the persons, to whom I have assigned some maintenance, subject to the conditions and for the period mentioned in this will, provided they do their work faithfully, earnestly, honestly, eagerly, and obediently with good conduct and keep him pleased. In case of default of the above conditions or displeasure of my aforesaid brother, or in case of any embezzlement, misappropriation or dishonesty, he has full authority to dismiss them and to stop and confiscate the maintenance fixed. All these powers will be exercised by the male descendants of my brother Kalb Ali Khan, after his death and will thus continue generation after generation. But if the said brother does not care to take this trouble or refuses to manage the above property, it should be made over to the Government and the Deputy Commissioner for management. The Deputy Commissioner alone or by appointing a committee and an advisory board of some Mohammadan gentlemen belonging to the Asna Ashari community, should then manage the Waqf property. The same action should be taken in case the

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male heirs of the said brother should happen to be inefficient and should be guilty of breach of the conditions and misappropriation. If, after my death or during the severe attack of disease or unconsciousness, any one of my dependants is guilty of dishonesty or embezzlement or misappropriation, etc., in respect of my property and goods or if my brother suspects the said dependant of these things, then my brother will have the power to dismiss him or to deprive him of the gift."

From these passages it sufficiently appears that the testator's intention was to dedicate the five items of property for a public charitable purpose well known and highly esteemed as pious by the Mussulman law. He not only used the word "wakf" but expressed his intention to benefit the general public, and directed that the property should be "excluded from the rights of relations", thus giving ample evidence that he knew what was meant by "wakf" and fully intended to effect a wakf. It is true that, after the words "excluded from the rights of relations", come words which say that Kalb Ali and his heirs who are his descendants shall have the right of private residence in the sarai. This would include female heirs who would not necessarily be managers of the wakf. But in their Lordships' view this provision does not show that the testator did not intend to make wakf of the properties; nor does it render the dedication illusory or make it invalid either on the ground that the property was not substantially dedicated to charity or on the ground that the wakif had retained a benefit for himself. It is not necessary in this case to pray in aid the provisions of the Mussalman Wakf Validating Act, 1913. There is no ground for holding that the right of residence was intended or was likely to exhaust the accommodation of the sarai or could in law be insisted on to the exclusion of the charity. Nor is the right given to the testator's heirs obnoxious to the rule of Shia law which requires a wakif to divest himself of all interest in the property and in its usufruct. (Cf. *Abadi Bagum* v. *Kaniz Zainab*[1].)

Again, it is true that the testator, having set forth in detail each of his properties and his disposition thereof, adds thereto a list headed "Details of Expenses." Having entered "expenses on account of my burial" at Rs. 500 and expenses on account of fast and prayers and the taking of his body to Karbala, etc., at Rs. 1,500, and the marriage expenses of two girls at Rs. 500, the testator concluded with an entry: " for

1. (1926) 52 M.L.J. 430: L.R. 54 I.A. 33: I.L.R. 6 Pat. 259 (P.C.).

payment of debt—about Rs. 10,000 or the amount remaining due from me after my death." There is no evidence as to the amount owing by him at his death or as to the funds from which his debts if any were discharged. The will contains no direction for the payment of debts out of any particular asset, nor does it charge any property with his debts. The wide powers of disposal given to the testator's brother, which would include a power of sale, are in their Lordships' opinion to be read, so far as the wakf properties are concerned, as powers given to a manager to be exercised in the course of proper management; and this is indeed comprehended in the direction to "use all these powers in obedience to the directions given in this will." No objection arises in the present case upon the fact that the property dedicated by the will exceeds the one-third share beyond which a Muslim cannot without the consent of his heirs dispose of his property by will: there are concurrent findings of the Courts in India that the testator's heirs consented. Nor does any difficulty arise upon the concluding passages which their Lordships have already cited from the will, by reason that the testator does not use the word "mutawalli" when making provision for the management of the sarai and the property devoted thereto. Upon a proper construction of the will, their Lordships are of opinion that there was a valid and effective dedication of the five properties above-mentioned for the purposes specified. There appears to be no evidence as to the amount or value of the promissory notes outstanding at the testator's death or as to what was done with them.

It remains to consider the two properties in Amritsar Cantonment hereinbefore described as the Mess Kothi and the Small Kothi, of which the income was given for life to Musammat Buti and her son, and to Musaffar Ali respectively. The effect of the testator's directions as to the interests in remainder is that, on the death of the persons mentioned, the property and the income should be "attached to the sarai", and that, if either property should be sold during the lifetime of the person entitled for life, he or she should get a specified sum out of the wakf, and the proceeds of the sale should be invested and "attached to the sarai." This raises a question of some nicety in the application of the Shia law. If the will can be read as intending that on the death of the testator these two properties should become "wakf", it would be in no way

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unlawful that a life interest in the usufruct should be reserved for the beneficiaries above-named. On the other hand, a direction that the property should become wakf after the death of a person surviving the testator is contrary to the principles applied by the Shia law to dedications *inter vivos*. "If one should say I have appropriated when the beginning of the month has come . . . the appropriation would not be valid" (Shuraya-ool-Islam. Baillie v. II p. 218.) Their Lordships recognise that the decision in *Baker Ali Khan* v. *Anjuman Ara Begam*[1], which permits a Shia to create a wakf by will is itself a mitigation of the rigour of this principle, but they are not of opinion that the principle is abrogated for all purposes in the case of a testamentary disposition, nor do they think that it can be confined to cases where the passing of the property to the endowment is made to depend upon an event which is problematical as well as future. On these points they are not in agreement with the observations made in the case of *Muhammad Ahsan* v. *Umardaraz*[2]. While not disposed to put a narrow or unduly technical construction on this will, upon a careful consideration of the language used by the testator and of the substance and effect of his dispositions, their Lordships find themselves unable to hold that he intended either of the two properties now in question to become wakf property until the tenant for life had died or there had been a sale under the powers conferred by the will. On this view they think that there is no valid dedication of either property, and to this extent the appeal succeeds.

They will humbly advise His Majesty that it should be declared that the properties in Amritsar Cantonment described in the will of Agha Kalb Abid Khan as the Mess Kothi and the Small Kothi are not wakf; that, subject thereto and save as regards the Lahore properties upon which no decision can be given in this appeal, the decretal order of the High Court should stand and this appeal should be dismissed.

The appellants must pay to the plaintiff-respondents one-half of their costs of this appeal.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Francis, Harker.*

R. C. C. ——— *Appeal dismissed.*

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1. (1903) L.R. 30 I.A. 94: I.L.R. 25 All. 236 (P.C.).
2. (1906) I.L.R. 28 All. 633.

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Gaekwar Baroda State Railway .. *Appellant**

*v.*

Hafiz Habib-Ul Haq and others .. *Respondents.*

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*Civil Procedure Code (V of 1908), Ss. 86, 87 and 110—Sovereign Prince—Statutory right not to be sued—Right of waiver—Corporation owned by Prince—Alleged breach of contract by—Whether action against corporation competent—Affirming judgment—Privy Council appeal.*

The provisions of Ss. 86 and 87 of the Code of Civil Procedure relate to an important matter of public policy and they are imperative and must be observed. H.H. the Gaekwar of Baroda is a Sovereign Prince within the meaning of these sections. And a suit instituted against the Gaekwar of Baroda State Railway, which is owned and managed by the Gaekwar, is in effect a suit against the Gaekwar and it cannot be maintained without the necessary certificate under S. 86. In such a case the requirements of Ss. 86 and 87 of the Code being statutory, they cannot be waived. Nor can the Sovereign Prince in such circumstances be deemed to carry on business in an assumed name so as to sue the corporation owned by him, for a suit cannot be brought against an assumed name.

*Quaere*, whether modification by the High Court of a decree of a Subordinate Judge, the High Court reducing by a small amount a decree for money passed by the Subordinate Judge in favour of the plaintiff, is an affirmation of or a differing from the decision of the Court below for the purposes of S. 110, Civil Procedure Code.

Decision of the Allahabad High Court reversed.

Appeal from a judgment and decree of the High Court of Judicature, Allahabad, dated 22nd December, 1933, modifying but in the main confirming a decree dated 3rd July, 1929, of the Subordinate Judge, Agra.

*Sir William Jowitt, K.C.* and *Sir T. J. Strangman* for Appellant.—The Baroda State Railway was in the first place not capable of being sued through its engineer-in-chief and manager. Further, the railway is not a corporation sole or even a legal entity; and the manager and engineer were not liable on the contracts in question. His Highness the Maharajah Gaekwar of Baroda is the sole proprietor of the railway; moreover, on the one hand, he was not a party to the suit, and, on the other, if the suit be regarded as having been brought against him, it is incompetent because the Maharajah was a Sovereign Prince over whom the Court could have no jurisdiction, and no consent had been given as prescribed

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*P. C. Appeal No. 67 of 1936. 18th March, 1938.
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by S. 86 of the Code of Civil Procedure. Further, again on the assumption that the suit was brought against him, the Maharajah did not waive, and could not have waived, his right not to be sued without the prescribed consent; and in any case there were other conditions to be fulfilled besides the giving of the consent.

*C. S. Newcastle, K.C., H. R. Abdul Majid* and *Dingle Foot* for Respondents.—By way of preliminary objection to this appeal, it is submitted that it is incompetent for non-compliance with Ss. 109 and 110 of the Civil Procedure Code. In granting the certificate pursuant to their granting of leave to appeal, the High Court stated that the Courts in India had differed. In fact they had not done so. What actually happened was that the High Court confirmed the decree of the Subordinate Judge with a minor modification.

The Subordinate Judge had jurisdiction under S. 20 of the Code to try the action. Further, the appellant submitted to the jurisdiction of the Court, thus waiving his rights of immunity. The conclusion arrived at was correct; the railway is a corporation capable of being sued. Whether the railway is or is not a corporation is a question of fact to be determined in accordance with the law of the State of Baroda. See *Banque Internationale De Commerce De Petrograd* v. *Goukassow*[1] and *Lazard Brothers & Co.* v. *Midland Bank*[2]. Those cases recognise the principle of the establishment as juristic entities of corporations established by foreign law. That principle is applicable by analogy here because the evidence shows that the railway was established as a corporation by the law of the State of Baroda. In those circumstances, and having regard to the fact that the Gaekwar, by allowing the railway to defend the suit on its merits and produce evidence, and by taking advantage of the opportunity of perhaps obtaining judgment in his favour, must be taken as having waived his privileges, the appeal should be dismissed.

18th March, 1938. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal from a judgment and decree of the High Court of Judicature at Allahabad dated the 22nd of December, 1933, which varied but in the main confirmed a judgment and decree of the Subordinate Judge of Agra dated the 3rd July, 1929. The suit was brought by Mohammad Habib-ullah, who died after the judgment of the Trial Court was given, and during the

1. (1923) 2 K.B. 682. 2. (1933) A.C. 289.

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pendency of the appeal to the High Court. The respondents to this appeal were brought on the record as his heirs and personal representatives. The defendant in the suit was described as "The Gaekwar Baroda State Railway through the Manager and Engineer-in-Chief" of the said Railway.

The plaintiff was a timber merchant, and in April, 1923, he entered into four contracts for the supply of sleepers for the said railway in Baroda which are the subject-matters of this appeal. A fifth contract for the supply of shisham wood was also comprised in the suit.

The contracts were made in Baroda between the plaintiff and a Mr. Martin who signed the contracts as "Manager and Engineer-in-Chief, Baroda State Railway". No sleepers were delivered in respect of two contracts. The other two contracts were partly performed by the delivery of sleepers. It was alleged on behalf of the defendant that the sleepers which were delivered were not in accordance with the contracts, and for this and other reasons, which need not now be specified, all the contracts were cancelled by a letter dated the 3rd of May, 1924, from Mr. A. T. Houldcroft who was then the manager and engineer-in-chief of the railway, which was said to have been received by the plaintiff on the 7th May, 1924. The plaintiff filed his suit on the 7th May, 1927, in the Court of the Subordinate Judge of Agra, claiming Rs. 38,185-12-0 for the balance of the price of the sleepers supplied plus retrenchment money, and Rs. 1,16,720-14-0 damages for failure to take delivery of the remainder of the sleepers and wood.

The written statement, which was filed on the 10th of December, 1927, was signed by Mr. C. Allan Cooke, who was then the manager and engineer-in-chief of the said railway. It contained many defences, including pleas that the Agra Court had no jurisdiction to try the suit, and that the suit was barred by limitation, but the main question which their Lordships have to consider in this appeal arises in respect of the following plea:

24. The suit not having been filed against the proper party is not maintainable; the defendant railway is owned by H.H. the Maharaja Gaekwar of Baroda, a Sovereign Prince, and is managed by His Highness' Government, the claim against the Manager and Engineer-in-Chief of the defendant railway who is only a paid servant of the State is bad in law.

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Many issues were settled and tried by the Subordinate Judge, and the issue in connection with the above-mentioned plea was as follows:

"Is the Maharaja Gaekwar of Baroda a necessary party to the suit? Is the suit as framed maintainable?".

This raises an important question, for it was alleged on behalf of the defendant that the suit was in reality, though not in form, a suit against H. H. the Gaekwar of Baroda, that it had been framed in the above-mentioned manner because of the difficulty in the plaintiff's way caused by the provisions of Ss. 86 and 87 of the Civil Procedure Code of 1908, to which further reference will presently be made, and that it was an attempt to fix H. H. the Gaekwar with liability in this indirect manner.

The Subordinate Judge made a decree in favour of the plaintiff for the price of material supplied including retrenchment money Rs. 37,065, interest on the said amount Rs. 14,430, damages Rs. 50,054 minus Rs. 112 for shisham log wood which he held was barred by time, balance Rs. 49,942, total Rs. 1,01,437, with further directions as to interest and costs. The defendant appealed to the High Court, which ordered and decreed that the appeal should be allowed in part, and that the Subordinate Judge's decree should be modified to the extent that the amount decreed thereunder should be reduced by Rs. 7,797-9-0, and that in other respects the aforesaid decree should be confirmed and the appeal dismissed.

The defendant applied to the High Court for leave to appeal to His Majesty in Council and the grounds of his application admittedly included substantial questions of law.

The learned Judges of the High Court allowed the application and certified that "As regards the value and nature of the case it fulfils the requirements of S. 110 of Act No. V of 1908". A preliminary objection was taken by learned counsel on behalf of the plaintiff respondents that the appeal was incompetent for non-compliance with the provisions of the Civil Procedure Code, Ss. 109 and 110.

In support of this contention reference was made to the judgment of the learned Judges of the High Court who granted the above-mentioned certificate.

In that judgment it was stated that "the valuation of the suit in the Court below being above Rs. 10,UCO and the

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valuation of the proposed appeal to His Majesty in Council being also above Rs. 10,000 and the Courts in India having differed, the case satisfies the requirements of law under S. 110, Civil Procedure Code, and we certify accordingly". The point which was taken by the learned counsel was that the learned Judges were wrong in holding that the Courts in India had differed, inasmuch as the decree of the Subordinate Judge was confirmed by the High Court in all respects, except that the amount decreed by the Subordinate Judge in the plaintiff's favour was reduced by Rs. 7,797-9-0.

It was argued that the decree of the High Court really affirmed the decree of the Court immediately below, and therefore that the ground relied on by the learned Judges for granting the certificate was wrong.

Several cases relating to this question were cited to their Lordships, and it appears that the decisions therein are not altogether consistent, but their Lordships do not propose on this occasion to consider them in detail or to give any decision upon the point. The reason for their Lordships' conclusion in this respect is that, even if the decree of the High Court did affirm the decree of the Subordinate Judge (which their Lordships do not decide), it is obvious that the appeal involves substantial questions of law, and, as the value of the subject-matter of the suit and of the appeal was above Rs. 10,000, the learned Judges were right in granting the certificate.

Indeed the learned counsel for the plaintiff respondents frankly admitted that this was a case in which their Lordships, if it were necessary, would properly grant special leave to appeal by reason of the important questions of law involved.

The Subordinate Judge in his judgment recorded the admission made on behalf of the plaintiff in the Trial Court that the above-mentioned railway is "neither a State railway nor a Company railway but is owned and managed by His Highness the Maharaja of Baroda through his own men", and it is to be noted that in the course of some interlocutory proceedings before the trial the plaintiff declined to make His Highness the Gaekwar a defendant in the suit.

The Subordinate Judge, however, found it possible to make a decree, as already stated, in the plaintiff's favour,

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holding that the railway was a corporation within the meaning of the Civil Procedure Code, and that it possessed a *locus standi* of its own before the law Courts and could be sued in its own name through the head of the railway department. This conclusion was based largely upon the construction which the Subordinate Judge placed upon the provisions of 42 & 43 Vict., c. 41 and the Indian Railways Act (Act IX of 1890), which the learned Judge considered were applicable to the Gaekwar Baroda State Railway. The High Court came to the same conclusion and held that the defendant railway is a corporation, of which H. H. the Gaekwar is the owner.

One of the learned Judges in the High Court noted in his judgment that the plaintiff was not suing a Ruling Prince, and that he was not trying to execute his decree against such a Prince, but stated that "what he wants is a decree against the defendant railway which is the property of a Ruling Prince". He held further that it was open in India to the plaintiff to obtain his object so long as he did not contravene the express provisions of the Code of Civil Procedure, and expressed the opinion that the position was "that the owner of the corporation carries on business under an assumed name and the suit therefore can be instituted against that assumed name without in any manner infringing the provisions of S. 86 of the Civil Procedure Code".

The other learned Judge agreed with the conclusions arrived at by his learned brother and added that in his opinion the case was governed by O. 30, r. 10, of the Civil Procedure Code.

With all respect to the learned Judges their Lordships are unable to assent to the propositions and conclusions contained in their judgments. The provisions of Ss. 86 and 87 of the Civil Procedure Code, 1908, are as follows:

86.—(1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy—

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(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) The Governor-General in Council may, by notification in the Gazette of India, authorise a Local Government and any Secretary to that Government to exercise, with respect to any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing subsections to the Governor-General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immovable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

87. A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State:

Provided that in giving the consent referred to in the foregoing section the Governor-General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

The sections relate to an important matter of public policy in India and the express provisions contained therein are imperative and must be observed.

H. H. the Gaekwar is a Sovereign Prince within the meaning of these sections, and it was admitted by counsel on behalf of the plaintiff respondents that no certificate had been obtained as provided by S. 86, and further that no such certificate could have been obtained as none of the conditions contained in S. 86 (2) (a), (b) and (c) were applicable to this case.

With regard to the above-mentioned statement as to the position, it is obvious that a suit cannot be brought against "an assumed name". There must be some juristic entity capable of being sued, which is using or is known by the assumed name. It was, however, held by the learned Judges of the High Court that "the defendant railway came into existence under a grant from the Sovereign power and it is, therefore, a corporation though its owner is one person (His Highness the Maharaja of Baroda) and not several persons".

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Their Lordships cannot find any evidence in the record to justify the above-mentioned finding, and indeed the learned counsel who appeared for the plaintiff respondents admitted, and in their Lordships' opinion rightly admitted, that he was not able to support the judgment of the High Court on this or any of the grounds mentioned therein.

The learned counsel, however, contended that the conclusion at which the Courts in India arrived, namely, that the railway was a corporation capable of being sued was correct, and that he could support the High Court's decision on a ground not considered by the Courts in India.

He argued that the question whether the railway was a corporation was a question of fact and must be determined in accordance with the law of the State of Baroda. For this proposition he relied upon two cases, namely, *Banque Internationale De Commerce De Petrograd* v. *Goukassow*[1] and *Lazard Brothers & Co.* v. *Midland Bank*[2] and especially on the following passage in Lord Wright's opinion at page 297. "English Courts have long since recognised as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law." It was contended that by analogy the Courts in British India should recognise the railway as a juristic person, inasmuch as it could be shown from the materials in the record of this case that the railway had been established in the State of Baroda as a corporation.

The evidence which was mainly relied upon to establish the above contention was a notification which was under the heading "Supreme Court" No. 77 of 1921-22, dated the 16th April, 1922.

The translation is in the following terms:

SUBJECT:—

In regard to suits arising out of the dealings relating to the State Railway not being deemed as suits against the State (but) to be regarded like other suits.

'Suits relating to the State Railway not to be deemed as suits against the State but to be considered as other suits.'

The management of the State Railway and the work of keeping supervision over, it was entrusted in the first instance to the B. B. & C. I. Railway Co.

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During that time all suits relating to the Railway Administration, like other suits, were filed in any Court having jurisdiction but recently for some time past the management of that Railway has been taken over by the Government of His Highness the Gaekwar in its own hands and its management is carried by the Railway Department of the State. For this reason in order to make it clear whether suits relating to the working of the Railway being taken as ordinary suits, should be filed as before in any Court having proper jurisdiction, or suits of that nature, being regarded as suits against the State, should, in the first instance, be filed in the Prant Niyayadhishi (District Court). (In order to make that clear) a note herefrom, No. 114, dated 18th February, 1922, was issued, relating to Civil Order No. 162/82, dated 7th April, 1922, as passed, consequently it is decided that suits arising out of the business of the Railway of this State, not be regarded as suits against the State, and being considered like other suits, means should be adopted by all concerned to file them as before in any Courts of proper jurisdiction.

It was contended on behalf of the plaintiff respondents that by this notification H. H. the Gaekwar of Baroda intended to place the Gaekwar Baroda State Railway in the same position as the Bombay Baroda and Central India Railway Company, which apparently had managed the said railway until H. H. the Gaekwar took the management thereof into his own hands, and that he thereby intended to establish the railway administration as a corporation.

Their Lordships are not able to accept that contention: to place such a construction upon the terms of the notification would be unreasonable and contrary to the ordinary meaning of its terms, which, in their Lordships' opinion, are quite plain.

The notification is no more than a direction regulating the procedure as to suits relating to the railway administration and the working of the State railway in Baroda. It provided that such suits in Baroda were not to be regarded as suits against the State but were to be considered as other suits, and it gave directions as to the Courts in Baroda in which the said suits might be instituted.

The notification related to the State of Baroda only, and was merely a piece of internal administration with respect to the Courts in Baroda in which the suits therein referred to were to be instituted and the procedure to be adopted in connection therewith.

The notification, in their Lordships' opinion, affords no evidence whatever that H. H. the Gaekwar intended to make the railway administration a legal entity or to establish it as a corporation.

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Reference was made to a further notification No. 92 of 1921-22, dated the 17th June, 1922. This related to the civil and criminal jurisdiction over the Okhamandal Railway, and amongst other matters it provided that the Indian Railways Act of 1890 and the rules relating thereto had been made applicable. It was argued that this notification was of some materiality for the purpose of showing the status of the railway therein referred to.

It was, however, admitted by learned counsel for the plaintiff respondents that the Indian Railways Act of 1890 has no application to Baroda, and, in their Lordships' opinion, the above-mentioned notification affords no assistance to the plaintiff respondents' case.

When asked to state how the alleged corporation was constituted, the learned counsel for the plaintiff respondents contended that the corporation, as established by H. H. the Gaekwar, consisted of the members of the railway administration from time to time.

In their Lordships' opinion, there is no evidence on the record to support such a contention, and it is directly contrary to the admission already mentioned which was made on behalf of the plaintiff at the trial of the suit, namely, "that the railway is neither a State railway nor a company railway but is owned and managed by His Highness the Maharaja of Baroda through his own men".

Their Lordships are of opinion that the suit was in reality, though not in form, a suit against H. H. the Gaekwar of Baroda, and if the judgments of the Courts in India were allowed to stand they would have far-reaching results and might have the effect of nullifying the provisions of Ss. 86 and 87 of the Civil Procedure Code.

It was further held by the High Court that, even if it be assumed that the suit was in reality against H. H. the Gaekwar of Baroda, the provisions of S. 86 of the Code of Civil Procedure could not be relied upon, because H. H. the Gaekwar had waived his privilege by allowing the defendant railway to defend the suit on its merits and to produce evidence and take the chance of getting a judgment in his favour.

Learned counsel for the plaintiff respondents contended that the above-mentioned finding was correct.

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Their Lordships cannot accept that contention.

In the first place it appears that the summons was addressed to and served upon the manager of the State Railway. He filed a written statement, containing the plea which has already been set out in full, whereby he alleged that the suit was not filed against the proper party and was not maintainable. He applied without success that this issue should be tried as a preliminary issue. No one purported to appear in the suit on behalf of H. H. the Gaekwar of Baroda, and there is no ground for saying that he waived his privilege. Further, as already pointed out, the provisions relating to this matter are statutory. They are contained in Ss. 86 and 87 of the Code of Civil Procedure, they are imperative, and, having regard to the public purposes which they serve, they cannot, in their Lordships' opinion, be waived in the manner suggested by the High Court.

Their Lordships therefore are of opinion that the suit was not maintainable. In view of this conclusion it is not necessary to consider the other issues which were raised in the Courts in India.

For the above-mentioned reasons their Lordships are of opinion that the appeal should be allowed, the decrees of the High Court and of the Subordinate Judge set aside, and the suit should be dismissed. The plaintiff respondents must pay the costs of the defendant appellant in this appeal, and in both the Courts in India. They will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Gregory, Rowcliffe & Co.*

Solicitors for Respondents: *Douglas, Grant & Dold.*

R. C. C. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE VARADACHARIAR.

V. E. R. M. K. Krishnan Chettiar
by agent Rama Aiyangar .. *Appellant** (*Petitioner*)
*v.*
Velayee Ammal .. *Respondent* (*Respondent*).

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*Married Women's Property Act (III of 1874), S. 6—'Policy of insurance', and 'on the face of it' in S. 6—Meaning of—Clause in policy incorporating the proposal—If part of policy and can be looked at to see if any trust is created—Person nominated to receive 'self or wife'—If constitutes a trust in favour of wife.*

Where in a policy of assurance strictly so called there were no words expressing that the policy was for the benefit of the wife or children of the assured, but in the body of the policy itself and in the schedule thereto there were provisions expressly making the proposal part of the policy, the statements in the proposal must be deemed to be incorporated in the policy and it is permissible in those circumstances to look into the proposal to find out whether a trust has been created in favour of the wife or child within the meaning of S. 6 of the Married Women's Property Act. 'Policy' in S. 6 means the document or documents evidencing the contract.

*Krishnamurthy* v. *Anjayya*, (1936) 71 M.L.J. 39 and *Venkatasubramania Sarma* v. *The United Planters Association of South India*, (1937) 46 L.W. 904, doubted and distinguished.

Across cl. (12) of the proposal which was intended to contain the name of the person nominated to receive the sum assured and his or her relationship with the proposal, the words entered were "self or wife Vellayammal".

*Held*, that there was created by that a valid trust in favour of the wife within the meaning of S. 6 of the Married Women's Property Act. The reasonable meaning of the words is that the policy was to be for the benefit of the assured or in the event of his death before the policy matured it was to be for the benefit of his wife.

Appeal against the order of the Court of the Subordinate Judge of Coimbatore in E. P. No. 168 of 1935 in O. S. No. 175 of 1929.

*V. Rajagopala Aiyar* and *T. V. Ramiah* for Appellant.

*K. V. Ramachandra Aiyar* for Respondent.

The Court (*Burn and Venkataramana Rao, JJ.*) made the following

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* A. A. O. No. 427 of 1935. 15th March, 1938.

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## ORDER OF REFERENCE TO A FULL BENCH.

*Burn, J.*—In view of the difference of opinion expressed in the decision in *Venkatasubramania Sarma* v. *The United Planters Association of South India*[1] and in *Bengal Insurance and Real Property Company, Ltd.* v. *Velayammal*[2], I think this appeal should be laid before His Lordship the Chief Justice in order that if His Lordship approves a Full Bench may be constituted to consider the matter. This is a matter of frequent recurrence and of general importance and it is desirable that there should be an authoritative interpretation of S. 6 of the Married Women's Property Act. In our decision in *Venkatasubramania Sarma* v. *The United Planters Association of South India*[1], Lakshmana Rao, J. and I held that the words "on the face of it" occurring in S. 6 of the Married Women's Property Act of 1874 mean "on the face of the policy of assurance" strictly so called and that for the purpose of S. 6 of the Married Women's Property Act it is not permissible to look into the proposal or declaration or any other document which may for certain purposes be considered to form part of the contract of assurance between the assured and the company. In the present case it is clear that in the policy strictly so called there are no words expressing that the policy was for the benefit of the wife or children of the assured. But in *Bengal Insurance and Real Property Company, Ltd.* v. *Velayammal*[2], this very policy was considered by Cornish and King, JJ., and they held that a trust in favour of the wife was created in this case. It is urged on behalf of the appellant that the decision of this point by Cornish and King, JJ., was *obiter* since the point did not arise in the pleadings in the suit. Without expressing an opinion whether the decision is *obiter* or not I feel that it is not possible to disregard the decision of a Bench relating to this actual policy. The decision is nevertheless in direct conflict with the decision of Lakshmana Rao, J. and myself.

For these reasons I think the matter should be placed before a Full Bench.

*Venkataramana Rao, J.*—I agree with my learned brother that this matter should be placed before a Full Bench.

1. (1937) 46 L.W. 904. 2. I.L.R. [1937] Mad. 990.

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The whole question turns upon the meaning to be given to the term "policy of insurance" in S. 6 of the Married Women's Property Act and to the words "expressed on the face of it" in the said section. The view taken by my learned brother and Lakshmana Rao, J, in *Venkatasubramania Sarma* v. *The United Planters Association of South India*[1] is that the policy of insurance must be construed as meaning the particular document in and by which the company agrees to pay a particular sum to the assured on the conditions mentioned therein and it is not permissible to look into the proposal or the declaration for finding out whether a trust has been created in favour of the wife or child. It may be argued that in that case, as also in the case reported in *Krishnamurthy* v. *Anjayya*[2] which my learned brothers purported to follow, the policy itself states that the money was to be payable to the persons legally entitled to it. In the present case the policy does not state to whom the money is payable but in the opening paragraph of the policy it is stated that the proposal and declaration are made part of the contract. It is further stated that the conditions and privileges mentioned in the schedule should also form part of the contract. The question then arises whether the declaration, proposal and schedules also, by reason of the provision that they should form part of the contract, should not be taken as part of the policy of insurance itself. In this view, there must be deemed to be a trust for the benefit of the wife within the meaning of S. 6 of the Act. The view of Cornish and King, JJ., in *Bengal Insurance and Real Property Company, Ltd.* v. *Velayammal*[3], is that by reason of the provision that the proposal and declaration form part of the contract, it must be taken that they form part of the policy of insurance itself. They purported to follow the decision in *Norwich Equitable Fire Assurance Society*, Re, *Claim of Royal Insurance Company*[4], where a very wide connotation was given to the term "policy of insurance". It will be a question for argument whether the same connotation should be given to the same term "policy of insurance" in S. 6 of the Act or not.

This is a matter which arises very frequently and it is not desirable that there should be any doubt in regard to it.

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1. (1937) 46 L.W. 904.
2. (1936) 71 M.L.J. 39.
3. I.L.R. [1937] Mad. 990.
4. (1887) 57 L.T. 241.

I would therefore agree in the order proposed by my learned brother.

This appeal came on for hearing, in pursuance of the aforesaid Order of Reference to a Full Bench.

*V. Rajagopala Aiyar* and *T. V. Ramiah* for Appellant.

*K. V. Ramachandra Aiyar* for Respondent.

The judgment of the Full Bench was delivered by

Leach, C.J.

*The Chief Justice.*—This appeal raises the question of what is meant by the word "policy" in S. 6 of the Married Women's Property Act, 1874. The respondent is the widow of one Sengottiah Goundan, who died on the 16th August, 1928. On the 24th August, 1927, the deceased submitted to the Bengal Insurance and Real Property Company, Ltd., a proposal for a policy of insurance on his own life. The proposal was for an endowment policy for Rs. 5,000 payable in 15 years. Cl. 12 of the proposal is intended to contain the name of the person nominated to receive the sum assured and his or her relation with the proposer. In this case the words entered were, "self or wife Velayammal" (the name of the respondent). The proposal was accepted and a policy was issued on the 5th May, 1928. The policy contained *inter alia* the following clause:—

"This policy of assurance granted by the Bengal Insurance and Real Property Company, Ltd. (hereafter called "the company") witnesseth that proceeding upon the proposal and declaration subscribed by Subbaraya Goundar Sengotayya Goundar in and dated24th August, 1927, which is hereby made a part of this contract and in consideration of the payment already made to the company of the first premium or the first instalment thereof as stated in the sub-joined schedule and of the subsequent premiums or instalments of premiums to be paid as therein provided, the company doth hereby agree that upon proof satisfactory to the directors of the happening of the event or events on which the sum assured is to become payable and/or other benefits accrue as described or referred to in the said schedule and of the title of the claimant or claimants under this policy it will pay the sum stated in the schedule as the sum assured and provide the other benefits, if any."

Cl. 8 of the schedule also has bearing on the question which falls for decision. It is in these words:—

"This policy which together with the schedule and privileges and conditions endorsed thereon, and the proposal and declaration and answers hereto constitutes the entire contract between the company and the assured shall become indisputable after two years from the date of issue of this policy provided the premiums shall have been regularly paid and the age correctly stated, and provided also that no fraud or wilful misrepresentation has been made by the assured."

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On her husband's death the respondent demanded payment from the company of the amount of the policy. The company declined to pay on the ground that there had been a material misrepresentation with regard to the health of the assured. This resulted in the respondent filing O. S. No. 134 of 1933 in the Court of the Subordinate Judge of Coimbatore against the Insurance Company and the deceased's brother Ramaswami Gounden, who had set up a claim that the amount due under the policy constituted a part of the joint family estate. The company raised the issue of material misrepresentation and also contended that the Court had no jurisdiction to try the suit. The respondent succeeded and a decree was passed on the 24th September, 1934, in her favour for the amount stated in the policy. An appeal followed to this Court, but it was dismissed. The present appellant obtained a decree against the estate of Sengottiah for a sum of Rs. 9,707-2-8 with interest and costs on the 28th February, 1931, and in execution of that decree applied to the Court of the Subordinate Judge of Coimbatore for attachment of the respondent's decree against the Insurance Company. The Subordinate Judge held that the application did not lie, and the present appeal is from that decision.

The appellant contends in the first place that this case does not fall within the provisions of S. 6 of the Married Women's Property Act, because there is nothing on the face of the policy itself which creates a trust in favour of the respondent. The Subordinate Judge held that the proposal must be deemed to form part of the policy. In the second place the appellant says that even if the proposal can be deemed to form part of the policy the words therein "self or Velayammal" cannot constitute a trust in her favour. The case has been placed before the Full Bench as there has been a conflict of opinion on the interpretation to be placed on S. 6 of the Married Women's Property Act. Cl. (1) of that section states:—

"A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate."

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When the appeal arising out of the respondent's suit against the insurance company was before this Court (Cornish and King, JJ.) the question whether the proposal and declaration could be construed as being part of the policy arose and it was held that they formed part of the policy. (*The Bengal Insurance and Real Property Company, Ltd.* v. *Velayammal*[1].) On the other hand Venkatasubba Rao, J., in *Krishnamurthy* v. *Anjayya*[2] and Burn and Lakshmana Rao, JJ., in *Venkatasubramania Sarma* v. *The United Planters Association of South India*[3] have held that the word 'policy' means the document described as the policy and that it cannot be deemed to include any other document. Venkatasubba Rao, J., said that the words used must be plain and unambiguous and for the purposes of the section the only document that can be looked into is the policy. I would here point out that that case differed very much from the case we are now concerned with. There was there no clause making the proposal part of the policy. Burn and Lakshmana Rao, JJ., quoted with approval this decision of Venkatasubba Rao, J., but here again there was no clause incorporating the proposal in the policy. All that the policy stated was that the proposal and the declaration made by the assured should be the basis of the insurance. On the other hand, the policy contained an express provision that the money should be paid to the legal heirs of the assured. In the present case, there are no words in the document issued on the 5th May, 1928, indicating to whom the money shall be paid, but we have, as I have already indicated, a provision in the body of the policy itself and a similar provision in the schedule making the proposal part of the policy, and we have to look to the proposal to discover to whom the insurance money is payable. It seems to us that in these circumstances the Court must read the statements in the proposal as being incorporated in the policy. The parties to the contract were at liberty to make such a provision.

In *Champsey Bhara and Company* v. *Jivraj Balloo Spinning and Weaving Company, Ltd.*[4], the Privy Council had to construe what was meant by an error on the face of an award. The question was whether a document referred to in the award

1. I.L.R. [1937] Mad. 990 at 998. 2. (1936) 71 M.L.J. 39.
3. (1937) 46 L.W. 904.
4. (1923) 44 M.L.J. 706: L.R. 50 I.A. 324: I.L.R. 47 Bom. 578 (P.C.).

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could be read as part of the award. Lord Dunedin who delivered the judgment of their Lordships observed (page 586 of the report):

"An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

The House of Lords considered the same question in *F. R. Absalom, Ltd.* v. *Great Western (London) Garden Village Society, Ltd.*[1] There the award recited the contract between the parties and referred to the provisions of condition 30 thereof. The House of Lords held that condition 30 was incorporated into and formed part of the award just as if the arbitrator had set it out verbatim and had then proceeded to state the construction which he placed upon it. The same principle applies here. The policy of insurance stated expressly that the proposal and the declaration were "made part of the contract". That being so the Court must look at them to find out the full terms of the contract. Moreover S. 2 (6) of the Indian Life Assurance Companies Act, 1912, defines a "policy of assurance on human life" as meaning "any instrument by which the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life or any instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life". The instruments which evidence the contract between the parties and therefore constitute the policy are the proposal, the declaration, and the document which was issued by the insurance company when the proposal was accepted. We wish it to be clearly understood that we are dealing here with a case where the policy does expressly incorporate the proposal. We have no criticism whatever to offer of the decisions in *Krishnamurthy* v. *Anjayya*[2] and *Venkatasubramania Sarma* v. *The United Planters Association of South India*[3], on the facts of those cases, but the learned Judges who decided those cases did use words which might be held to apply to a case like this. If that was their intention we must express our dissent. The word "policy" in S. 6 of

1. (1933) A.C. 592. 2. (1936) 71 M.L.J. 39.
3. (1937) 46 L.W. 904.

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the Married Women's Property Act means the document or documents evidencing the contract. If the document known as the policy stands alone and does not incorporate in it any other document, only that document can be looked at, but if it does expressly incorporate another document, as in this case, the document must be deemed to be part of "the policy". For the reasons indicated we consider that the learned Subordinate Judge was right in treating the proposal as part of the policy of insurance in this case.

This brings me to the contention of the learned Advocate for the appellant that the words used in answer to question No. 12 of the proposal, "Self or wife Velayammal" cannot be construed as constituting a trust in favour of the respondent. He would attach no meaning at all to those words. The answer to the question is certainly not as full as it might have been, but it is an answer, and the words can be construed as meaning that the policy was to be for the benefit of the assured or in the event of his death before the policy matured it was to be for the benefit of his wife. It seems to us that this is the only reasonable interpretation to be placed upon the words, and placing this interpretation upon them it means that there was a trust created in favour of the respondent in the event of the husband dying before the policy matured. That there can be a contingent trust is accepted in England, and as the Married Women's Property Act of 1874 followed similar legislation in England English decisions are directly applicable. In *Fleetwood's Policy*, In re[1], Tomlin, J., had to consider a case where the terms of the policy provided that the money was to be paid to the wife of the insured if she were living at his death or in the event or her prior death, to his executors, administrators and assigns. The learned Judge observed:—

"A number of cases have been cited to me, and my attention has also been called to S. 11 of the Married Women's Property Act, 1882. In my view that section applies to this policy. The policy is, in the terms of the section, a policy of assurance effected by a man on his own life, and expressed to be for the benefit of his wife. It is true it is expressed to be for the benefit of his wife in a certain event only, but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of this Act. I think, therefore, that the policy creates a trust in favour of the wife, but only in the terms of the trust."

Another case which has a bearing on this question is that of *Cleaver* v. *Mutual Reserve Fund Life Association*[2]. This

1. (1926) Ch. 48. 2. (1892) 1 Q.B. 147.

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case followed the conviction of Florence Elizabeth Maybrick for the murder of her husband. Her husband, James Maybrick, effected an insurance on his life in favour of his wife. The policy was made payable to the wife if she was living at the time of his death; otherwise the money was to go to his legal representatives. The Court of Appeal, consisting of Lord Esher, M.R., and Fry, L.J., and Lopes, L.J., held that there was here a trust created by the policy in favour of the wife under S. 11 of the Married Women's Property Act, 1882, but it became incapable of being performed by reason of her crime. No doubt was expressed as to the policy creating a trust in her favour under that section. The same view has been taken in this Court in *Srinivasa Chariar* v. *Ranganayaki Ammal*[1] and *Abhiramavalli Ammal* v. *The Official Trustee of Madras*[2]. In the latter case which was decided by Madhavan Nair, J., the policy was payable to the "assured or his wife if he predeceases her" and my learned brother held that these words operated to create a trust in favour of the wife within the meaning of S. 6.

The learned Advocate for the appellant has placed great reliance on *Dinbai* v. *Shet Bamanshaji Jamasji*[3] and *Tibbetts* v. *Engelbach*[4]. In the former case a Bench of the Bombay High Court had before it an endowment policy of insurance which was payable at the death of the assured or at the age of 55 and was made payable to the wife provided she survived him. Failing her it was to be paid to the assured, his executors, administrators or assigns. The Court did not consider the English authorities and came to the decision that there was no trust created in favour of the wife within the meaning of S. 6 of the Married Women's Property Act, on the wording of the section. As I have already stated, the Indian Act follows the English Act and the English cases are directly applicable. When these cases are considered there seems to be no doubt that in a case like the present a trust is created. *Tibbetts* v. *Engelbach*[4] was a case in which a father had taken out an endowment policy on the life of his own daughter and for her benefit. It was held that in such circumstance, no legal estate was created in the daughter and that there was no trust for her

1. (1915) 3 L.W. 466.
2. (1931) 62 M.L.J. 111: I.L.R. 55 Mad. 171.
3. (1933) I.L.R. 58 Bom. 513.
4. (1924) 2 Ch. 348.

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benefit. The Court treated this case as being outside the Married Women's Property Act, 1882, as it was, because under that Act, as under the Indian Act, the policy must be on the life of the husband or the father. As there can be a contingent trust and as we construe the words in the proposal, which forms part of the policy, as creating a contingent trust in favour of the respondent we must also reject the second contention of the learned Advocate for the appellant.

For these reasons this appeal fails and must be dismissed with costs.

S. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

M. C. Krishnan Nambiar .. *Petitioner** (*Accused*)

*v.*

The Municipal Prosecutor, Calicut Municipality .. *Respondent* (*Complainant*).

Krishnan Nambiar *v.* Municipal Prosecutor, Calicut Municipality.

*Madras District Municipalities Act* (*V of 1920*), *Ss 93, 345 and 347—Profession-tax—Person holding appointment—Test of liability for tax—Education-tax—Recovery under profession-tax—Madras Elementary Education Act* (*VIII of 1920*), *S. 34—Prosecution for non-payment of profession-tax—Procedure.*

In the case of a person holding an appointment the test of liability for assessment to profession-tax is the holding of the appointment at the particular place and not personal presence within the Municipality.

*Veerappa Chettiar* v. *Municipal Council, Palni,* (1924) 48 M.L.J. 428: I.L.R. 48 Mad. 476, relied on.

Where the education-tax is levied by a Municipality under the head of profession-tax by virtue of the provisions of S. 34 of the Madras Elementary Education Act the assessee cannot escape liability by paying the profession-tax to another Municipality in which the education-tax is not levied. In such a case the assessee will only be entitled to credit for the amount paid to the other Municipal Council.

Where the default to pay the profession-tax is wilful the prosecution of the assessee by the Municipal Council will fall under S. 345 and not under S. 347 of the Madras District Municipalities Act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the First Class Bench Magistrates of Calicut dated 26th April, 1937 and made in Serial No. 493 of 1937.

*P. Govinda Menon* for Petitioner.

*K. Kuttikrishna Menon* for Respondent.

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* Crl. R. C. No. 565 of 1937.
Crl. R. P. No. 533 of 1937. 14th December, 1937.

Krishnan Nambiar *v.* Municipal Prosecutor, Calicut Municipality.

*The Public Prosecutor* (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner was the Subordinate Judge of Calicut from 1st April, 1934 to 18th June, 1934 and his absence from Calicut during the summer recess from 29th March, 1934, to 4th June, 1934, cannot make any difference. He was holding that appointment till 18th June, 1934, and as pointed out in *Veerappa Chettiar* v. *Municipal Council, Palni,*[1] the test for liability in the case of a person holding an appointment is not personal presence within the Municipality. There is therefore no force in the contention that the petitioner was not holding that appointment within the Municipality of Calicut for 60 days, and the decision in *Mahadeva Aiyar* v. *Municipal Council, Masulipatam,*[2] is clearly distinguishable. The levy of profession-tax was therefore legal and S. 34 of the Elementary Education Act empowers Municipal Councils to levy an education-tax under the head of profession-tax. S. 36 enacts that the education-tax shall be deemed to be an addition to the profession-tax, when it is levied under that head, and it further provides that all the provisions of the Municipalities Act relating to the realisation of such tax shall be applicable. In this case the education-tax was levied under the head of profession-tax, and after assessment by one Municipal Council the assessee cannot escape liability by paying the profession-tax to another Municipality in which education-tax is not levied. He is entitled only to credit for the amount paid to the other Municipal Council and in spite of several reminders the petitioners declined to pay the difference. The default to pay the amount due was thus wilful, and the prosecutions in respect of sums due to Municipal Councils under the District Municipalities Act are governed by S. 345 and not S. 347 of the Act. The prosecution was commenced within three years and there is no ground for interference. The petition is therefore dismissed.

B. V. V. ——— *Petition dismissed.*

1. (1924) 48 M.L.J. 428: I.L.R. 48 Mad. 476.
2. (1937) 2 M.L.J. 569.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE STODART.

Pangudaya Pillai and another .. *Appellants** (*Defendants 2 and 3*)

*v.*

Uthandiya Pillai and others .. *Respondents* (*Plaintiffs and 1st Defendant*).

*Limitation Act (IX of 1908), Ss. 20 and 21—Loan by manager for benefit of family—Subsequent partition—Part-payment by manager after partition—If keeps alive the debt as against the other members of the family—Promissory note by manager executed not as manager but as for his urgency—If lands bought therefrom for benefit of family—Such property divided between members at partition—If debt to be treated as a family debt.*

Pangudaya Pillai *v.* Uthandiya Pillai.

Where a promissory note ran as follows:—" Promissory note executed on 23rd April, 1919, by *A* in favour of *S*. Amount borrowed by me from you this day in cash on account of my urgency, for purchasing lands is Rs. 700. I shall pay you this sum, etc." and *A* happened to be the managing member of the joint family consisting of himself and 2 younger brothers, it cannot be presumed that the land purchased therefrom was originally purchased for the family; and in the absence of evidence that in order to buy the land, it was necessary to borrow money and that the money could not have been met out of the annual profits of the family property or out of its savings, it will not bind the other members. The mere fact that at a subsequent partition between the brothers this new property was also divided does not by itself show that the purchase was intended for the benefit of the family or that it in fact resulted in any benefit to the family as such.

A person who as manager of the family originally executed a promissory note for a debt binding on the family, cannot, after partition with the coparceners, keep it alive as against the other members of the family by endorsements of part-payments on the note under S. 20 of the Limitation Act. Payment made after partition was not made by "manager for the time being" as required by S. 21 (3) (*b*) of the Limitation Act.

*Held*, that also the joint liabilities of the members of an undivided Hindu family for a family debt is not a debt within the meaning of S. 20 of the Limitation Act so that one member by making the part-payment after partition cannot keep the debt alive as against all the others.

Appeal against the decree of the District Court of Trichinopoly in A.S. No. 92 of 1932, preferred against the decree of the Court of the District Munsiff of Srirangam in O.S. No. 108 of 1931.

*T. V. Muthukrishna Aiyar* and *A. V. Narayanaswami Aiyar* for Appellants.

*K. Bashyam Aiyangar* and *T.R. Srinivasan* for Respondents.

* S. A. No. 573 of 1933. 15th February, 1938.

Pangudaya Pillai
*v.*
Uthandiya Pillai.
——
Stodart, J.

The judgment of the Court was delivered by

*Stodart, J.*—The suit on which this second appeal arises was based on a promissory note executed by the first defendant. Second and third defendants—the present appellants—are the younger brothers of the first defendant. Plaintiff alleged that they were present when the money was lent and the note executed but this was not believed in the trial Court. Plaintiff further alleged that the first defendant was manager of the joint family consisting of himself and his brothers, the second and third defendants, that the note was to secure a loan which was contracted for the benefit of the family and that the three brothers continued undivided up to the date of suit. It was found however at the trial that the family had become divided in 1920 the year after the execution of the note and further that the plaintiff had become aware of this change of status at least as early as 1924. Two main questions arose for decision:

1. Was the loan contracted for the benefit of the family?

2. Do the endorsements of part-payment made on the note by the first defendant avail to save the bar of limitation against the second and third defendants?

The learned District Munsiff found that out of the consideration of Rs. 700, Rs. 300 was expended on purchasing a small piece of land and Rs. 100 in discharging the balance of the price of a house site previously purchased. He did not find that these transactions were *prima facie* advantageous to the family but held that, since the land, which was purchased by first defendant alone for Rs. 300, was brought into hotchpot at the partition and divided amongst the brothers, second and third defendants were also liable to discharge the debt. On the point of limitation he held that the suit was barred against the second and third defendants. On appeal the learned District Judge agreed with the trial Court that the second and third defendants were liable for the debt and on the point of limitation he reversed the decision of the District Munsiff holding that the payments made by the first defendant after partition operated to extend the time for a suit as against the second and third defendants. Both of these adverse findings are now attacked and on both grounds we think this appeal should succeed.

Pangudaya Pillai v. Uthandiya Pillai.

Stodart, J.

The promissory note is as follows:—

"Promissory note executed on 23rd April, 1919, by Arunachalam Pillai in favour of Sappania Pillai. Amount borrowed by me from you this day in cash on account of my urgency for purchasing land is Rs. 700. I shall pay this sum, etc."

There is nothing here to indicate that the land was originally purchased for the family. On the contrary the first defendant Arunachalam declares that he purchased it for himself and he does not describe himself as acting as the manager of the family. Nor as we have observed is there anything to show that the land purchased was beneficial to the family. On the contrary, if the only profit which the family, as such, derived from the loan was this small piece of land for which Rs. 300 was paid, then the whole transaction was imprudent. For the annual profit from 22 cents., even of wet land as this was, would not suffice to meet the interest of Rs. 84 on the loan of Rs. 700. Apart from that, even if we assume for the sake of argument that the land was a profitable investment there is no indication at all that in order to buy it, it was necessary to borrow money and that the price could not have been met out of the annual profits of the family property or out of accumulated savings.

As for the lower Court's reasoning that the second and third defendants would be liable for the debt because the land was shared with them at partition that we think is unsound. For the first defendant, the actual purchaser, may have thrown the land into hotchpot to compensate for some advantage contributed by the second and third defendants. First defendant had his own separate business and presumably some assets of his own and some liabilities which he alone was bound to discharge. It is quite possible that the second and third defendants contributed something at the partition of 1920, to counter-balance which, each got 7 cents out of the land purchased in 1919. The fact therefore that the land, purchased in the sole name of the first defendant, was subsequently divided amongst all the defendants, does not by itself show that the purchase was intended for the benefit of the family or that, in point of fact, it resulted in any benefit to the family as such. The appellants are, we think, bound to succeed on this ground alone.

Coming to the question of limitation a very interesting argument has been advanced for the respondent by Mr. Sita-

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rama Rao who has brought to the question at issue his extensive knowledge of the case-law bearing on this somewhat difficult subject. The facts as found we have already stated. In more detail they are as follows:—The promissory note was executed in 1919. In 1920 the defendants became divided. Neither at the time of the execution of the promissory note, nor at the time of the partition is there anything to show that these appellants were aware of the loan. After the partition, if the endorsements on the note are to be accepted, the first defendant made four payments of interest, namely, on the 27th of April, 1921—Rs. 100; on the 12th April, 1924—Rs. 5; on the 16th March, 1927—Rs. 10; and on the 5th March, 1930—Rs. 5. At no time so far as the evidence goes, did the second and third defendants become aware of the loan. The suit was filed on the 11th June, 1931. The result is somewhat astonishing, namely, that eleven years after partition the junior members of the family should find themselves called upon to meet a claim founded on a pre-partition debt, of which until that moment they may not have had the slightest knowledge. The learned District Judge was of the opinion that it would be unjust if the right of a creditor to recover a family debt out of the whole property of the family could be defeated by partition. But we think his sympathy is misplaced. A person who lends money to the manager of a joint family by way of simple loan may sue for it, partition or no partition, within the statutory period. If he does not wish to do that but prefers—as many creditors do prefer—to leave his money out at interest, is it too much to expect of him that he should enquire whether the family is still undivided? So that, if it is not, he may obtain acknowledgments of the debt from those members of the family who did not contract with him at the time of the loan.

The question we have to decide is whether after partition by making payments towards the loan and placing them on record as required by S. 20 of the Indian Limitation Act, the person who, as manager of the family, originally contracted the debt, can keep it alive against the other members of the family—assuming of course that it is a debt binding on the family. Here for instance the plaintiff could have filed his suit at any time before the 23rd April, 1922 and could have got a decree against the second and third defendants, not, it is

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true, executable against them personally, but capable of being executed by the attachment and sale of any property they had got at the partition and which they still retained. Or, instead of filing a suit the plaintiff having learnt of the partition could have secured an acknowledgment from the second and third defendants, though of course this would have given him no lien on the property which they had obtained at the partition. But the debt would have been kept alive as against them. Can we go a step further and say that by accepting part-payment of principal and interest from the senior member of the family the plaintiff actually kept the debt alive as against all the members?

The point has been twice decided recently in this Court and in a sense adverse to the respondent. Mr. Justice Curgenven as he then was, in Civil Revision Petition No. 623 of 1933 (not reported) held on facts which are similar to the facts of this case, that the point was governed by S. 21 (3) (*b*) of the Limitation Act. He said:

"That payment, being made after partition, was not made by 'the manager for the time being' as required by S. 21 (3) (*b*) of the Limitation Act, and did not therefore avail to save limitation against the defendants' brother."

And Sir Owen Beasley, C.J., in *Rama Vadhyar* v. *Manian Vadhyar*[1] held to the same effect. This present appeal has been referred to a Bench for decision on account of the alleged discrepancy between the Law Weekly case and *Munisami* v. *Kutti*[2]. There is however no real discrepancy. For the latter case is one where the debt was contracted by a Hindu father before partition and the question was whether limitation was saved against his sons by payments made by him after partition. It was held that inasmuch as the pious duty of a Hindu son to pay his father's debts was not extinguished by partition the father's payments operated to keep the debt alive against the sons.

Now, examining the relevant sections of the Limitation Act, S. 21 is explanatory of Ss. 19 and 20. By S. 19 the time for the suit is extended by an acknowledgment in writing signed by the person against whom the claim is made. By S. 20 the time is extended by a payment of interest or part-payment of

1. (1937) 45 L.W. 767.
2. (1933) 65 M.L.J. 311: I.L.R. 56 Mad. 833.

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principal evidenced by the writing or signature of the debtor. In both cases the act which operates to give a fresh period of limitation may be done by an "agent duly authorised in this behalf". And S. 21 extends as it were the somewhat strict expression "duly authorised agent" to certain persons in whom authority to acknowledge lawful claims is vested in virtue of their legal relationship to the principal, such as the lawful guardian of a minor or the committee of a person of unsound mind. S. 21 (3) (*b*) is:

"For the purposes of the said sections (Ss. 19 and 20) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by the manager of the family for the time being, shall be deemed to have been made on behalf of the whole family."

Mr. Justice Curgenven's reasoning in the case cited is that "the person liable to pay the debt" if his liability arises only on the ground that it is a family debt, cannot for the purpose of S. 20 be represented after partition by the person who was the family manager. Mr. Sitarama Rao's contention however is that S. 21 (3) (*b*) does not apply to the case at all. He bases his argument on a strict construction of S. 20. That section so far as relevant is:

"Where interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt, a fresh period of limitation shall be computed from the time when the payment was made."

And this has been interpreted as covering cases where there is a plurality of debtors and the payment is made by only one of them, saving of course the cases specifically excepted in S. 21 (2), of joint contractors, partners, executors or mortgagors. In all other cases payment by one gives a fresh period of limitation against all. This interpretation is now well established and it is unnecessary for us to refer in detail to the numerous instances which have been cited at the bar and in which it has been applied. There is the case of the universal donee whose liability for the debts of the donor arises under S. 128 of the Transfer of Property Act; limitation against him is saved by a payment made by the donor after the date of the gift: *Velayudam Pillai* v. *Vaithialingam Pillai*[1]; and the case of payment by one of several heirs towards the debt of a deceased person saving limitation against all who have taken the latter's property at his death: *Narasimha Rama Aiyar* v. *Ibrahim*[2]; and the case where payment by the purchaser of

1. (1912) 24 M.L.J. 66. 2. (1928) 56 M.L.J. 630.

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the equity of redemption of interest on a mortgage saves limitation against the mortgagor of which *Bhuban Mohan Sinha* v. *Ram Gobinda Goswami*[1] is an example.

The proposition sought to be established by Mr. Sitarama Rao for the respondent is that in the case of a debt lawfully contracted for the necessity of a joint Hindu family all the members of the family are co-debtors; so that part-payment by one, acknowledged by writing as prescribed in S. 20 of the Limitation Act, gives a fresh period of limitation against all.

Now the legal remedies open to a person who lends money on a promissory note, to the managing member of a joint Hindu family have been well defined in a course of authorities which it is unnecessary for us to cite. While the family is still joint the creditor can file a suit against the managing member alone and can obtain a decree against him on the promissory note, and, if he proves that the debt is binding on the family, a declaration that he, the plaintiff, is entitled to execute his decree by attachment and sale of the joint family property. At the time of execution proceedings however the junior members of the family are at liberty to dispute the binding nature of the debts; and in order to forestall such objections the creditor may implead the junior members in the suit itself and if they dispute the binding nature of the debt he can have that question tried. Partition does not put an end to the liability of the junior members but the nature of the remedy is changed. In the first place, the suit must be filed in the first instance against all the members of the family. In the second place, the decree against the junior members will be in the form of a declaration that execution may be had by attachment and sale of that portion of the property which each got at partition and of which he still retains possession. This is now a well-settled proposition of law and for authority, we need only refer to the clear exposition of it by our learned brother Venkataramana Rao, J., in A.A.A.O. No. 172 of 1933 reported in *Suryanarayana* v. *Viswanatham*[2]. In the present case partition has taken place before the respondent took any steps to enforce his debt. The promissory note was executed on the

1. (1926) I.L.R. 54 Cal. 179.
2. (1936) 71 M.L.J. 518.

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23rd April, 1919. Partition was effected in the following year. Up to the 23rd April, 1922, the respondent could have filed his suit against all these defendants and obtained a decree of the kind just stated. He did not do so. But within that period he secured evidence of a part-payment of interest by an endorsement on the promissory note in the handwriting of the first defendant; this, he now contends, by the operation of S. 20 of the Limitation Act gave him a fresh period of limitation against all the members of the family; and so with each successive payment. S. 20 is construed as meaning that, when any of the several persons liable to pay a debt, makes a payment of interest then from the date of that payment a fresh period of limitation shall be computed for a suit on the debt, which suit will lie against all persons liable to pay the debt.

Now accepting this construction of S. 20, it appears to us that the question for decision is reduced to this. Are defendants 2 and 3 persons liable to pay the debt, within the meaning of S. 20? That question we think must be answered in the negative as the trial Court has answered it. The debt is the money now due on account of the money lent to first defendant on the promissory note. Certainly the second and third defendants are not now liable to pay it. All that plaintiff can get by way of relief against them is a decree declaring that if they got any of the family property at partition and if they still retain that property or any part of it, then in execution of the decree that property may be attached and sold. This kind of contingent liability did not, in our opinion, make the second and third defendants, at the time when first defendant made the initial payment of interest nor at the time when he made each successive payment, co-debtors of the first defendant, in the sense implied in S. 20.

Mr. Muthukrishna Aiyar for the appellants is in our opinion right when he contends that the joint liabilities of the members of an undivided Hindu family for a family debt, is not a debt within the meaning of S. 20, so that one member by making a part-payment can keep the debt alive against all the others. This argument is that if it was that kind of a debt there would have been no necessity for the legislature in 1928 to enact S. 21 (3) (*b*). The relevant words of that section which we have already set out are:

"For the purposes of Ss. 19 and 20 where a liability has been incurred on behalf of a Hindu undivided family as such, a payment made by the manager

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of the family for the time being, shall be deemed to have been made on behalf of the whole family."

Now, according to Mr. Sitarama Rao, S. 20 already provided for such cases. It enabled not only the manager but indeed any member of the family by making a payment towards the debt and acknowledging it in writing, to give the creditor a fresh period of limitation for a suit against all the members. But if that was the effect of S. 20 there was no need for the enactment of S. 21 (3) (*b*).

Reading Ss. 20 and 21 together therefore we are unable to hold that the members of a joint family are, for the purposes of S. 20, "persons liable to pay the debt" when the debt in question cannot be levied from them personally, but is merely recoverable by the sale of the joint family property, on foot of a decree made to that effect. Much less then are the said members "persons liable to pay the debt" when by reason of partition the joint family has disappeared and the debt is recoverable merely by sale of the property got at partition on foot of a decree made against those divided members, the operation of which decree is contingent on their still retaining possession of the said property or some of it.

In the result we allow this second appeal. The decree of the District Munsiff is restored and the appellants are awarded their costs throughout to be paid by the plaintiffs in the suit.

S. V. V. ——— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Pedda Ramamuni Reddi and others .. *Petitioners* (Accused 1 to 4).*

Ramamuni Reddi, *In re.*

*Criminal Procedure Code (V of 1898), Ss. 350 (1), Proviso (b) and 530 (l) —Demand of accused to re-summon and re-hear the witnesses—Refusal by Magistrate—Cross-examination before Magistrate deciding the case—Prejudice to accused—If caused.*

Where the accused demanded that the prosecution witnesses should be re-summoned and re-heard and the Magistrate refused this request but they were further cross-examined before the Magistrate who decided the case,

*Held*, that the accused cannot be said to have been prejudiced by the refusal of the Magistrate to re-summon and re-hear the witnesses and the conviction cannot be set aside on that ground. Non-compliance with the demand of the accused is not an irregularity which vitiates the trial.

* Crl. R. C. No. 516 of 1937. (Crl. R. P. No. 484 of 1937). 17th March, 1938.

Ramamuni Reddi, *In re.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session, Kurnool Division, in C.A. No. 13 of 1937 (C.C. No. 82 of 1936 on the file of the Joint Magistrate, Nandyal).

The first Magistrate framed a charge against the accused and posted the case for further proceedings, fixing a date. On that day the accused intimated that they wanted to cross-examine all the witnesses again. Then the case came for hearing before a new Magistrate. On that day the accused applied to the Court to hear the case *de novo* for the better appreciation of the evidence. The Magistrate passed the following order:—

"To-day is the first day of the trial, and so for all practical purposes, this is *de novo* trial."

He did not grant the request of the accused but re-called the prosecution witnesses, and the accused cross-examined them.

*P. Basireddi* for Petitioners.

*The Public Prosecutor* (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The Joint Magistrate reports that the petitioners demanded that the witnesses should be re-summoned and re-heard but non-compliance with the demand is not an irregularity which vitiates the trial, *vide* S. 530 of the Code of Criminal Procedure and all the witnesses were further cross-examined before the Magistrate who decided the case. The petitioners cannot therefore be said to have been prejudiced by the refusal of the Joint Magistrate to re-summon and re-hear the witnesses, and the conviction cannot be set aside on this ground, *vide* Proviso (*b*) to S. 350 of the Code of Criminal Procedure. No other ground was urged against the conviction nor is there any ground for interference with it in revision. But the occurrence took place in 1935 and the trial was protracted. The hurt caused was trivial and it is unnecessary to send the petitioners back to jail. The substantive sentence of imprisonment is therefore reduced to the period already undergone and otherwise this petition is dismissed.

K. C. —— *Petition dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Appu Goundan .. *Petitioner* (Accused).*

Appu Goundan, *In re.*

*Criminal trial - Case tried by Magistrate—Accused alleging offence to be serious one—Jurisdiction of Magistrate sought to be ousted—Procedure.*

A statement by an accused person that the offence committed by him is a more serious one, not triable by the Magistrate hearing the case, does not deprive the Magistrate of jurisdiction to proceed with the case unless the prosecution accepts the truth of that statement or the Magistrate is of the opinion that it is true.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Salem, in C. A. No. 64 of 1937 (C.C. No. 1115 of 1937 on the file of the Court of the Stationary Sub-Magistrate of Salem).

*J. S. Vedamanickam* for Petitioner.

*N. Somasundaram* for *The Public Prosecutor* (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—I find no reason to interfere. A statement by an accused person that the offence committed by him is a more serious one, not triable by the Magistrate, does not deprive the Magistrate of jurisdiction unless the prosecution accept the truth of that statement or the Magistrate is of opinion that it is true. As the accused was found in possession of wash, the presumption set out in S. 64 operates and the accused is presumed to have committed an offence punishable under S. 55 of Act I of 1886.

The Criminal Revision Petition is dismissed.

B. V. V. *Petition dismissed.*

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* Crl. R. C. No. 640 of 1937. 31st March, 1938.
Crl. R. P. No. 603 of 1937.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

S. Girdharilal Son & Co. .. *Appellants** (*Plaintiffs*)

*v.*

B. Kappini Gowder and others .. *Respondents* (*Respondents 1 to 3*).

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*Indian Partnership Act (IX of 1932), Ss. 69 and 74—Suit by an unregistered firm on a promissory note executed before the commencement of the Act—Registration of the firm subsequent to suit—Registration if necessary to such a case of a contract entered into before the Act—Such a suit saved by the saving clause in S. 74—Subsequent registration if validates the suit.*

A firm filed a suit on 23rd August, 1934, on a promissory note executed on 12th August, 1931, towards which a payment had been made on the 23rd August, 1931. On the date of the suit the firm was unregistered and it was registered under the Act only a month after the filing of the suit. The Partnership Act came into force on 1st October, 1933 and S. 69 came into force on 1st October, 1933. On an objection taken to the maintainability of the suit under S. 69, cl. (2), their Lordships Pandrang Row and Venkataramana Rao, JJ., differed.

*Pandrang Row, J.*, holding that S. 69, cl. (2) does not apply to this suit as the contract is one entered into prior to the commencement of the Act and that the suit is expressly saved from the operation of the bar imposed by S. 69 (2), by S. 74, and

*Venkataramana Rao, J.* holding that S. 69 (2) is a bar to the maintenance of the action by an unregistered firm even in respect of a contract entered into, or a cause of action which accrued, before the commencement of the Act if the suit is instituted after the 1st October, 1933, the date when S. 69 (2) came into force, that S. 69 (2) is not controlled by S. 74 (*b*), and that the subsequent registration of the firm is not enough to validate the original institution of the suit and enable the plaintiffs to sustain the action as the condition regarding registration of the firm is a condition precedent to the institution of the suit.

*Held*, by *Varadachariar, J.*, on a reference under cl. (36) of the Letters Patent, that even on the footing that the language employed in S. 69 is capable of being applied even to contracts entered into before the Act came into force and to causes of action that accrued before that date, the saving words found in S. 74 have the effect of exempting a suit like the present from the operation of S. 69. It is not right to hold that the provision contained in S. 69 is in the nature of processual law in the sense in which that term is used in the cases discussing the principle of retrospective operation of statutes.

The scope of the expressions (*i*) 'substantive right' and 'law of procedure' within the meaning of the cases dealing with the retrospective operation of a statute and (*ii*) 'affect' and 'impair' in S. 74 of the Partnership Act discussed.

Appeal against the decree of the Court of the Subordinate Judge of Nilgiris at Ootacamund, dated 17th December, 1935, in O.S. No. 89 of 1934.

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* Appeal No. 250 of 1936. 3rd February, 1938.

Girdharilal Son & Co. *v.* Kappini Gowder.

*B. Sitarama Rao, E. Antony Lobo* and *A. Nagarajan* for Appellants.

*S. Panchapakesa Sastriar, K. Nanjundiah, T. K. Rajagopalan, M. L. Nayak* and *M. R. Venkataraman* for Respondents.

This appeal coming on for hearing on Monday and Tuesday, the 11th and 12th days of October, 1937, and the case having stood over for consideration till Thursday, the 16th day of December, 1937, the Court (*Pandrang Row* and *Venkataramana Rao, JJ.*) delivered the following

JUDGMENT: *Pandrang Row, J.*—This appeal is from the decree of the Subordinate Judge of the Nilgiris at Ootacamund, dismissing a suit for the recovery of Rs. 9,000 due on a promissory note executed on the 12th August, 1931. A payment had been made on 23rd August, 1931, and the suit was filed on the 23rd August, 1934. The claim was in respect of money due to the plaintiff-firm, and that firm was actually registered about a month after the suit was instituted, namely, on the 22nd September, 1934. In the original written statement, the defendants did not take any objection to the maintainability of the suit. But about a year later, namely, in November, 1935, they raised the objection that the suit was not maintainable by reason of the provisions of S. 69, cl. (2) of the Indian Partnership Act of 1932. This preliminary objection alone was decided by the Court below, and the suit was dismissed on the ground that the preliminary objection was good, the lower Court holding that the registering of the firm about a month after the institution of the suit could not date back to the institution of the suit, and would not overcome the bar imposed by S. 69 (2) of the Indian Partnership Act. It seems to me that it is not necessary to decide whether the effect of the subsequent registration will relate back to the institution of the suit, unless it is found that S. 69 (2) applies to the present suit. This does not mean that I differ on this point from my learned brother, but I prefer not to decide it because I am of opinion that S. 69 (2) does not apply to the present suit and that the present suit is expressly saved by the saving clause in the Indian Partnership Act, namely, S. 74. It is on these points that I have to differ from my learned brother.

No doubt, there are several decisions of several High Courts which support the view which has commended itself to

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my learned brother. It is enough to refer to the earliest of these, as the others merely follow it, more or less, namely, *Surendranath De* v. *Manohar De*[1]. The decision therein appears to be based mainly on two English cases, namely, *Reg* v. *Leeds and Bradford Railway Company*[2] and *Kimbray* v. *Draper*[3]. I do not think these two decisions have remained unquestioned. *Reg* v. *Leeds and Bradford Railway Company*[2] followed the earlier decision in *Towler* v. *Chatterton*[4]. In Craies' Statute Law, 4th Edn. at page 341, the result of the cases dealing with this question is stated as follows:—

" The result of these decisions seems to be that the suggested exception is rarely if ever applicable, and cannot be enunciated as an undoubted rule of construction."

The suggested exception being that where the legislature provides in the statute a certain period of time within which proceedings respecting antecedent injuries might be taken before the proper tribunal, the statute must thereafter be given a retrospective operation. It was this consideration that prevailed in *Surendranath De* v. *Manohar De*[1] and in fact the very words used in *Reg* v. *Leeds and Bradford Railway Company*[2] were quoted therein; it was held that the suspension of operation for a year so far as S. 69 of the Indian Partnership Act was concerned is to be taken "as an intimation that the legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries must be taken before the proper tribunal". I may add that *Kimbray* v. *Draper*[3] was a case concerned with a new provision made in an Act for security for costs. It purported to follow the earlier decision in *Wright* v. *Hale*[5], though doubts were expressed about it both by Cockburn, C.J., and Blackburn, J. The latter case appears to be the first case in which the exception to the general rule of not giving retrospective effect to statutes so as to affect or impair existing rights was laid down, namely, that the rule need not be applied where the statutory provision is a mere matter of procedure. This case (*Wright* v. *Hale*[5]) is the first case in which the rule was enunciated that where an enactment merely affects procedure and does not extend to rights of action, the general rule of not giving

1. (1934) I.L.R. 62 Cal. 213.
2. (1852) 21 L.J. M.C. 193.
3. (1868) 3 Q.B. 160.
4. (1829) 6 Bing. 258: 13 E.R. 1280.
5. (1860) 30 L. J. Ex. 40.

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retrospective effect to statutes so as to affect or impair existing rights does not apply. It must be remembered that that was a case in which the question that arose was one relating to costs. The words used by Pollock, C.B., in that case show what exactly he had in mind when he referred to the matter before him as a matter of procedure. He said:—

"I have always understood that there is a considerable difference between laws which affect vested rights and those laws which merely affect the proceedings of Courts; as, for instance, declaring what shall be deemed good service, what shall be the criterion to the right of costs, how much costs shall be paid, the manner in which witnesses shall be paid, or what witnesses the parties shall be entitled to, and so on...... I do not think a matter of that sort can be called a right in any sense in which Lord Coke in his Institutes has spoken of rights."

If by mere matter of procedure is meant only matters of this kind, no difficulty can possibly arise. The difficulty arises when an elastic word of indefinite and uncertain import such as 'procedure' is used in an extended sense and a separate rule of law is laid down that where a statute relates to procedure it can be given retrospective operation, as distinct from the general rule that retrospective effect should not be unnecessarily given to a statute so as to affect existing rights. It is really incorrect in my opinion to say that these two rules are distinct, or that the former constitutes an exception to the latter. There is only one rule, the rule based on the foundation that the Legislature shall not be presumed to take away or impair existing rights; and when in matters of strictly so-called procedure retrospective operation is given, it is because there is no right in a matter of procedure which any person can have and which he can enforce as against any one else. This aspect of the matter has been dealt with in *Ramakrishna Chetty* v. *Subbaraya Aiyar*[1] as follows:—

"It is a well-established principle that unless the terms of a statute expressly so provide or necessarily require it retrospective operation will not be given to a statute so as to affect, alter or destroy any vested right *See* S. 6, cl. (*c*) of the Indian General Clauses Act and S. 8, cl (*c*) of the Madras Act I of 1891. For to do so would result in great injustice, and it would be presumed that the legislature did not intend to deprive any person of a right previously vested in him. The general rule that statutes relating to processual law have retrospective operation is as much subject to this important qualification as statutes dealing with substantive rights. The questions whether a person is entitled to maintain a particular action or to do so in a particular form and what defences are open to the defendant cannot be affected by any statute passed after its institution"

1. (1912) 24 M.L.J. 54: I.L.R, 38 Mad. 101 at 103.

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Then the learned Judges go on to quote from the decision of the Privy Council in *Colonial Sugar Refining Company* v. *Irving*[1], a case which requires full consideration for the purpose of the present question. The facts of that case were that a certain suit was pending when the Judiciary Act of 1903 became law. the Act having received the Royal assent on the 25th October, 1903; the writ in the action had been issued in the previous year but judgment was not delivered till 4th September, 1903, that is to say, a few days after the Judiciary Act had come into force. The Judiciary Act by Ss. 38 and 39 practically substituted the previous right which a litigant had of appealing to the Privy Council by a right of appeal to the High Court of Australia. It was held that though the judgment had not been delivered in the case before the new Act came into force, the new Act did not apply and that the litigant's right of appeal to the Privy Council continued to exist in spite of the new Act. The judgment in the case was delivered by Lord Macnaghten and the principal portion of the judgment at page 372 is as follows:—

"As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case, there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

The words used by Lord Macnaghten, namely, 'touches a right in existence at the passing of the Act' and 'interference with existing rights' clearly indicate the broad scope of the rule which protects existing rights not only from destruction but also from any diminution or injury.

1. (1905) A. C. 369.

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It was not seriously disputed before us that if a statute destroyed an existing right or even placed an onerous condition upon it, it would not be given retrospective effect unless the statute was clear on the point and no other interpretation of the statute was possible. Though questions of limitation and questions relating to the law of evidence are treated in some respects as branches of the law of procedure, nevertheless, it has been found necessary by Courts not to apply the so-called rule that laws of procedure are retrospective to cases where existing rights are altogether taken away or burdened with an onerous condition. It is not necessary for me to refer to all the cases on the point, some of which have been referred to by my learned brother in his judgment. It is enough to refer to the cases dealing with the new condition of obtaining leave of Court for the filing of a Second Appeal, namely, *Vasudeva Samiar,* In re[1] and *Sadar Ali* v. *Dalimuddin*[2]. It was however argued that where the condition imposed newly by statute on the right of suit is one that can be easily performed by the intending plaintiff, there is no justification or reason for not giving effect to the new statute even as regards existing rights of action. In the first place, it is difficult in principle to draw a clear line between onerous conditions and light conditions. Secondly, the general rule of law is not only that existing rights should not be taken away or seriously affected, but should not be affected or impaired. Questions of degree do not arise in a matter like this and, in my opinion, it would be indefensible in principle to introduce an element of uncertainty in a rule of law which is of general application.

It seems to me that the real foundation of the fundamental rule of law common to all civilised nations against giving retrospective operation to statutes so as to affect existing rights is the rule of justice which regards all deprivation or impairment of existing rights as *prima facie* wrong, and the consequent presumption that the Legislature which aims to promote the ends of justice should not be presumed to bring about an injustice of this kind unless the intention to do so is clearly expressed or unless such an inference is inescapable by reason of the words used by the Legislature. I do not think the injustice done in a case would become necessarily less

1. (1928) 56 M.L.J. 369: I.L.R. 52 Mad 361 (F.B.).
2. (1928) I.L.R. 56 Cal. 512 (F.B.).

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when the injury to existing rights is the result of the operation of a new rule which may be said merely to relate to procedure. 'Procedure', as I have already said, is a word of uncertain and indefinite import. Writers of text-books on Jurisprudence have hardly succeeded in defining exactly what 'procedure' is, or where procedure ends and substantive law begins. Some jurists prefer to call 'procedure' as "adjectival law" because its object is to aid and protect the rights given by substantive law, and it exists only for the sake of substantive law. Holland in his book on Jurisprudence, 11th Edn. at page 355 attempts the following definition:

"It comprises the rules for (*i*) selecting the jurisdiction which has cognisance of the matter in question; (*ii*) ascertaining the Court which is appropriate for the decision of the matter; (*iii*) setting in motion the machinery of the Court so as to procure the decision; and (*iv*) setting in motion the physical force by which the judgment of the Court is, in the last resort, to be rendered effectual."

Judged by this definition S. 69 (2) of the Indian Partnership Act cannot be said to relate to mere matter of procedure, for it requires something to be done, namely, registration, *dehors* the Court. My learned brother has referred to some passages from Salmond on Jurisprudence dealing with the same point, and I would quote some more passages from the same work, which have a bearing on those quoted by him. The learned author dismisses the plausible view of procedure which regards it as concerned not with rights, but with remedies, by saying that this is to confound the remedy with the process by which it is made available. At page 497, 7th Edn., the learned author observes as follows:—

"Although the distinction between substantive law and procedure is sharply drawn in theory, there are many rules of procedure, which, in their practical operation, are wholly or substantially equivalent to rules of substantive law. In such cases the difference between these two branches of the law is one of form rather than of substance. A rule belonging to one department may by a change of form pass over into the other without materially affecting the practical issue. In legal history such transitions are frequent, and in legal theory they are not without interest and importance."

He goes on to refer to 'three important classes', in which procedure and substantive law appear to merge into one another and are practically indistinguishable, namely:

"(1) An exclusive evidential fact is practically equivalent to a constituent element in the title of the right to be proved. The rule of evidence that a contract can be proved only by a writing corresponds to a rule of substantive law that a contract is void unless reduced to writing;

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"(2) A conclusive evidential fact is equivalent to, and tends to take the place of, the fact proved by it. All conclusive presumptions pertain in form to procedure, but in effect to the substantive law . . . . . for instance, a bond (that is to say, an admission of indebtedness under seal) was originally operative as being conclusive proof of the existence of the debt so acknowledged; but it is now itself creative of a debt; for it has passed from the domain of procedure into that of substantive law; and

"(3) The limitation of actions is the procedural equivalent of the prescription of rights. The former is the operation of time in severing the bond between right and remedy; the latter is the operation of time in destroying the right. The former leaves an imperfect right subsisting; the latter leaves no right at all. But save in this respect their practical effect is the same, although their form is different."

It may be said that even in form so far as the right to possession is concerned, the form as well as substance is the same, for, S. 28 of the Limitation Act provides that in such cases the right will be deemed to be extinguished. As observed by the Privy Council in *Hari Nath Chatterjee* v. *Mothurmohun Goswami*[1] and affirmed in *Khunni Lal* v. *Gobind Krishna Narain*[2] "the intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right". The intention of the law of limitation being practically to put an end to existing rights after a certain lapse of time, the reason why a new rule of limitation is applied retrospectively, is not because the law of limitation is a law of procedure but because the express intention of the law of limitation is to destroy or extinguish existing rights of action after a certain lapse of time. It is retrospective if it is clearly intended to be retrospective, and not because it is merely a matter of procedure.

So far as rules relating to questions of evidence are concerned, when a new law of evidence takes away an existing right and gives new rights to parties who had no rights before, the Courts are unwilling to give retrospective effect to it, though ordinarily the law of evidence is regarded as a matter of procedure. It is enough in this connection to refer to *Gardner* v. *Lucas*[3]. That was a case where when an existing disability created by an Act of 1672 in respect of deeds not signed by a particular manner was removed by an Act of 1874, the new Act was held not to apply to deeds executed when the Act of 1672 was in force, because the new Act could not be

1. (1893) L.R. 20 I.A. 183: I.L.R. 21 Cal. 8 (P.C.)
2. (1911) 21 M.L.J. 645: L.R. 38 I.A. 87: I.L.R. 33 All. 356 (P.C.).
3. (1878) 3 A.C. 582.

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said to create new rights in parties who had none, and in effect destroy existing rights by giving validity to deeds which otherwise were of no effect, divesting heirs or next of kin in favour of the party in whose interest the improbative instrument had been made. Lord Blackburn laid down the rule in the following words:

"Now the general rule, not merely of England and Scotland, but, I believe, of every civilized nation, is expressed in the maxim '*nova constitutio, futuris formam imponere debet, non praeteritis*'—*prima facie*, any new law that is made affects future transactions, not past ones."

A similar provision is found in the Roman law; "*Leges et constitutiones futuris certum est dare formam negotis, non ad facta praeterita revocari*" (Code 1.4.7); to the same effect is the positive provision in Art. 2 of the Code of Civil Procedure—"*La loi ne dispose que pour l'avenir, elle n'a point d'effect retroactif*". The real test is, when deciding whether a particular provision of law is to be given retrospective effect or not, not whether the law is a law of procedure or substantive law, but whether the law in question affects or impairs existing rights including rights of action which are substantive rights. Where existing rights would be adversely affected, Courts decline to give retrospective effect unless compelled thereto by the words of the statute. That a right of action is a substantive right is not disputed; there is considerable authority in support of that position, and it is not necessary to refer to the large number of cases which bear on the point. It is enough to mention In re *Joseph Suche & Co., Ltd.*[1] and In re *Athlumney*[2]. The latter case deals also with the question whether in cases where the commencement of the operation of a statute is suspended for a time, it is an indication that no further restriction upon retrospective operation is intended. Wright, J., observed as regards this point as follows:—

"But this exception seems never to have been suggested except in relation to statutes affecting procedure, such as Statutes of Limitation, and even in relation to them it is questioned in *Moon* v. *Durden*[3]:

He proceeded to state that in the case before him the enactment did not merely affect procedure, though the effect of the enactment was not to destroy the right which the creditor had to dividend beyond 5 per cent. but merely postponed that

1. (1875) 1 Ch. 48. 2. (1898) 2 Q.B. 547.
3. (1848) 2 Exch. 22.

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right. He continued as follows:—

"If the section is construed retrospectively, it will postpone the creditor's right to dividend beyond 5 per cent. and will *pro tanto* deprive him of the vested right of action which he possessed at the commencement of the Act and when the bankruptcy occurred."

His decision was that retrospective effect should not be given in the case before him. In *Joseph Suche & Co., Ltd.*, In re[1], Jessel, M. R., observed that:

"The right to prove for a debt is not distinguishable in substance from a right of action before winding-up, being simply a legal proceeding to recover a debt against a company in liquidation."

And he held that the provisions of S. 10 of the Judicature Act which direct that:

"In the winding up of any Company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable......as may be in force,"

were not retrospective, though it was argued before him that the rules to be applied under that section, being rules relating to procedure, should be given retrospective effect, and *Kimbray* v. *Draper*[2] was quoted in support of that contention. One other English case may be referred to, namely, *Henshall* v. *Porter*[3] in which McCardie, J., held that in accordance with well-established rules of construction, as well as by virtue of S. 38 (2) of the Interpretation Act, 1889, the Gaming Act of 1922, which repealed S. 2 of the Gaming Act, 1835 and enacted that "no action for recovery of money under the said section shall be entertained by any Court", did not prevent the bringing of an action under the repealed section of the Act of 1835 after the date when the repealing Act came into force in respect of a cause of action which had arisen before that date.

So far I have dealt with the question whether S. 69, cl. (2) of the Indian Partnership Act should be given retrospective effect, and I have said enough to indicate my view that it should not be given retrospective effect. But the matter does not rest there, because the Legislature has expressly enacted a saving clause in S. 74. In other words, the presumption that the Legislature does not intend to affect or impair

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1. (1875) 1 Ch. 48.

2. (1868) 3 Q.B. 160.

3. (1923) 2 K.B. 193.

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existing rights including rights of action is re-inforced in the present case by an express saving clause in the shape of S. 74 the relevant portions of which run as follows:—

"Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect—

(*a*) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(*b*) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act, or

* * * *

(*f*) any rule of law not inconsistent with this Act."

Presumably cl. (*f*) would include the rule of law which denies retrospective operation to statutes so as to affect existing rights and is embodied by the Legislature in the General Clauses Acts. So far as cls. (*a*) and (*b*) are concerned, it is clear that the right with which we are now concerned, namely, the right of suit with respect to the debt due on the promissory note, is a right which had accrued before the commencement of the Act, and that the present suit is a remedy and indeed the only remedy, in respect of such a right. Cl. (*b*) of S. 74 has been interpreted both by Sulaiman, C.J., in *Danmal Parshotamdas* v. *Baburam Chhotelal*[1] and by my learned brother in *Parinchu* v. *Ravi Varma*[2] in the same way, namely, that it would include any suit for the enforcement of a right already accrued, and that the words "before the commencement of this Act" would not qualify "legal proceeding or remedy", found earlier in that clause. My learned brother however thought that the word 'affect' cannot be interpreted to mean 'apply to' as appears to have been understood or interpreted by Sulaiman, C.J. Now the word 'affect' is an ordinary word which must be given its dictionary meaning. It means, "to act upon, to produce or effect a change upon, to influence, to touch." It does not therefore follow that a right is not affected unless it is taken away wholly or in greater part; any diminution or deterioration or impairment of the right would affect it. The word 'impair' which has been used in this connection also has a wide meaning. 'Impair' means: to diminish in quantity, value or strength, to weaken; and an absolute right of suit is impaired or affected when a condition is imposed upon it. It may be the condition is light, or it may be the

1. (1935) I.L.R. 58 All. 495. 2. (1936) 45 L. W. 276.

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condition is onerous, but it is not always easy to say which burden is onerous and which is not. The onerous nature of the burden depends not only on the burden itself but also on the individual who has to bear the burden, and the law cannot have respect of persons in order to determine whether a particular condition is onerous or not. It is not possible to have any general principle based on such a shifting foundation. In my opinion, whenever a burden is imposed, the previously existing right is affected or impaired, if not imperilled. It seems to me that it is hardly right to say in a case of this kind, where we have got the actual facts before us, where a suit to recover a sum of Rs. 9,000 would otherwise be dismissed, that the right to recover that amount is not imperilled by reason of the condition imposed by S. 69 (2) of the Indian Partnership Act. I am unable to shut my eyes to such an extent to the facts of the case as to say to the plaintiffs that, whatever they might think, their rights have not been affected by S. 69 (2) of the Indian Partnership Act, though in effect they would lose their entire right to recover the money due to them by reason of that statutory provision. I do not think the law requires me to say that such deprivation of rights was intended by the Legislature and should take place and that this consequence cannot be avoided because S. 69 (2) of the Act relates to a matter of procedure.

Since the case was argued before us, I have come across a decision of a Full Bench of the Rangoon High Court, in which this question of what is procedure and what is not procedure has been considered and decided, and I think it is but right that I should refer to it. The case is *Chettiar Firm* v. *The Central Bank of India, Ltd.*[1] The High Court of Rangoon had made an amendment to O. 21, r. 90 of the Civil Procedure Code which made the right to have a sale set aside subject to the proviso that before such an application is made, a certain deposit was to be made. The Full Bench of the same High Court held that such an amendment by the High Court was *ultra vires* as the proviso did not relate to procedure. Roberts, C.J., approved the following definition of procedure given by Lush, J., in *Poyser* v. *Minors*[2]:

1. A.I.R. 1937 Rang. 419: 1937 Rang. L.R. 268 (F.B.).
2. (1881) 7 Q.B.D. 329.

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"Procedure denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines that right."

Roberts, C.J., observed that the right of applying to set aside a sale referred to in O. 21, r. 90, Civil Procedure Code, was only declaratory of the common law, and as such right of application was taken away unless the person is able and willing to make the deposit, the new rule could not be regarded as mere procedure. He relied on *Capel* v. *Child*[1] and on the observation in Broom's legal maxims, that no one is to be deprived of his property in any judicial proceeding unless he has an opportunity of being heard. Leach, J., observed as follows:—

"Proviso (*b*) in the rule under discussion clearly offends against this principle, because in effect it says that a person shall not enter the Court and ask for redress until he has deposited a sum of money, not by way of Court-fee, but as a warranty of good faith. It is said that the proviso was inserted in the rule in order to prevent applications of a frivolous character being filed; but, unfortunately, its effect does not stop there. It can operate to prevent a person who has suffered a wrong coming into Court for redress because he has not the means to make the deposit."

Braund, J., observed that the proviso was "a mandatory rule by which, when read with S. 47 (1) of the Code, the Court purports not merely to regulate the mode of its exercise of jurisdiction but to divest itself altogether of jurisdiction in all cases in which the applicant cannot, or will not, make a substantial deposit", and that the proviso so far as it imposed an onerous condition upon an applicant applying to set aside a sale appeared to go further than a mere matter of procedure.

Here again, no doubt, there is a reference to the onerous character of the condition precedent, but I do not think that it was meant to be an essential qualification. It appears to me that the fundamental and universal rule that no existing rights should be deemed to be impaired or affected unless the Legislature's intention so to do is clearly expressed or such a result is unavoidable by reason of the words used in the statute, is not subject to any real exception. Otherwise the result would be what the Legislature is presumed not to intend, and work an obvious injustice, which the Legislature must be deemed to be at least as anxious to avoid as any one else. In my opinion, difficulties have arisen on this point only because the question has been complicated by the importation into the rule of elastic and general words of uncertain and indefinite import like

1. (1832) 2 C. & J. 558: 149 E. R. 235.

"matter of procedure" or "processual law"—words which are very good illustrations of the fallacies that lie hidden in words, which of all the *idola* imposed by words on the understanding are, according to Bacon, the most troublesome of all, and make human thought the bond slave of words. As I have said already, there is no real exception to the general rule so far as so-called matters of procedure are concerned, and if, even otherwise, there is such an exception so far as procedural law is concerned, the term 'procedural law' must be very strictly construed, and the exception should not be allowed to be extended so widely as to eat up the rule. The exception, no less than the rule, is, in my opinion, subject to the fundamental principle that existing rights are not taken away except by express enactment or by necessary intendment.

Bearing this fundamental principle in mind in construing the saving clause in the Act, namely, S. 74, I find it impossible to accept the contention that the Legislature intended that, in spite of S. 74 (*b*), the bar imposed by S. 69 (2) should prevail even in respect of rights of suit which were in existence when that section came into force. I am therefore of opinion that the present suit is maintainable and should not have been dismissed on the preliminary ground by the Subordinate Judge and that his decree should accordingly be set aside and the suit remanded for fresh disposal. As, however, my learned brother is of a different opinion, the question whether the suit is maintainable or not must be referred to a third Judge.

*Venkataramana Rao, J.*—This is an appeal from the decree of the learned Subordinate Judge of Nilgiris dismissing the suit of the plaintiffs which was instituted for recovery of a sum of money borrowed from them on the 12th March, 1931. The plaintiffs were non-suited on the ground that S. 69 (2) of the Indian Partnership Act was a bar to the maintenance of the action as the plaintiffs' firm was not registered before the date of the institution of the suit, namely, 23rd August, 1934.

In appeal it is contended by Mr. Sitarama Rao for the plaintiffs that S. 69 (2) of the Act does not affect contracts entered into before the said Act came into force, that they are saved by S. 74 (*b*) of the Act, that even assuming registration of the firm was necessary, the firm was registered a month after the institution of the suit and the subsequent registration

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of the firm was enough to validate the original institution of the suit.

I shall first deal with the contention based on the subsequent registration of the firm. It seems to me that this contention is not tenable having regard to the plain language of the section which says:

"No suit to enforce a right arising from a contract shall be instituted"

unless the condition mentioned therein, that is, the registration of the firm is fulfilled. Therefore the condition is a condition precedent to the institution of a suit. The word used is 'shall'. The Privy Council in dealing with an analogous section (S. 80, Civil Procedure Code) where the language was almost similar, namely, 'no suit shall be instituted against the Secretary of State......until the expiration of the two months next after the notice in writing has been delivered' remarked thus:

"The Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words. S. 80 is express, explicit and mandatory." (Vide *Bhagchand Dagdusa* v. *Secretary of State for India*[1].)

This is the view which has been taken in construing an analogous section [S. 28 (2) of the Provincial Insolvency Act] according to which leave of the Insolvency Court is made a condition precedent to the institution of a suit and our High Court has held that leave subsequently obtained would not cure the initial defect and validate the institution of the suit—vide *Davood Mohideen Rowther* v. *Sahabdeen Sahib*[2]. In *Chandulal Kushalji* v. *Awad*[3], a question arose under S. 433, Civil Procedure Code, 1882, corresponding to S. 86 of the Civil Procedure Code, 1908, as to whether a suit against a Ruling Chief without obtaining the consent of the Governor-General can be validated by a subsequent consent and it was held that it could not be. In *Danmal Parshotamdas* v. *Baburam Chhotelal*[4], it was held that subsequent registration would not validate the original institution. A similar view was taken in *Krishan Lal-Ram Lal* v. *Abdul Ghafur Khan*[5]. But in some cases the view has also been taken that if the suit was not barred by limitation on the date of the subsequent registration, the suit must be deemed to have been instituted on the date when registration

1. (1927) 53 M.L.J. 81: L.R. 54 I.A. 338: I.L.R. 51 Bom. 725 at 747 (P.C.).
2. (1937) 2 M.L.J. 223: I.L.R. (1937) Mad. 841.
3. (1896) I.L.R. 21 Bom. 351.
4. (1935) I.L.R. 58 All. 495.
5. (1935) I.L.R. 17 Lah. 275.

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was effected. But it is unnecessary to consider whether this view is correct, as even the application of this rule would not help the plaintiffs because by the date of registration the plaintiffs' suit became barred. Mr. Sitarama Rao strongly relied on the decision in *Ratnaswamy Pillai* v. *Adipurnam Pillai*[1] which was a case under S. 92 of the Civil Procedure Code and it was held therein that where a suit was instituted without the leave of the Advocate-General, it could be validated by subsequent consent. From a perusal of the case it will be seen that the learned Judges in that case made it clear that their observations must be confined only to cases arising under S. 92, Civil Procedure Code—*vide* pages 468 and 469. It may be noticed that even this view was not shared by other High Courts—*vide* for example *Gopal Dei* v. *Kanno Dei*[2]. Mr. Sitarama Rao also relied upon two English cases, namely, *Hawkins* v. *Duche*[3] and In re *Shaer*[4] decided under S. 8 of the English Registration of Business Names Act. Under that section, it is no doubt true that no action can be maintained in respect of a contract unless the firm is registered but the section itself contained a provision that it is open to the Court to dispense with the said condition and relieve the disability. Therefore, once relief is granted by the Court, the effect will be as stated by Lord Hanworth, M.R., in In re *Shear*[4] "to rehabilitate the proceedings from the beginning". But no such provision is contained in S. 69 (2) of the Act and it may be a matter for the Legislature and not for the Court to grant a similar relief. Mr. Sitarama Rao again laid some stress on the Privy Council decision in *Mahammad Azmat Ali Khan* v. *Lalli Begum*[5] decided under Pensions Act; but that case was decided on the language of S. 6 of the Act which provides that a Civil Court shall take cognisance of the claim relating to a pension upon receiving a certificate from the Collector. Their Lordships held that when the Court received the certificate it was bound to take cognisance of the claim and finding an existing suit when it received the certificate, it might take cognizance of the claim in that suit. It therefore seems to me that emphasis was laid by their Lordships on the word 'claim'

1. (1930) M.W.N. 456.
2. (1903) I.L.R. 26 All. 162.
3. (1921) 3 K.B. 226.
4. (1927) 1 Ch. 355 at 357.
5. (1881) L.R. 9 I.A. 8: I.L.R. 8 Cal. 422 (P.C.).

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and there is a distinction between the claim in the suit and the suit itself. Here the bar is to the institution of the suit and not to the cognisance of the claim. The subsequent registration of the firm will not validate the original institution of the suit and enable the plaintiffs to sustain this action.

I shall now consider the contention relating to S. 69 (2) of the Act. At the outset, it may be mentioned that almost all the High Courts have taken the view that S. 69 (2) is a bar to the maintenance of an action by an unregistered firm in respect of a contract or a cause of action which accrued before the commencement of the Act if it is instituted after 1st October, 1933, the date when S. 69 (2) came into force. (Vide *Krishan Lal-Ram Lal* v. *Abdul Ghafur Khan*[1], *Danmal Parshotamdas* v. *Baburam Chhotelal*[2], *Surendranath De* v. *Manohar De*[3], *Ram Sundar* v. *Madhu Sudhan*[4], *Shazad Khan* v. *Darbar Babu Kuchhi*[5], *Catholic Sangam* v. *Ravi Varma*[6], *Varadarajulu Naidu and Kuppuswami Naidu & Co.* v. *Rajamanicka Mudaliar*[7], *Sundararaja Aiyangar* v. *Mannarswami*[8] and *Firm of Syed Ibrahim Sahib* v. *Gurulinga Aiyar*[9].) The view taken in all these cases is that S. 69 (2) enacts a rule of procedure and it is not controlled by S. 74 (*b*) of the Act. In *Catholic Sangam* v. *Ravi Varma*[6], I stated the effect of S. 69 (2) thus:

> "There is no doubt that this section enacts a rule of procedure. It imposes a condition for the enforcement of a right and does not affect the right itself. Being an enactment relating to procedure it will apply to pending actions as well as to future actions. The Legislature, to avoid hardship, provided that S. 69, cl. (2) shall come into force on 1st October, 1933. This provision is also a clear indication that the enactment is intended to be retrospective."

It was also pointed out therein that all actions brought after October, 1933, should be governed by the said provision and that S. 74 (*b*) was only intended to save pending legal proceedings from the bar of S. 69 (2) and not future proceedings. This view is canvassed by Mr. Sitarama Rao on the ground that the right of a suit is a substantive right and therefore a right vested in the plaintiffs on the date of the Act, that any restriction placed thereon would affect that right and that S. 69 (2) must be deemed to be a provision affecting a substan-

1. (1935) I.L.R. 17 Lah. 275
2. (1935) I.L.R. 58 All 495.
3. (1934) I.L.R 62 Cal. 2'3.
4. (1936) 40 C.W.: . 1180.
5 (1936) I.L.R 15 Pat. 810.
6. A.I.R. 1937 M . 419 at 420.
7. (1937) 2 M.L.J. 273.
(1937) 1 M . . 610.
9. (1937) 2 M.L.J. 717.

tive right, that in accordance with the general rule of law governing the construction of statutes an enactment affecting a substantive right cannot be held to be retrospective and that this provision is made clear by the Legislature by enacting S. 74 (*b*). In support of this position he relied on *The Colonial Sugar Refining Co., Ltd.* v. *Irving*[1], In re *Vasudeva Samiar*[2], *Sadar Ali* v. *Dalimuddin*[3] and *Rajah of Pittapur* v. *Venkatasubba Rao*[4]. Before examining the soundness of the contention, it is necessary perhaps to explain what is meant by procedure and to determine whether S. 69 (2) enacts a rule of procedure or enunciates a condition which affects a substantive right. Though it is not possible, as Salmond points out, to state with precision the exact nature of the distinction between substantive law and the law of procedure, still the distinction is marked. As stated by him:

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> "The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions—all the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter." (Salmond on Jurisprudence, pages 495 and 496.)

He further amplifies by observing that

> "the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other." (Page 497.)

Holland in his book on Jurisprudence explains the scope of adjective law thus:

> "A remedial right is in itself a mere potentiality deriving all its value from the support which it can obtain from the power of the State. The mode in which that support may be secured, in order to the realisation of a remedial right, is prescribed by that department of law which has been called 'adjective', because it exists only for the sake of 'substantive law', but is probably better known as 'procedure'. In the exceptional cases in which an injured party is allowed to redress his own wrong, adjective law points out the limits within which such self-help is permissible. In all other cases it announces *what steps must be taken in order duly to set in motion the machinery of the law-courts for the benefit either of a plaintiff or of a defendant*". (Pages 358 and 359, 13th Edn., 1924.)

Wharton in his Law Lexicon explains it thus: "The mode in which successive steps in litigation are taken". Thus it will be seen that under 'procedure' are comprised all steps which a party must take in order to get the aid of the Court for the enforcement of his rights. It therefore includes not only the steps which a party has to take after an action is launched in

1. (1905) A.C. 369.
2. (1928) 56 M.L.J. 369: I.L.R. 52 Mad. 361 (F.B.).
3. (1928) I.L.R. 56 Cal. 512 (S.B.).
4. (1915) 29 M.L.J. 1: I.L.R. 39 Mad. 645 (F.B.).

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Court but also steps which he has to take before commencing it. The issue of a citation or a summons, the procuring of necessary evidence and such other steps in the further progress of the suit are all comprised in procedure which a party has to observe after a suit is launched, but there may be certain steps which he has to take outside Court in order to enable him to initiate proceedings in Court. The familiar instance is the service of notice by the plaintiff on the defendant as enacted by S. 80, Civil Procedure Code or by S. 350 of the District Municipalities Act. The rule of limitation which enjoins a party to bring his action within a particular period is another instance. As observed in *Moon* v. *Durden*[1]:

"There is a material difference when an Act of Parliament is dealing with a right of action already vested, not intended to be taken away, and when it is dealing with mere procedure to recover those rights, which it may be quite reasonable to regulate and alter."

The right of action does not constitute a title to keep all the consequences of the right as they were before. S. 69 (2) does not affect the right of action: it only prescribes that a condition is to be performed before a party seeks the aid of the Court for giving him relief in respect thereof. Under S. 80, Civil Procedure Code, no suit can be instituted unless notice has been served on the Secretary of State. This section has been held to enact a rule of procedure. (*Vide* Mulla's Commentary, page 274.) The Privy Council in *Bhagchand Dagdusa* v. *Secretary of State for India*[2] refers to it as "a statutory provision as to procedure". In *Brooks* v. *Bockett*[3] the facts were these. Before 6and 7 Victoria, Chapter LXXIII, a solicitor was entitled to bring an action for work done outside Court immediately the work was done but S. 37 of the Act provided that no solicitor shall commence or maintain any action or suit until the expiration of one month after he shall have delivered a bill in the manner provided for therein. The Act was passed in 1843 but the work in respect of which the action was brought was completed before 1840. It was also evident that the bill was delivered before that date but no bill was delivered after the date when the Act came into force and before the action was brought. Lord Denman, C.J., observed that according to the Act a bill delivered before 1840 would

1. (1848) 2 Exch. 22: 154 E.R. 389.
2. (1927) 53 M.L.J. 81: I.L.R. 54 I.A. 338: I.L.R. 51 Bom. 725 at 747 (P.C.).
3. (1847) 9 Q.B. 847: 115 E.R. 1500.

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not be sufficient because such a bill was not taxable before the Act, whereas, on the other hand, after the Act the bill was taxable and a defendant might insist upon such taxation, that the Act distinctly provides that no attorney shall commence or maintain any action until he has delivered the bill after the Act and waited for a month and that the Act was retrospective, and as there was no delivery within the meaning of the Act, the action failed. Thus, though the cause of action to institute a suit accrued before the Act, yet the condition prescribed for instituting the suit was held to apply on the principle that the condition related only to procedure.

The observations of Lord Esher in *Coburn* v. *Colledge*[1] on this section (S. 37) bring out clearly what is meant by a rule of procedure and they are to this effect:

"Before any enactment existed with regard to actions by solicitors for their costs, a solicitor stood in the same position as any other person who has done work for another at his request, and could sue as soon as the work which he was retained to do was finished, without having delivered any signed bill of costs or waiting for any time after the delivery of such a bill. Then to what extent does the statute alter the right of the solicitor in such a case, and does the alteration made by it affect or alter the cause of action? It takes away no doubt the right of the solicitor to bring an action directly the work is done, but it does not take away his right to payment for it. which is the cause of action. The Statute of Limitations itself does not affect the right to payment, but only affects the procedure for enforcing it in the event of dispute or refusal to pay. Similarly, I think S. 37 of the Solicitors Act, 1843, *deals not with the right of the solicitor, but with the procedure to enforce that right.* It does not provide that no solicitor shall have any cause of action in respect of his costs or any right to be paid till the expiration of a month from his delivering a signed bill of costs, but merely that he shall not commence or maintain any action for the recovery of fees, charges or disbursements until then. It assumes that he has a right to be paid the fees, charges and disbursements, but provides that *he shall not bring an action to enforce that right until certain preliminary requirements have been satisfied.*"

The principle of this decision was applied and followed by our High Court in a case reported in *Muthiah Chettiar* v. *Ramasami Chettiar*[2]. In that case the facts were these. Under S. 7 of the Rent Recovery Act,

"no suit brought and no legal proceedings taken to enforce the terms of a tenancy shall be sustainable unless pattas and muchilikas have been exchanged. . . . ."

But this condition was done away with by S. 77 of the Madras Estates Land Act which enacts that

"at any time after an arrear of rent has become due the landlord may institute a suit before the Collector for the recovery of the arrear."

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1. (1897) 1 Q.B 702 at 705 and 706. 2. (1913, 25 M.L.J. 205.

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A suit was instituted for arrears for faslis 1315, 1316 and 1317 which accrued due before the Estates Land Act came into force. The plea was taken that under S. 7 of the Rent Recovery Act the action was not sustainable. It was overruled by Sundara Aiyar and Sadasiva Aiyar, JJ., on the ground that S. 7 only enacted a rule of procedure and at the time the suit was brought, it was no longer in force. Both the learned Judges dissented from *G. Lee Morris, Receiver of the Estate of the late Rajah of Tanjore* v. *Sambamurthi Rayar*[1] and in the course of the judgment, Sundara Aiyar, J., observed thus:

"Did S. 7 of Act VIII of 1865 affect the landlord's right to the rent? In my opinion, it did not. It merely imposed a condition which the landlord was bound to fulfil if he wished to institute a suit for its recovery or to take legal proceedings to compel its payment. . . . . In so far as it related to the recovery of it through Court, it undoubtedly belonged to the region of processual law."

A similar view was taken by Subrahmanya Aiyar and Benson, JJ., in an unreported case (S. A. No. 1091 of 1897) referred in *Kumarasami Pillai* v. *President, District Board of Tanjore*[2]. The learned Judges therein pointed out that the exchange of patta and muchilika or tender of patta was a condition imposed by law as a *necessary preliminary to the filing of a suit.*

It is well settled that 'limitation is a branch of the law of procedure and is only a condition annexed to the enforcement of a right and does not affect the right itself'. Therefore it has been held that a statute shortening or extending time within which proceedings can be taken is retrospective. As an instance of a statute shortening the time may be mentioned the case of '*The Ydun*'[3]. In respect of a cause of action which accrued before the Public Authorities Protection Act came into force, the question arose whether the period of limitation prescribed by the said Act is applicable. The said Act came into force on 1st January, 1894. The default in respect of which the suit was instituted occurred in September, 1893 and the suit was instituted in 1898; but under the Act the action must be commenced six months after the default complained of. So on the date of the Act there was only a period of one month or so that was available if the period of limitation of six months were held to apply.

1. (1871) 6 M.H.C.R. 122.
2. (1898) I.L.R. 22 Mad. 248 at 250.
3. (1899) P. 236.

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But it was contended that the cause of action accrued before the Act and the period of limitation provided by the Act should not be made applicable. This contention was overruled and the action was held to be barred on the ground that it was not brought within six months after the matter complained of. Sir F.H. Jeune observed as follows:

" It is clear that what must be taken to be an improvement in procedure is not considered as interference with a vested right of those who would have preferred the procedure to remain in its unreformed condition."

This view was endorsed by the Court of Appeal. As an instance of a statute extending the time may be mentioned the case in *Rex* v. *Chandra Dharma*[1]. In that case, a prosecution was launched under S. 5, sub-S. 1, of the Criminal Law Amendment Act, 1885, for an offence committed on 15th July, 1904. Under that Act the prosecution should have been launched within three months after the commission of the offence, but by the Prevention of Cruelty to Children Act, 1904, which came into force on 1st October, 1904, the period of limitation was extended from three months to six months. It was held that though the prosecution was commenced on 27th December, 1904, more than three months after the date of the commission of the offence, by virtue of the later Act, the prosecution was sustainable. Channell, J., there observed:

"An alteration of the time within which they might be prosecuted, whether by extension or diminution, was a matter of procedure only."

But an exception has been made in cases where the alteration in procedure would have the effect of destroying a right of action, that is, if before the new Act came into operation the time fixed by it had already expired and would have prevented the plaintiff from enforcing his right, the new Act would not be considered as retrospective. It is this principle that was applied in *Ramakrishna Chetty* v. *Subbaraya Aiyar*[2] and *Rajah of Pittapur* v. *Venkatasubba Rao*[3]. In those cases the suits were for arrears of rent and on the date they were brought, more than three years had elapsed after the rent became due and they were dismissed on the ground that they must have been brought within three years as prescribed by Ss. 210 and 211 and Art. 8 of the Schedule to the Estates Land

1. (1905) 2 K.B. 335.
2. (1912) 24 M.L.J. 54: I.L.R. 38 Mad. 101.
3. (1915) 29 M.L.J. 1: I.L.R. 39 Mad. 645 (F.B.).

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Act. But for this Act, they would have had six years from the date when the rents accrued due and the suits would have been in time. It was held that, as by the time the Estates Land Act came into force, the three years' period had run out of the rule of limitation prescribed by this Act, it should not be held to be retrospective. This position is well set out in *Gopeshwar Pal* v. *Jiban Chandra Chandra*[1] thus:

"The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus two positions; where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application."

In the Full Bench decision in *Ganga Sahai* v. *Kishen Sahai*[2], the distinction between the right and the relief and the process to be adopted for getting the relief is well brought out. In that case a question arose as to the maintainability of a suit for foreclosure of a mortgage by conditional sale executed on the 3rd July, 1877, when Regulation XVII of 1806 was in full force, instituted after the Transfer of Property Act came into force which repealed the said Regulation. Under S. 8 of the said Regulation, no mortgage can be foreclosed without the service of one year's notice upon the mortgagor in the manner provided therein. Objection was taken that the conditions mentioned in the Regulation not having been complied with, the suit was not maintainable. This contention was repelled on the ground that the provisions of Ss. 7 and 8 of Regulation XVII of 1806 prescribed only a procedure and no person can have a vested right in procedure. An argument was advanced based upon S. 2 of the Transfer of Property Act which provided that nothing contained in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force, or any relief in respect of any such right or liability and therefore it must be taken that the previous provision must be deemed to have been unaffected by the Act. In dealing with this contention Oldfield, J., observed thus:

"There is no vested right to have recourse to a particular procedure for enforcing a contract; such a right cannot be claimed by the parties to a mortgage, as being in any sense a right which arises out of the legal relation of

1. (1914) I.L.R. 41 Cal. 1125 at 1141 (S.B.).
2. (1884) I.L.R. 6 All. 262 (F.B.).

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a mortgagor and mortgagee. To alter the procedure involves no breach of their contract.

Their rights and liabilities under their contract, and the relief they are entitled to in respect of such rights and liabilities, are different things from the procedure necessary to enforce such rights, liabilities and relief. And although the procedure for redemption and foreclosure of mortgage by conditional sale has been altered, it can scarcely be said that the mortgagor has been injuriously affected by the change. The Regulation prescribed certain ministerial proceedings to be taken, under which a year was allowed to the mortgagor to pay the debt, before a suit could be brought for possession, or to obtain a declaration of absolute title, whereas the present Act has done away with the preliminary proceedings, and allows the mortgagee to bring a suit for foreclosure."

Dealing with a similar set of facts Trevelyan, J., in a Full Bench case in *Bhobo Sundari Debi* v. *Rakhal Chunder Bose*[1] remarked thus:

"There is, I think, a clear distinction between relief and the mode of procedure for obtaining such relief. The relief remains unaffected by the change of the procedure. The rights and liabilities of the mortgagor and mortgagee, and the relief in respect of such rights and liabilities, are the same under the Transfer of Property Act as they were before. A different procedure for enforcing such rights and obtaining such relief has, however, been adopted. The procedure for enforcing a right is no portion of that right, nor does it alter or affect it."

On an examination of the above cases and other decisions on this branch of the law, it is fairly clear that the law of procedure deals with the process by which a remedy for the enforcement of a right is made available. A right of suit, a right of appeal and a right of distraint are all remedies for the enforcement of a right and they are equally substantive rights though remedial in nature. The law makes a distinction between rules of law which in any way impair or destroy those rights and those which a litigant has to comply with for availing himself of those remedial rights. The latter belong to the law of procedure and an enactment altering the procedure is always held to be retrospective even where the alteration tends to the disadvantage of one of the parties save in cases where it tends to destroy the right of the remedy.

The cases relied on by Mr. Sitarama Rao do not enunciate any principle which is in conflict with the principles above indicated. There are two cases on which Mr. Sitarama Rao laid considerable emphasis. The first is the case in *The*

1. (1886) I.L.R. 12 Cal. 583 at 589 (F.B.).

*Colonial Sugar Refining Co., Ltd.* v. *Irving*[1] where with reference to a pending action a right of appeal to the Privy Council which was available on the date when the action was instituted was taken away and a right of appeal was given to the Chief Court of the Commonwealth of Australia. Lord Macnaghten observed thus:

"To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. . . . . ."

Here, the right of appeal to the Privy Council as a superior tribunal is taken away and there is thus a deprivation or destruction of a vested right. The other case relied on by Mr. Sitarama Rao is a Full Bench decision in *Vasudeva Samia, In re*[2]. There the question was whether the amendment of cl. 15 of the Letters Patent which came into force on 31st January, 1928, by which no second appeal can be filed without the leave of the Judge who gave the decision against which appeal is sought to be preferred will apply to a pending appeal. The learned Judges who delivered judgment in that case were of the opinion that the principle laid down in *The Colonial Sugar Refining Co., Ltd.* v. *Irving*[1] would apply to the case on the ground that the institution of the suit would carry with it the implication that all appeals then in force were preserved to it through the rest of its career. The decision can probably be supported on the ground that the condition of leave is one which a litigant cannot comply with but is dependant upon the will of a foreign agency in whom is the power vested either to give leave or refuse leave, that is, the power to preserve the right or to destroy it. It can therefore be said that an existing right of appeal is turned into a mere chance, and put in peril and the right is thus affected. As Rankin, C.J., observed, 'an intention to interfere with a substantive right, to impair or imperil it, cannot be presumed'—vide *Sadar Ali* v. *Dalimuddin*[3]. It is thus clear that S. 69 (2) enacts only a rule of procedure; the rights under the contract are not taken away; the remedy by way of a suit is also not taken away; the relief obtainable has not been interfered with; the condition imposed is the one which a party can comply with and the remedy by

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1. (1905) A.C. 369. 2. (1928) 56 M.L.J. 369: I.L.R. 52 Mad. 361 (F.B.).
3. (1928) I.L.R. 56 Cal. 512 at 517 (S.B.).

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way of a suit is thus not imperilled in any way. The very cases relied on by Mr. Sitarama Rao also lay down the proposition that the provision of a statute dealing with a matter of procedure will have retrospective effect unless that construction is textually inadmissible (*Delhi Cloth and General Mills Co.* v. *Income-tax Commissioner, Delhi*[1]). They also lay down a further proposition that the provisions which touch a right in existence at the passing of the Act are not to be applied retrospectively in the absence of express enactment or necessary intendment. Therefore, if the necessary intendment of the statute is that it ought to be applied retrospectively, the Court is bound to give retrospective effect to it. The language of S. 69 (2) is very general and will apply to all suits arising from contracts whether entered into before the passing of the Act or not. S. 1 provides that S. 69 shall come into force on the 1st day of October, 1933, though the entire Act would come into force on the 1st day of October, 1932. This postponement of the operation of the section may fairly be taken as an indication of the intention of the Legislature to give retrospective operation to the section. (Vide *Ramakrishna Chetty* v. *Subbaraya Aiyar*[2] and the English cases referred to therein.) But Mr. Sitarama Rao contends that by virtue of S. 74 (*b*) of the Act it must be taken that the Legislature did not intend to give a retrospective operation to the section. S. 74, cls. (*a*) and (*b*) are to this effect:

"(*a*) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(*b*) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act."

Cl. (*a*) deals with what are called strictly substantive rights, that is, rights arising out of certain legal relationship between the parties; and cl. (*b*) deals with what are known as remedial rights which law gives for the enforcement of or redress for the infringement of such rights. Therefore what S. 74 lays down is that "nothing in this Act shall affect or be deemed to affect" those rights; that is, a right to sue or institute a legal proceeding or a right to any remedy will not be affected by the Act. The section does not deal with the process or the procedure for the enforcement of the said right

1. (1927) 53 M.L.J. 819: L.R. 54 I.A. 421: I.L.R. 9 Lah. 284 (P.C.).
2. (1912) 24 M.L.J. 54: I.L.R. 38 Mad. 101 at 104-107.

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or remedy. The process by which the remedy is made available is not the same as the remedy. What is contemplated is that the right to institute a suit or to enforce any other remedy in respect of a contract available to a party at the date when the Act came into force will not be affected. But if a legal proceeding has already been commenced, it would not be affected by S. 69, cl. 2. It appears to be the intention of the Legislature that the retrospective operation which is given to a rule of procedure should not be extended to legal proceedings pending on the date of the Act. As explained by me in *Catholic Sangam* v. *Ravi Varma*[1] the word 'remedy' may be taken to be a comprehensive term as including a right to sue or any other remedy without resorting to Court, for instance, a right to sell pledged goods, a seller's lien and a right of resale of goods. But for this enactment, it may be that even pending legal proceedings would have been affected—vide *Kimbray* v. *Draper*[2]. If the intention was not to affect even legal proceedings not begun in respect of such contracts, the Legislature would have provided in S. 74 a provision similar to the one they did in respect of the repeal of an enactment, namely, any legal proceeding or remedy may be instituted or continued as if the Act had not been passed [*cf.* S. 6, cl. (*e*) of the General Clauses Act]. I am therefore of the opinion that the action is barred by S. 69 (2) of the Act and it is not saved by S. 74 (*b*) of the Act.

The suit has therefore been rightly dismissed by the Court below. I would therefore dismiss the appeal with costs.

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This appeal coming on for hearing this day under the provisions of cl. 36 of the Letters Patent, the Court (*Varadachariar, J.*) delivered the following

Varadachariar, J.

JUDGMENT: *Varadachariar, J.*—I agree with Pandrang Row, J., that the present suit is maintainable and that the objection based on S. 69 (2) of the Partnership Act must be overruled. The arguments that can be urged in favour of one view or the other have been fully set out in the judgments delivered by my learned brothers; it is therefore not necessary for me to deal with every one of them in detail or with the several decisions referred to in their judgments.

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1. A.I.R. 1937 Mad. 419.
2. (1868) 3 Q.B. 160.

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The relevant facts and dates are: The promissory note sued on was executed on 12th March, 1931, the Partnership Act except S. 69 came into force on 1st October, 1932, S. 69 came into force on 1st October, 1933, and this suit was filed in August, 1934. On these facts, the question arises, whether the plaintiffs who admittedly constitute a firm but had not got themselves registered before the date of the institution of the suit are entitled to maintain the suit. If the matter were wholly *res integra* it may be open to argument whether the language of S. 69 of the Partnership Act clearly and necessarily applies to contracts entered into before the date of the coming into force of the Act. In *Wright* v. *Greenroyd*[1] where the question arose with reference to S. 32 of the English Medical Act of 1858, Blackburn, J., thought that it was clear from the language of that section that the prohibition referred to a charge incurred after the 1st January, 1859. The language of that section was that:

> "After the 1st January, 1859, no person shall be entitled to recover any charge in any Court of law for any medical or surgical advice, attendance or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act."

As a matter of language, it is not easy to see any marked difference between the above words and the language of S. 69 of the Partnership Act. In view however of the way in which the general words of this section of the Partnership Act have been understood in many of the reported decisions, I prefer to deal with the case on the footing that, but for other considerations, the language employed is capable of being applied even to contracts entered into before the Act came into force and to causes of action that accrued before that date.

On the above assumption two questions arise for decision: (1) Whether the saving words found in S. 74 have the effect of exempting a suit like the present from the operation of S. 69, and (2) if S. 74 has no such operation, whether on general principles the Court ought to hold that S. 69 does not apply to a suit to enforce a cause of action which had accrued prior to the date of the coming into force of the Act. In dealing with S. 74, I may note one ambiguity which however is not very material to this case. In cls. (*a*), (*b*) and (*c*) refer-

1. (1861) 1 B. & S. 758: 121 E.R. 896.

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ence is made to "the commencement of this Act" and the learned Counsel for the respondents rightly pointed out that it may not be easy to say when dealing with an objection under S. 69, whether the above words should be held to refer to 1st October, 1932, when the Act except S. 69 came into force or to 1st October, 1933, when that section came into force. I do not however express any opinion upon this question because the right of action in the present case accrued even before 1st October, 1932, when the Act came into force. The material clause of S. 74 is sub-cl. (*b*) which [omitting the unnecessary words and importing what is necessary from sub-cl. (*a*)] will read as follows:

"Nothing in this Act shall affect any remedy in respect of any right acquired or accrued before the commencement of this Act."

In view of the words 'legal proceeding' found in sub-cl. (*b*) it has been held in some of the reported decisions that all that the exemption was intended to secure was the continuance of proceedings pending at the commencement of the Act. With great respect I am unable to hold that the language of the section is capable of being so read. The difficulty in the way of so reading it is adverted to by Sulaiman, C.J., in *Danmal Parshotamdas* v. *Baburam Chhotelal*[1] and by Stodart, J., in *Davood Mohideen Rowther* v. *Sahabdeen Sahib*[2]. By way of contrast I may refer to the language employed by the Legislature in S. 63 of Act XX of 1929 where the difference between the provision saving remedy in respect of a right already accrued and the special provision made in respect of proceedings pending on the date of the commencement of the Act is clearly brought out. Even if it is possible to read the expression 'legal proceeding' in sub-cl. (*b*) of S. 74 as in some way relating only to 'pending' proceedings, it is difficult to read the word 'remedy' with the same qualification because it is not appropriate to speak of a 'pending remedy'. If S. 74 (*b*) could be read—and I am inclined so to read it—as saving the "remedy" in respect of any right acquired or accrued prior to 1st October, 1932, the preliminary objection raised in the present suit must be overruled.

Learned Counsel for the respondents however adopted another line of argument in dealing with sub-cl. (*b*) of S. 74. He emphasised the distinction between remedy in the sense of

1. (1935) I.L.R. 58 All. 495. 2. (1937) M.W.N. 654.

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action or right of action and rules of procedure incidental to the working out of that remedy. I agree with him that this distinction is recognised in some of the cases referred to by him. The question still remains, under which of these categories, will the provision in S. 69 fall. He asks me to hold that it is a mere rule of procedure and does not affect any remedy that the plaintiffs were entitled to before the commencement of the Act. At one stage, he went the length of contending that the remedy can be said to be "affected" only if it is "extinguished"; but he did not persist in that contention, in view of decisions like *The Colonial Sugar Refining Co., Ltd.* v. *Irving*[1], *Sadar Ali* v. *Dalimuddin*[2] and In re *Vasudeva Samiar*[3]. These cases show that an alteration or restriction or even the imposition of a condition preliminary to the enforcement of the remedy must be held to affect the remedy, within the meaning of the rule presuming against the retrospective operation of statutes. He argued that it is not the imposition of every condition that can be said to affect the remedy even in this sense. He strongly relied upon two English decisions relating to the condition that a solicitor should deliver a bill of costs before he could sue for the recovery of the amount thereof. The judgments in *Coburn* v. *Colledge*[4] do not throw much light upon the question in the form in which it now arises for decision; but the earlier decision in *Brooks* v. *Bockett*[5] does suggest that the Court regarded a condition of the above kind as a matter of procedure. The discussion in the case turned so much on the form of the pleading that there is hardly much light derivable from the judgment as to the reasons why this view was taken. Learned Counsel also relied upon the cases which have held that requirements like those relating to the delivery of a patta before a landlord could sue for rent or the delivery of a notice under S. 80, Civil Procedure Code, are in the nature of a provision of processual law. These decisions undoubtedly support his contention that "processual provisions" are not for the purposes of the present discussion necessarily limited to steps to be taken after the institution of a suit or in the Court itself. While I agree with that contention, I must point out that it is not every condition that may be imposed

1. (1905) A.C. 369.
2. (1928) I.L.R. 56 Cal. 512 (S.B.).
3. (1928) 55 M.L.J. 369: I.L.R. 52 Mad. 361 (F.B.).
4. (1897) 1 Q.B. 702.
5. (1847) 9 Q.B. 847: 115 E.R. 1500.

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upon a plaintiff in respect of his right of suit that can be regarded as a mere provision of processual law. In the English Medical Act case that I already referred to, it was certainly not regarded as a mere matter of procedure though the restriction was framed in very similar language. (See also *Thistleton* v. *Frewer*[1].)

In this connection, it is necessary to consider the purpose and effect of the provision in S. 69. If it had such unintegral connection with the subject-matter of the proposed suit as in some way to make the step required by it a step in the litigation, I should have been inclined to accept the argument that it related to a matter of procedure. But it is obvious that that was not its purpose. In the case for instance of a patta being delivered or a notice being given or a bill being tendered by a Solicitor, it is clear that the condition intimately bears upon the subject-matter of the suit to follow. The object however of S. 69 was to make sure that the general policy of the Legislature that all partnerships should be registered will be carried out. It is true that occasionally questions may arise in a suit as to who are the partners of a particular firm; but that cannot justify my ignoring the real purpose of the provision in S. 69. As pointed out by Sir Dinshaw Mulla, the object of this provision was to bring pressure to bear on partners to have the firm and themselves registered. This policy has been attempted to be enforced in various ways in different systems. In the English legislation, S. 7 of Registration of Business Names Act of 1916 imposes a penalty upon partners making default in the matter of registration. Such a provision certainly cannot be described as a processual provision. The Indian Legislature did not wish to go so far and for the present thought that it would be sufficient pressure to deprive unregistered partners of the right of suit. Though I do not wish to base any conclusion upon the language of a marginal note, it is noteworthy that in S. 8 of the English Act corresponding to S. 69 of the Indian Partnership Act, the marginal note is "Disability of persons in default". In the Indian Companies Act, the Legislature has provided that unregistered associations of the kind contemplated by the Act will be illegal on default of registration. These are, in my opinion, different ways adopted by the

1. (1861) 31 L.J. Exch. 230.

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Legislature to enforce this policy of compelling registration, and I do not think it right to hold that the provision contained in S. 69 is really in the nature of 'processual' law in the sense in which that term is used in the cases discussing principle of retrospective operation of statutes. In an early case, for example, *Lee Morris, Receiver of the Estate of the late Rajah of Tanjore* v. *Sambamurthi Rayar*[1], Justice Holloway drew attention to the danger of confounding what are merely processual provisions with those which under that fictitious appearance are really provisions of material or substantive law. The particular application which the learned Judge made of that distinction in the case before him has no doubt been dissented from in later cases. (See *Muthiah Chettiar* v. *Ramaswamy Chettiar*[2].) But the distinction is undoubtedly true.

In the above view, it does not seem to me to be necessary to deal with the second question stated at the outset, namely, whether even independently of S. 74, S. 69 can be given retrospective operation. Nor is it necessary to consider the argument based on the fact that the Legislature gave an interval of one year before S. 69 was brought into operation. It cannot be said that that interval can be explained only on the ground that the provision must have been intended to be retrospective. There are other considerations which required such an interval, particularly the necessity for bringing into existence the necessary machinery, and for the framing of rules contemplated by S. 71.

The result is that the decree of the lower Court will be set aside and the case remanded for disposal on the merits. The appellants will be entitled to a refund of the Court-fee paid on the Memorandum of Appeal and they will also be entitled to the costs of this appeal.

S. V. V. —— *Appeal allowed.*

1. (1871) 6 M.H.C.R. 122.
2. (1913) 25 M.L.J. 205 at 213.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

K. K. Abdul Rahiman Rowther .. *Petitioner** (*1st Defendant*)

*v.*

M. J. Jamalluddin Sahib & Co., through one of its partners Muthukrishnama Naidu .. *Respondents* (*Plaintiffs*).

Abdul Rahiman Rowther *v.* Jamalluddin Sahib.

*Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 31—Suit for account—Dealings between principal and agent—Suit by agent for recovery of specific sum of money—Jurisdiction of Small Cause Court—Test as to suit for account.*

Whether a suit is one for account within the meaning of Art. 31 of the Second Schedule of the Provincial Small Cause Courts Act depends upon the relation in which the parties stand to each other and the nature of the investigation required to afford relief to the plaintiff. Where the essence of the action is that no relief can be granted without accounts being taken the suit must be deemed to be one "for an account".

Where the course of dealings between the parties was that the plaintiff's firm would advance monies to the defendant and the latter would consign goods for sale on commission, and the defendant would then be credited with the sale proceeds and debited with the commission and various kinds of charges, and the plaintiff sued for recovery of a specific sum of money payable to him in respect of such dealings,

*Held*, that the suit was in substance a suit for an account and was consequently excluded from the jurisdiction of the Small Cause Court.

*Held, further*, that for the purpose of determining whether the suit was for an account it will not make any difference whether the agent brought the suit or the principal did so.

*Konduru Runga Reddi* v. *Kumbahala Subbamma*, (1904) I.L.R. 28 Mad. 394; *Varadarajulu Chettiar* v. *Narayanaswami Chetty*, (1913) 24 M.L.J. 693; *Kailas Chandra* v. *Kiranenda Ghosh*, (1911) 10 I.C. 883; and *Kshetranath Banerjee* v. *Kalidasi Dasi*, (1916) 27 C.L.J. 96, referred to.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge (Additional) of Madura in S. C. S. No. 286 of 1933.

*C. S. Swaminathan* for Petitioner.

*D. Narasaraju* for *G. Rajagopalan* and *T. A. Rangachari* for Respondents.

The Court delivered the following

JUDGMENT.—The question I have to decide is, whether the suit which has given rise to this petition, is exempted from the cognisance of a Provincial Small Cause Court. That turns upon the meaning of the words "suit for an account" occurring

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* C. R. P. No. 338 of 1936. 31st March, 1938.

Abdul Rahiman Rowther v. Jamalluddin Sahib.

in Art. 31 of the Second Schedule to that Act. The course of dealings was as follows:—The plaintiff's firm would advance monies to the defendant and the latter would consign goods for sale on commission. The defendant would be credited with the sale proceeds and debited with the commission and various kinds of charges. The plaintiff's firm thus held a dual character of creditor and agent, the defendant's position being that of debtor and principal. The question that has to be determined is, whether the plaintiff's suit, brought professedly for a specific amount is cognizable by a Provincial Small Cause Court. It is difficult, as has been observed in one of the cases cited before me, to reconcile the decisions on the point; nor is it possible to deduce therefrom a rule of general application. The present suit having been brought by an agent, Mr. Narasaraju for the plaintiff contends that actions by agents stand on a different footing from actions by principals. His contention is that where an agent sues, there can be no question of the defendant being required to render an account, whereas if the action is by the principal, the suit becomes one "for an account". There is an observation of Mookerjee, J., which lends apparent support to this contention. The learned Judge observes:—

> "There cannot in essence be a suit for accounts by the plaintiff against the defendant unless the defendant is under a liability to render accounts to the plaintiff." (*Kshetranath Banerjee* v. *Kalidasi Dasi*[1].)

Although the statement seems general, it is difficult to believe that it was intended to embody an infallible test. The actual point decided in the case was, that a suit for the recovery of a specific sum of money, does not assume the character of a suit for accounts, merely because for the deciding of the question in controversy, accounts may have to be examined. Indeed, that Mr. Justice Mookerjee did not intend to lay down any general or universal test, appears clearly from observations made in an earlier case by a Bench, of which the learned Judge was a member (*Kailas Chandra* v. *Kiranenda Ghosh*[2]). "If in order to grant relief to the plaintiff," the Bench observes:

> "it is necessary to take accounts, the suit is one for account within the meaning of Art. 31, although the plaintiff may have chosen to put a definite money value upon the claim."

1. (1916) 27 C.L J. 96. 2. (1911) 10 I.C. 883.

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Then the learned Judges go on to express the same idea even more clearly:

> "Whether the suit is one for account . . . must depend upon the relation in which the parties stand to each other, and the nature of the investigation required to afford relief to the plaintiff."

These observations are quoted with approval by Benson and Sundara Aiyar, JJ., in *Varadarajulu Chettiar* v. *Narayanaswami Chetty*[1]. True, it is not every suit by principal against agent and *vice versa* that is excluded from the cognisance of a Small Cause Court, for, if such general exclusion had been intended, nothing would have been easier for the Legislature than to have said so in direct terms. For instance, if the accounts had been settled and the account-taking in the technical sense would not become necessary, the Small Cause Court would be competent to deal with the matter. But whoever figures as the plaintiff (principal or agent, it makes no difference), where the essence of the action is that no relief can be granted without accounts being taken, the suit must be deemed one "for an account". What is known as a suit for an account is a special form of suit—a special process being required to take an account. The expression "suit for account" is used in the well-known technical sense of the term (*Konduru Runga Reddi* v. *Kumbahala Subbamma*[2] and *Kshetranath Banerjee* v. *Kalidasi Dasi*[3]) already referred to. The bare fact that some sort of arithmetical process is involved in the decision, does not render the suit a suit for account. While this is undoubtedly true, care must be taken to distinguish this class of suits from those, where account taking in the strict sense, is of the very essence of the claim. Judged by this test, the present suit is, as Mr. Swaminathan contends, excluded from the jurisdiction of the Small Cause Court. Though the suit is by the agent, is it not obligatory upon him to render an account in the action itself, if called on to do so? If the *bona fides* of the sales were questioned, would not the agent be under a duty to render an account? Again, would it not be open to the defendant to challenge in this very suit the expenses debited against him? These are matters to be gone into in suits for account and it makes no difference whether the agent brings the suit or the principal does so. The distinction

1. (1913) 24 M.L.J. 693. 2. (1904) I.L.R. 28 Mad. 394. 3. (1916) 27 C.L.J. 96.

contended for is therefore unsound in principle and I am not prepared to accept it.

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In the result I make an order directing the plaint to be returned for presentation to the proper Court. Each party will bear his costs throughout.

One word more. The parties reside in two different places; the plaintiff at Madura, the defendant at Alathur. The defendant has filed, I understand, a counter-suit in the Alathur Munsiff's Court. One or the other of the parties, it is stated, intends to move the High Court for an order that both suits should be tried by the same Court. If such an application is made it may be posted before me.

B. V. V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE LAKSHMANA RAO.

K. P. S. Karuthan Chettiar and another .. *Appellants* (Plaintiff and newly added party)*

*v.*

P. Ct. Chidambaram Chettiar (died) and another .. *Respondents (Defendant and his L.R.).*

Karuthan Chettiar *v.* Chidambaram Chettiar.

*Principal and agent—Duty of agent—Old outstandings—Collection of—Agent if entitled to commission.*

An agent of a firm is bound to collect old outstandings due to it, if required by the principal. Independently of an agreement or custom to pay commission for collecting old outstandings, the agent is not entitled to commission for collecting such outstandings.

*Ramaswami Chetti* v. *Alagappa Chetti,* (1914) 28 M.L.J. 199, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Devakottai in O.S. No. 181 of 1931.

*K. Rajah Aiyar* and *V. Ramaswami Aiyar* for Appellants.

Respondents not represented.

The Court delivered the following

JUDGMENT.—Appeal No. 411 of 1933 with Memorandum of Objections:—The appeal and memorandum of objections arise out of a suit by the appellant against his agent for an

* Appeal No. 411 of 1933. 4th March, 1938.

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account of his agency and recovery of the amount found due on the taking of the accounts. The agent died after filing the memorandum of objections and the legal representative has not chosen to appear. The memorandum of objections fails for that reason and the questions raised by the appeal are whether as held by the trial Court the agent is entitled to

(1) a commission of four per cent. for collecting old outstandings;

(2) ten per cent. of the net profits earned during the agency towards what is known as 'samans'.

The claim was based on agreement and custom but as found by the trial Judge there is no satisfactory evidence of any agreement or custom to pay any commission for collecting old outstandings. The salary chit Ex. A fixes the remuneration of the agent and it requires him to carry on the firm business according to the directions of the principal. The collection of the outstandings is certainly a part of the firm business and in the face of the salary chit the agent cannot refuse to collect them if required. The decision in *Ramaswami Chetti* v. *Alagappa Chetti*[1] deals with the liability of the agent for old outstandings and not his duty to collect them if directed and the observation of the trial Judge that it is well settled that it is not part of the duty of an agent to collect old outstandings of the firm is unwarranted. He is bound to collect them if required by the principal and the evidence of the agent shows that no commission was paid to him for collecting old outstandings during any of the previous periods of his agency. There is according to him no fixed rate either and the view of the trial Judge that independently of any agreement or custom the agent is entitled to some commission for collecting old outstandings is untenable. The claim for commission for collecting old outstandings must therefore be disallowed.

As regards the share of the profits claimed towards samans the evidence of D.W. 4 shows that it is customary among Nattukottai Chetties to pay ten per cent. of the net profits to the foreign agent as samans and the custom has been recognised by this Court in Appeal No. 412 of 1925 and S. A. No. 467 of 1937. It is also mentioned in page 100 of the Madura District Gazetteer and the objection was not seriously

1. (1914) 28 M.L.J. 199.

pursued. The claim for samans is thus well founded and the appeal fails to that extent.

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The decree of the lower Court will therefore be modified by disallowing the claim for commission for collecting old outstandings and the parties will bear their respective costs in this appeal. The memorandum of objections is dismissed and the appellant will have his costs out of the estate of the agent in the hands of the legal representative.

K. C. ——— *Appeal partly allowed and memo. of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Rajah Velugoti Sarvagna Kumara Krishna Yachendra Bahadur Varu of Venkatagiri .. *Petitioner**

*v.*

N. V. Rama Naidu and another .. *Respondents.*

Rajah of Venkatagiri v. Rama Naidu.

*Contempt of Court—Suit against a number of ryots by a Rajah—Article in a paper, appealing for funds for defence—Article stating the defendants' case and inferring it to be true—Belief of the author that it would not prejudice the fair trial of the suit—If amounts to contempt of Court.*

Where pending a suit for an injunction against certain persons from entering the petitioner's forest and cutting firewood therein, certain third persons published in a newspaper an appeal for funds stating therein the defendants' case and an inference that it is true and made other statements about the petitioner as maliciously using his influence against the defendants, the article amounts to a contempt of Court, notwithstanding the facts (1) that the trial Judge would not be affected by the article; (2) or that the respondents (publishers and author of the article) believed that the article was of a nature which would prejudice the fair trial of the suit; and (3) that the article closes with an appeal for assistance for the defendants.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to punish the respondents herein for contempt of Court for having published in the Telugu weekly paper called "*Zamin Ryot*" in its issue of 27th August, 1937, an article containing certain statements a true translation of which is annexed to this petition as Ex. A and a similar article in the same weekly in its issue dated 10th September, 1937, relating to O. S. No. 308 of 1937 on the file of the Court of the District Munsif of Nellore.

*Crl. M. P. No. 1084 of 1937. 12th October, 1937.

Rajah of Venkatagiri *v.* Rama Naidu.

*M. Patanjali Sastri* for *P. S. Raghavarama Sastri* for Petitioner.

*B. Somayya* for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

*The Chief Justice.*—This is an application by the Rajah of Venkatagiri for an order against the respondents for contempt of Court. The petitioner is the plaintiff in a suit in the District Munsiff's Court, Nellore, for an injunction restraining forty inhabitants of Venkatagiri from entering the petitioner's forests and cutting firewood therein. The defendants claim that they have the right to cut firewood there and to sell it. They base this right on grant, custom and prescription. The suit was filed in June last and on the 27th of August, the following article appeared in the "*Zamin Ryot*" which is published in Nellore:—

"*Help the Arava Malas of Venkatagiri,*" means of livelihood enjoyed for generations deprived by the Estate.

*Appeal by Kamatam Shanmugam, M.L.A.*

There are about 500 families of Harijans in Venkatagiri; during the time of Chevi Reddi, the original ancestor of the Rajahs of Venkatagiri Estate, one Yachadu, the original ancestor of the Malas, sacrificed his life as offering at the bidding of Bhairavamurti (Deity) in order to provide the Estate with money. In pursuance of the (last) favour asked for by Yachadu prior to the sacrifice whenever marriages take place in the house of the Estate (people) even to this day, they first perform the marriage of one among the Malas, take the holy-rice showered on the (bridal) couple and thereafter perform their own marriages. Out of such Malas about 300 families have been serving the Estate for the past about 29 generations, as grooms, keepers of the elephants and as servants getting fodder to the said animals. The salaries paid to them are not even enough to satisfy their barest necessities. Consequently, they have been, in addition to their salaries eking out their livelihood by bringing and selling dry firewood from the forests situate in Venkatagiri. None of the late rulers of the Estate ever raised any objection in regard to this. Since about one year, the Estate has been selling firewood by opening a firewood depot and has (thereby) not only ruined the occupation of these people, but also caused an injunction order to be issued against them. Now the Estate has prepared some (kind of) statements and while forcing them to sign or affix their marks therein, dismissed from service forty persons who did not do so. When they go to the small villages near by to gather green and dry grass with a view to sell the same and earn a living, they are setting up the ryots to obstruct these people in the respective villages. Every now and then criminal cases are being concocted and filed and these people are sent to prisons. The Estate, besides not only ruining their occupation in this manner, has also been putting them to considerable trouble and loss by maliciously using their entire influence. Civil cases are going on between the two parties. Certain kind-hearted advocates are conducting the proceedings on behalf of the Malas free (of costs). Until the cases are disposed of, the said 300 families have to suffer for their food and raiment. I, therefore, pray that countrymen, who have the welfare of the poor at heart, will

naturally render assistance to these people, either in cash or paddy or any other article necessary for their life. Kind-hearted donors are requested to send in their contribution to the following persons:—

(1) Arava Surayya, Kapadipalem, Nellore.

(2) Arava Padanarasayya, Yeguvapalem, Venkatagiri Town."

The author of the article is the second respondent who is a member of the Madras Legislative Assembly. The first respondent is the editor of the paper. The petitioner complains that the article constitutes gross contempt of Court, and we consider this to be the case. The article states the defendant's case and infers that it is true. It then accuses the petitioner of having ruined the defendants and of having concocted false criminal cases against them. It further accuses the petitioner of using his influence maliciously and to the detriment of the defendants. The fact that the article closes with an appeal for assistance for the defendants does not help the respondents. This appeal could have been made without the accusations which preceded it.

The law is quite clear and is stated thus at page 91 of the third edition of Oswald's Contempt of Court:—

"All publications which offend against the dignity of the Court, or are calculated to prejudice the course of justice, will constitute contempts. Offences of this nature are of three kinds—namely, those which (1) scandalise the Court; or (2) abuse the parties concerned in causes there; or (3) prejudice mankind against persons before the cause is heard. Under the first head fall libels on the integrity of the Court, its judges, officers, or proceedings; under the second and third heads anything which tends to excite prejudice against the parties, or their litigation, while it is pending. For example, attacks on or abuse of a party; his witnesses or solicitor constitute contempts, though a mere libel on a party, not amounting to an interference with the course of justice, does not, the party being left to his remedy by action."

In *The St. James's Evening Post case*[1], Lord Hardwicke observed:—

"Nothing is more incumbent upon Courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard:

And he added:—

"There cannot be anything of greater consequence, than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

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1. (1742) 2 Atk. 469: 26 E. R. 683.

Rajah of Venkatagiri *v.* Rama Naidu.

Leach, C. J.

In re *the William Thomas Shipping Company, Limited,*[1] Maugham, J., observed:—

"I think that to publish injurious misrepresentations directed against a party to the action, especially when they are holding up that party to hatred or contempt, is liable to affect the course of justice, because it may, in the case of a plaintiff, cause him to discontinue the action from fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to, for a like reason."

The fact that the trial Judge would not be affected by the article has no bearing on the matter, as was pointed out by this Court in the case *Sathappa Chettiar* v. *Ramachandra Naidu*[2].

The defence set out in the affidavits is that the respondents did not regard the article as being of a nature which would prejudice the fair trial of the suit and they offered to express their regret if the Court were of a contrary opinion. The belief of the respondents does not excuse the offence. Lord Langdale, M.R., in *Littler* v. *Thomson*[3] said:—

"Whatever might have been his belief at the time he published these articles, that belief will not protect him from the consequences if his publication has been of such a nature as to disturb the free course of justice. The effect of such publications would seem to be not only to deter persons from coming forward to give evidence on one side, but to induce witnesses to give evidence on the other side alone. What I am to consider is, whether these papers are or are not calculated to disturb the free course of justice."

At a later stage in the case Lord Langdale observed:—

"I am surprised that a gentleman of education and science should think that it was serving the cause of truth and justice, or likely to benefit the gardeners, whose interest he professes to advocate, to publish articles of this description pending the progress of a cause."

The respondents have appeared before us and the Court having informed them that it considers that the article does constitute grave contempt, they have expressed their regret for their action. In these circumstances we do not consider it necessary to take any action in the matter beyond ordering the respondents to pay the costs of the petitioner, which we fix at Rs. 100.

S. V. V. —— *Petition allowed.*

1. (1930) 2 Ch. D. 368 at 376.
2. (1931) 61 M.L.J. 848: I.L.R. 55 Mad. 262.
3. (1839) 2 Beav. 129: 48 E.R. 1129.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Matam Nadipudi Koti Veerayya *alias* Sambhudevara *alias* Sambhu Swamulavaru and others .. *Appellants* in Appeal No. 144 of 1932 (Plaintiffs)*

*v.*

The Board of Commissioners for Hindu Religious Endowments, Madras and another .. *Respondents (Petitioners).*

Koti Veerayya *v.* Board of Commissioners for H. R. E., Madras.

*Madras Hindu Religious Endowments Act (II of 1927), Ss. 9 (7) and 69—Scope—Mutt—Grant of properties for lighting and performance of worship therein—Public worship being carried on in it—Head of mutt treating mutt properties as private properties of his family—Mutt, if public or private endowment—Liability to make annual contribution—Inam Register—Entries in—Value of.*

Certain lands were granted to the head of a mutt for the purpose of defraying the cost of lighting of lamps and performance of pujas at the shrines within the mutt and other lands are held by it for the maintenance of worship in it. Public worship takes place within its precincts and it provides religious instructions for members of the Vira Saiva sect. The properties of the mutt were for sometime treated as if they were the private properties of the family of the head of the mutt.

*Held*, that the mutt was a public religious endowment and was a mutt of the character contemplated by the Madras Hindu Religious Endowments Act. The Board had the right to call upon those in charge of it to make the contribution required by S. 69 of the Act.

A mutt does not fall within the purview of the Act unless it can be regarded as being a public religious endowment. In a proper case, the entries in the Inam Register can be relied on to ascertain the nature of the grant.

*The Secretary of State for India in Council* v. *Srinivasachariar*, (1920) 40 M.L.J. 262: L.R. 48 I.A. 56: I.L.R. 44 Mad. 421 (P.C.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in O. S. No. 71 of 1928; and C. R. P. presented under Ss. 115 of Act V of 1908, and 107 of the Government of India Act, to revise the order of the District Court of Guntur dated 6th April, 1933 and made in O. P. No. 91 of 1928.

*K. S. Krishnaswami Aiyangar* for *S. Srinivasa Aiyangar* for Appellants in Appeal No. 144 of 1932.

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* Appeal No. 144 of 1932 and C. R. P. No. 1218 of 1933.

24th September, 1937.

Koti Veerayya *v.* Board of Commissioners for H.R.E., Madras.

*P. V. Rajamannar* and *K. Subba Rao* for Respondents in Appeal No. 144 of 1932 and for Petitioners in C. R. P. No. 1218 of 1933.

*V. Rangachari* for Respondents in C. R. P. No. 1218 of 1933.

The Court delivered the following

Leach, C. J.

JUDGMENTS. *The Chief Justice.—Appeal No. 144 of 1932.*—In this appeal the Court is called upon to decide whether a mutt in the village of Chebrole, Guntur District, is a mutt within the purview of the Madras Hindu Religious Endowments Act, 1926 and as such is liable to make an annual contribution to the funds of the Board of Commissioners appointed under the Act. The appellants claim that the mutt does not constitute a public religious endowment. They say that it is entirely private in its nature and therefore it cannot be called upon in law to make any contribution. The Board having decided that the mutt is liable to make an annual payment, the suit out of which this appeal arises was filed by the appellants in the Court of the Subordinate Judge of Guntur for a declaration to the effect that the Board has no right to make a levy. The learned Judge agreed with the Board and dismissed the suit.

The appellants are brothers and are members of the sect known as Jangams or Vira Saivas. They worship the *Lingam* or symbol of Shiva which they wear suspended round the neck. According to "the manual of the Nellore District" compiled by John A. C. Boswell, Collector of Kistna District in 1873, there are five seats of the principal priests of this sect, namely, (1) Gokarna Matam at Nizampatam; (2) Vibhuti Matam at Bangalore; (3) Saranga Matam at Srisailam; (4) Tota Matam in Hyderabad; and (5) Chebrole Matam at Chebrole. The Chebrole Matam is the mutt with which the suit is concerned. When it was founded is not known, but the evidence in this case shows that it was in existence in 1775, since when the members of the appellants' family have been entirely responsible for its management. It has been the custom for the head of the family for the time being or its members to choose a male member to be the head of the mutt. The person so chosen is required to take a vow of celibacy and is known as the Sambhu Devara. The Sambhu Devara receives the veneration not only of the members of his family, but of a large number of disciples to whom he gives religious instruction. The disciples do not live with him in the mutt, but in

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their own villages, many of them, of course, visiting the mutt from time to time. It is the custom for the Sambhu Devara to pay visits to his disciples periodically. In these visitations he is usually assisted by the male members of his family, who themselves at times visit the disciples without him. The mutt is divided into three parts. In one part the Sambhu Devara lives and receives his disciples. In the second part are the residential quarters of the other members of the family and the kitchen. The third part consists of a courtyard in which there are the tombs of ancestors of the appellants who have held the office of Sambhu Devara. These tombs are ten in number and are regarded as shrines. Within the mutt premises the daily worship of the *Lingam* takes place and from time to time religious rites are performed at the tombs of the departed Sambhu Devaras. It is not suggested that these religious observances are confined to the first appellant and the members of his family. They are, in fact, participated in by members of the sect generally. The first plaintiff is the present Sambhu Devara. The mutt is maintained out of the income of lands situate in the villages of Koilmudi and Penumudi. The appellants claim that these properties do not constitute endowments of the mutt, but are in fact properties privately owned by the family. The appellants' case turns on the answer to this question.

S. 9 (7) of the Act defines the word "mutt". It means:

"An institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage; and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institution."

S. 69 states that every mutt and every specific endowment attached to a mutt shall pay annually for meeting the expenses of the Board such contribution not exceeding one and a half per centum of its income as the Board may determine. The appellants contend that this section can have no application as the Act only applies to mutts of a public character, and in this connection point to S. 2 which says:

"This Act extends to the whole of the Presidency of Madras except the Presidency Town and applies, save as hereinafter provided, to all Hindu Public Religious Endowments."

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For the Board it is argued that every mutt which falls within the definition of S. 9 (7) must be deemed to be a public mutt, but I think that this statement is too wide, and I am of the opinion that a mutt does not fall within the purview of the Act unless it can be regarded as being a public religious endowment. That there can be private mutts cannot be disputed, and where the property is given to the head of a mutt for his personal benefit it cannot constitute a public religious endowment. Some very apposite observations in this connection were made by Wallis, J., in the case of *Kailasam Pillai* v. *Nataraja Thambiran*[1]:

"Further in my opinion where gifts were given to heads of mutts without any specific trust the inference suggested by the circumstances of the case and by usage is that it was not intended to fetter the donees by any trusts in dealing with the gifts or to make them accountable in a Court of law for their manner of dealing with them. The ascetic character of the donees and the great reverence in which they were held would, I think, have rendered such restrictions in the eyes of the donors both unnecessary and unbecoming. The fact that the heads of mutts have more or less frequently abused their position is not of itself a sufficient reason for treating them as trustees of the mutt endowments. This is the only question in my opinion which arises, and my answer is that heads of mutts cannot be regarded as trustees of mutt endowments except in so far as it may be shown that any particular endowment was granted to them on trust."

But where the property has not been given to the head of the mutt for his own use, but has been given, for instance, for the purpose of defraying the cost of religious observances or the performances of pujas within the mutt, the position is very different. It is, therefore, necessary to ascertain the terms on which the lands were given.

I will deal first with the Koilmudi lands. These lands were granted in the year 1775 by the Zamindar of the day to the then Sambhu Devara. The grant is in the following terms:—

"We have granted 2 (two) kuchalas of Beedu Polam manyam (waste land) to Sambhu Devara Garu among the fields of the aforesaid village. 1185 fasli (1775-76). You should understand that you should get the said land separated and the boundaries fixed." (Exhibit A.)

The grant was confirmed in 1791 by another document, which reads as follows:—

"We have granted two kuchalas of land in the fields of the aforesaid village to Sambhu Devara Garu. You should understand that the said land should be (separated) (torn) Vaisakha Bahula 7 of Paridhavi year (Exhibit C)."

1. (1909) 19 M.L.J. 778: I.L.R. 33 Mad. 265 at 279 (F.B.).

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It will be observed that while the grant is to the Sambhu Devara it is not stated whether he is to hold the lands in his own right or on behalf of the mutt which was then in existence. If the matter remained there it might well be argued that this grant should be construed as a personal grant. But when we examine the Inam Register of 1862 and the statement which was filed by the Sambhu Devara of the time it is clear that these lands were given for the purpose of defraying the cost of lighting of lamps and performance of pujas at the shrines then within the mutt. In column 6 of the statement prepared by the Sambhu Devara and filed in the settlement proceedings there is this entry:—

"It was granted permanently by Rajah Vasireddi Ramanna Garu the then Zamindar of Koilmudi to the mutt for meeting the expenses of performing *deeparadhana* and other items."

Column 6 contains particulars as to how the grant was obtained and its conditions. In column 11 which requires particulars of the enjoyment of the grant there is this statement:—

"It is being enjoyed through Sambhuswamivaru for expenses for *nitya deeparadhana* and other items."

Now it is important to remember this is not a statement prepared by an official on information received which might be erroneous. It is a statement prepared and submitted for the purpose of the settlement by the Sambhu Devara himself. The entries in the settlement register are to the same effect. In column 8 of the register which requires particulars of the service for which the grant is held are the words:—

"For the Sambhu Devara Matam at Chebrole lighting lamps and making pujas to the shrine."

It has been suggested that the Court should disregard these entries and have regard merely to the terms of the grant itself. The learned Advocate for the appellants has here laid great stress on the decision in *The Secretary of State for India in Council* v. *Srinivasachariar*[1], where their Lordships disregarded the entries in the Inam Register and decided the case on the terms of the grant itself. In that case, however, the grant showed that the entries in the register were erroneous. In the present case the grant does not state that the

1. (1920) 40 M.L.J. 262: L.R. 48 I.A. 56: I.L.R. 44 Mad. 421 (P.C.).

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Sambhu Devara was to hold the property in his own right; it is silent in this respect. But we know the purposes for which the lands were given, because the grantee's successor stated them in 1862, and his statement put the matter beyond real dispute.

The learned Advocate for the appellants has relied on a number of documents to show that the appellant's ancestors treated these lands as being their private property. One of these documents is a tenancy agreement of the year 1847 which was executed by a tenant for a term of ten years in favour of the brother of the Sambhu Devara of that day. In 1852 the Sambhu Devara and a brother borrowed money on the security of the property and in 1854 the Sambhu Devara allowed his two brothers to partition it between themselves. But all these transactions took place before the settlement of 1862 when the same Sambhu Devara disclosed to the Settlement Commissioner the terms on which these lands were held. The fact that some of the appellants' ancestors did deal with this property as their own would not change the character of the grant. If it did constitute a religious endowment, a religious endowment it would remain. With regard to the partition it is to be observed that it did not deprive the mutt of the benefit of the lands permanently. That they came back into the possession of the Sambhu Devara is shown by the fact that in 1898 a tenancy agreement was executed in favour of the first appellant, the present Sambhu Devara. For the reasons indicated we hold that the Koilmudi lands did and do constitute an endowment of the mutt.

The original grant of the Penumudi lands has not been put in evidence. It is said that it was destroyed in a fire. The inam register, however, clearly shows that these lands also constitute a religious endowment. The entry in column 8 states that the lands are held for the maintenance of worship in the mutt and this in the circumstances must be regarded as conclusive.

The position then is this:—The lands in both the villages were granted to the mutt for religious purposes; the mutt has been in existence for at least a century and a half and is an institution which is venerated and visited by a large number of people; public worship takes place within its precincts and it provides religious instructions for members of the Vira Saiva

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sect. It is impossible, in these circumstances, for the appellants to maintain their contention that it is not a mutt of the character contemplated by the Madras Hindu Religious Endowments Act, 1926. Being a mutt governed by the provisions of the Act the Board has the right to call upon those in charge of it to make the contribution required by S. 69. The appeal consequently fails and must be dismissed with costs, which will be paid out of the mutt's funds. The appellants will also be allowed their costs out of those funds.

*C. R. P. No. 1218 of 1933.*—The petition is allowed. O. P. No. 91 of 1928 on the file of the District Court, Guntur, will be dismissed. No order as to costs.

Madhavan Nair, J.

*Madhavan Nair, J.*—I entirely agree. I add a few words only because of the insistence with which Mr. Krishnaswami Aiyangar argued that the Chibrolu Mutt is a private mutt. If the origin of the mutt is unknown, the history of the property of the mutt and the manner how it has been dealt with by the Matathipathi will often afford an answer to the question whether the mutt is a private institution or a public endowment. In this case the mutt in question is, in my opinion, a public religious endowment though the properties of the mutt were for sometime treated as if they were the private properties of the family of the appellants. It is clear from the inam statement that the head of the matam himself treated the property mentioned in it as having been given for public purposes. In its origin and narrow sense the term 'mutt' signifies the residence of an ascetic, or a sanyasi or a paradesi. (See *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*[1].) As pointed out in *Sammantha Pandara* v. *Sellappa Chetti*[2]:

"A preceptor of religious doctrine gathers around him a number of disciples whom he initiates into the particular mysteries of his order and instructs his religious tenets."

Gradually pious persons endow the preceptor with properties and in course of time we have associations of sanyasis devoted to divine worship who give upadesam or instruction to deserving candidates. It is in this manner that mutts come into existence. But there are many cases where mutts have been deliberately established from the very commencement as

1. (1887) I.L.R. 10 Mad. 375 at 386.
2. (1879) I.L.R. 2 Mad. 175.

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public institutions in order to maintain and strengthen the doctrines of particular systems of religious philosophy. The history of this class of what may be called "endowed mutts", which came into existence in the nature of monastic institutions presided over by ascetics and sanyasis are mentioned in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*[1] already referred to. It is possible to conceive of gifts of properties by pious followers to the head of a mutt personally for his own use. These he may administer as properties of his own but over other properties which appertain to the mutt his responsibility is that of a trustee. Ordinarily properties though given to the head of a mutt will also be used as properties of the mutt as an ascetic is prevented from owning property for personal enjoyment. The question whether a particular mutt forms a public religious endowment or is a private institution must be judged in the light of the evidence in each case. The origin of the mutt if it is known, its antiquity, the nature of the gifts of property made to it, the way, how these have been treated by its head, the long-established usage and custom of the institution, all these throw valuable light on the question whether the mutt is a public religious endowment or a private institution. The mutt in the present case did not, in my opinion, come into existence as an "endowed mutt" at its inception, but the sanctity of the life of the matam people—the appellants' ancestors—attracted grants of property from pious donors and gradually the matam came to be treated as a public religious endowment. If we did not have the inam statement made by the then head of the Chibrolu Matam or the inam entries in the register to help us, it might have been a matter of some difficulty to hold with confidence that the matam in this case is a public religious endowment. It may be argued with great force as has been done by Mr. Krishnaswamy Aiyangar that the grants *A* and *C* show that the property referred to in them were granted to the Chibrolu Matam people for their enjoyment and not as trustees to hold them for a public purpose. The treatment of the property by them may also be said to support this argument; but that the properties were to be used for a public purpose becomes clear from the other evidence in the case. I would therefore hold that mutt

1. (1887) I.L.R. 10 Mad. 375 at 386.

in this particular case is a public mutt and comes within the description of "a Hindu Public Religious Endowment" to which the Hindu Religious Endowments Act would apply.

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I agree with the orders passed by my Lord both in the appeal and in the Civil Revision Petition.

K. C. —— *Appeal dismissed and Revision allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Gaddipati Venkayya .. *Petitioner** (*Petitioner*)

*v.*

Chunduru Sambayya and others .. *Respondents* (*Respondents*).

Venkayya v. Sambayya.

*Madras Debt Conciliation Act (XI of 1936), Ss. 4 and 25—Creditor in insolvency—Application to Conciliation Board under S. 4—Application for stay of insolvency proceedings—Leave of Insolvency Court not obtained—Procedure—Provincial Insolvency Act (1920), S. 28 (2)—Effect.*

The application contemplated by S. 25 of the Madras Debt Conciliation Act is an application which is not prohibited by law or in contravention of any statutory provisions. Where a creditor in certain insolvency proceedings applied to the Debt Conciliation Board under S. 4 of the Madras Debt Conciliation Act without having obtained the leave of the Insolvency Court and he then applied under S. 25 of the Debt Conciliation Act praying that all further proceedings in the Insolvency Court might be stayed pending disposal of his application to the Debt Conciliation Board,

*Held*, that the application of the petitioner to the Conciliation Board was itself prohibited by S. 28 (2) of the Provincial Insolvency Act and therefore his application for stay of insolvency proceedings was incompetent.

The object of S. 28 (2) of the Provincial Insolvency Act is that once a person has been adjudicated insolvent and his property is vested in the Official Receiver all claims of creditors in respect of debts provable under the Insolvency Act should be decided by the Insolvency Court itself except in exceptional cases where for special reasons the Insolvency Court gives leave to carry on legal proceedings elsewhere in respect of such debts.

Petition under S. 75 of the Provincial Insolvency Act praying the High Court to revise the order of the Court of the Subordinate Judge of Tenali dated 3rd August, 1937 and made in C. M. P. No. 394 of 1937 in I. P. No. 77 of 1931.

*S. Rajarama Aiyar* for *Ch. Raghava Rao* for Petitioner.

*V. Subramanyam* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner is one of the creditors in the insolvency of one Chunduri Sambayya (I. P. No. 77 of 1931 on the file of the Subordinate Judge's Court, Tenali). He

* C. R. P. No. 938 of 1937. 3rd February, 1938.

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applied on the 9th July, 1937, under S. 25 of the Madras Debt Conciliation Act, 1936, praying that all further proceedings in the insolvency may be stayed pending disposal of his application to the Debt Conciliation Board. The application was dismissed by the Sub-Judge on the ground that the application of the petitioner to the Conciliation Board was itself prohibited by S. 28 (2) of the Provincial Insolvency Act and therefore his application for stay of the insolvency proceedings was incompetent. It is argued that this view of the Subordinate Judge is not according to law but I am not satisfied that the objections to that view are well founded.

S. 25 of the Debt Conciliation Act says:

" When an application has been made to a Board under S. 4, any suit or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which application has been made shall not be proceeded with until the Board has dismissed the application."

It may be mentioned in this connection that the application made by the petitioner to the Board has since been dismissed, and that the petitioner has filed an application for the restoration of his previous application which is still pending. I am of opinion that the application contemplated in S. 25 is an application which is not prohibited by law or in contravention of any statutory provision. In this case there can be no doubt that the application was in contravention of S. 28 (2) of the Provincial Insolvency Act which declares that no creditor to whom an insolvent is indebted in respect of any debt provable under the Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose. It is admitted that the leave of the Insolvency Court was not obtained for making the application to the Debt Conciliation Board. It must therefore be held that the application to the Debt Conciliation Board was one made in contravention of a statutory provision and it is impossible to accept the view that an application which is in direct contravention of a statutory provision gives a right to the very person who made such an application without the leave of the Insolvency Court to approach the Insolvency Court and demand that the insolvency proceedings should be stayed by reason of such an application. The legis-

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lature must be deemed to have meant only an application not otherwise contrary to law in S. 25 of the Debt Conciliation Act. I do not think it can be said that the application to a Board is not a legal proceeding. The scheme of the Act shows that it is a legal proceeding or at least the initiation of a legal proceeding. Applications under S. 25 of the Debt Conciliation Act come within the mischief provided against in S. 28 (2) of the Provincial Insolvency Act. The object of the provision in S. 28 (2) of the Provincial Insolvency Act is that once a person has been adjudged insolvent and his property is vested in the Official Receiver all claims of creditors in respect of debts provable under the Insolvency Act should be decided by the Insolvency Court itself except in exceptional cases where for special reasons the Insolvency Court gives leave to carry on legal proceedings elsewhere in respect of such debts.

I am of opinion in these circumstances that the order sought to be revised is not open to any legal objection. The petition therefore fails and is dismissed with costs.

B. V. V. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Original Testamentary Jurisdiction.]

PRESENT:—MR. JUSTICE WADSWORTH.

Alamelu Ammal .. *Plaintiff**

*v.*

C. Parthasarathy Naidu .. *Defendant.*

Alamelu Ammal v. Parthasarathy Naidu.

*Intestacy—Letters of administration granted—Suit by a person alleging a will—Proof, nature of.*

A testator died on 26th April, 1914, leaving by the petitioner, three sons and a daughter, the eldest son being the respondent. Shortly after his death the respondent applied for letters of administration as in an intestacy and notice having been served on the petitioner, his brothers and sister, and there having been no objection from them, in due course letters of administration were issued. In 1923 there was a partition of the properties as a result of which the respondent got the house which under the will then propounded would have to go to his mother. The will alleged and dated 25th November, 1912, was first asserted in 1936. The petitioner alleged that only recently she was able to find a copy of the will which was admittedly in the handwriting of the respondent. Though the document mentioned attestation of witnesses, there were no names mentioned. The copy therefore contained an indication that the original was signed and that there was an intention that it should be

* T. O. S. Nos. 11 and 16 of 1936 in O. P. No. 293 of 1936, — 3rd November, 1937.

attested by the witnesses, but no indication that they had attested it, nor any indication as to their identity. The petitioner had no other evidence of the due execution of the will except an inference which might be drawn from the various statements of the respondent.

*Held*, that in the absence of evidence whatever that any attestations were made and that the original will was in existence at the testator's death, the Court could not infer actual completion. The valid execution of the will had not been proved.

English case-law discussed.

*V. Radhakrishnayya* for Plaintiff.

*C. S. Srinivasachari* for Defendant.

The Court delivered the follownig

JUDGMENT.—T. O. S. No. 16 of 1936 is an application to revoke the letters of administration granted as in an intestacy in O. P. No. 129 of 1914 (now T. O. S. No. 11 of 1936) and to grant probate to the petitioner Alamelu Ammal of a will a copy of which is tendered in evidence. The alleged testator is one Krishnamoorthi, husband of the petitioner Alamelu Ammal. He died on 26th April, 1914, leaving, by the petitioner, three sons and a daughter, the eldest son being the present respondent, Parthasarathi. There was another family by one Ethiraja Ammal, who was either a wife or a concubine. The will which Alamelu Ammal propounds divides the estate between the petitioner, her daughter and the children of the alleged concubine.

Shortly after the death of Krishnamoorthi, his son, the present respondent Parthasarathi, applied for letters of administration as in an intestacy. Notices were served on his mother, and his brothers and sister and in due course letters of administration were issued without any objection in September, 1915. In 1923 there was a partition of the properties, as a result of which Parthasarathi got the house which under the will now propounded would go to his mother, the present petitioner. In 1935 there was a further partition of properties subsequently acquired as a result of litigation.

The will now propounded, which is dated 25th November, 1912, was first asserted in a lawyer's notice sent by the present petitioner on the 25th August, 1936. Her allegation is that she had only recently found that copy on which her petition is based. This copy is admittedly in the handwriting of the respondent Parthasarathi. It begins with the phrase:

"Know all concerned that this is my will signed by me in the presence of the two gentlemen who have attested it."

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It purports to contain a copy of the signature of the testator, and at the foot of it there are the words, "signed before us", but no names of attesting witnesses are found beneath that phrase. The copy therefore contains an indication that the original was signed and that there was an intention that it should be attested by two witnesses, but no indication that these two attesting witnesses ever did attest it, nor is there any indication as to their identity. The petitioner has no other evidence of the due execution of the will except any inference which might be drawn from the various statements of the respondent. In the first place we have the fact that in the original application for letters of administration he asserted that there was no will, and the persons to whom notices were sent did not contradict this assertion. In the reply to the notice of August, 1936, the respondent again asserted:

"My father left no will nor have I ever come into possession of any will of my father or suppressed the same."

It must be remarked that at this time the petitioner had not revealed the fact that she had in her possession a copy of it in the handwriting of the respondent. Then we have a statement in an affidavit sworn by the respondent on 19th October, 1936, in which he says:

"I further deny that to the best of my knowledge my father ever left any will on or about 25th November, 1912. I am not aware till now of the existence of any such will. I deny that I ever took possession of any such will or suppressed the same."

In his reply to the affidavit in support of the present petition, the respondent admits that the copy of the will is in his handwriting but denies that the will was attested by any witnesses or that he was ever in possession of the original will. He says that he came across the original during his father's illness in 1913, questioned his father about it and was told that it had been written to satisfy the importunities of the mother of the concubine. He adds that on the intervention of a relative his father was satisfied that there was no necessity for this will and destroyed the original in the presence of this relative, the respondent himself, the petitioner and the mother of the concubine. Except for the petitioner and the respondent these alleged witnesses of the destruction of the will are dead.

Now it is quite clear that the burden of proving valid execution of the will rests on the petitioner. When this burden has been discharged, it will be incumbent upon the respondent

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to prove that the will was revoked. The petitioner has no positive evidence at all, except the circumstances summarised above, that any such will, as is asserted, was ever actually executed in such a manner as would make it a good will in law. It is suggested that since the will was apparently executed outside Madras City it would be a good will so far as it relates to properties outside this city even in the absence of attestors, the argument being based on the decision in *Namberumal Chetti* v. *Veeraperumal Pillai*[1]. With reference to this argument I must remark that there is really no evidence as to the place of execution at all. The copy filed in Court contains no indication, and no evidence has been put before me, as to the place of residence of the testator on the date of the alleged execution of the will. It is pointed out that there is an assertion in the petition that the alleged testator was a resident at Guntur and it is admitted by the respondent that when the copy was taken by him the document which he copied was actually at Guntur. This however does not seem to me to be sufficient proof that the will was actually executed at Guntur. So far as it relates to the house in Madras it is certainly not a valid will without attestation. Moreover, I doubt whether when the will itself clearly contemplates the signature of two attesting witnesses to make it a complete transaction, it could be held that it had been properly executed in the absence of proof that the contemplated formalities were completed.

It is urged on behalf of the petitioner that the Court can presume on the materials before it that there was a valid execution of the will. Mr. Radhakrishnayya has quoted three English cases in which the Court relying on the maxim "*omnia praesumuntur rite esse acta*" has filled up the gap in the evidence of the completion of all the formalities by inferring that those things had been done which in the ordinary course of events having regard to the known circumstances are likely to have been done. One of these cases is *Harris* v. *Knight*[2]. It was a case in which the will was lost; there was a copy; the names of the attestators were known and both were dead; there was no proof of any proper attestation clause; but there was good evidence as to the execution and contents of the will and the fact that it was signed by one of the known attestors and

1. (1930) 59 M.L.J. 596. 2. (1890) 15 P.D. 170.

that it was in existence at the time of the testator's death. On these facts it was presumed to have been validly executed. It will be noticed that in the present case we do not know the names of the attestors, or if there were any attestors at all, nor do we know positively that any such will was in existence at the date of the testator's death, so that the inference to be drawn from the circumstances in the present case must go a great deal further than in the case just cited. The case of *Woodhouse* v. *Balfour*[1] is not of much assistance to the petitioner. That was a case in which there was no room for the signatures of the attesting witnesses at the foot of the will and they were found at the top of the next page. They admitted their signatures but had no recollection of actually attesting this particular document. Here again the Court inferred that the document was validly executed. The case of *In the Estate of Phibbs*[2] was a case of a lost will in which there was clear and good evidence that the will was validly executed and attested, but the witnesses could not remember the names of the attestors. It was held that the evidence was sufficient to establish that the will was duly executed. This was a case in which there was no contest; but clearly the evidence went a great deal further than that placed before me.

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For the respondents two English cases have been cited in which evidence somewhat similar to that now before me was held to be insufficient. One is In re *Ripley*[3] where the testator residing in India sent to his solicitor in England a copy of his will without any copy of his own signature or the signatures of the attesting witnesses, and asked to be informed if the will needed revision in any respect. No revision was suggested and subsequently the testator sent what purported to be a copy of a codicil referring to the previous will, the codicil copy containing the names of the signatory and the witnesses. Shortly afterwards the testator was killed in the mutiny and no other evidence was forthcoming as to the valid execution of the will and codicil and it was held that the statements of the testator contained in his letters were not sufficient to prove due execution. A somewhat similar decision is found in the case of In re *Gray*[4]. These cases seem to go on the point that at

1. (1888) 13 P.D. 2.
2. [1917] P. 93.
3. (1858) 164 E.R. 632.
4. (1870) 22 L.T. 489.

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common law a statement of a deceased person regarding facts within his knowledge would not be evidence unless it relates to one of the circumstances which can be proved by the secondary evidence of extra judicial statements by the deceased person, similar to those embodied in S. 32 of the Indian Evidence Act.

Looking into the facts of the present case from a practical point of view, what is it that we have established? We know that there was in existence at some time what purported to be a will dated 25th November, 1912. We have the statement of the respondent that he saw this will in the possession of the testator in 1913 and that it was unattested. The copy of that will contains an indication that attestations were contemplated. There is no evidence whatever that any attestations were made. There is no evidence that the original will was in existence at the time of the testator's death. We might infer from the fact that he signed this will with an intention to complete it. But can we infer its actual completion? I do not think we can. Nor do I think we can infer from the somewhat disingenuous statements of the respondent when taxed with the existence of such a will, a knowledge that there was ever in existence a duly completed and validly attested will such as is now asserted. All that we might infer is that he probably knew of the existence of this copy and was not sure whether the petitioner had seen the copy or not. Taking all the materials together I am of the opinion that the valid execution of this will has not been proved. It is therefore unnecessary to call upon the respondent to prove its revocation. T. O. S. No. 16 of 1936 is dismissed with the costs of the contesting respondent. The letters of administration granted in T. O. S. No. 11 of 1936 will be re-granted.

K. C. *Letters regranted.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Adiraju Somanna .. *Petitioner.**

Adiraju Somanna, *In re.*

*Civil Procedure Code (V of 1908), S. 115—Proceedings under S. 36, Legal Practitioners' Act (XVIII of 1879)—Order of District Judge declaring person to be tout—Revisional jurisdiction of High Court—Interference when justified*

C. R. P. No. 648 of 1937. 17th December, 1937.

Adiraju Somanna, *In re.*

—*Criminal Procedure Code (V of 1898), S. 439—Government of India Act (1935), S. 224.*

S. 36 of the Legal Practitioners' Act confers a special jurisdiction on Subordinate Courts and inasmuch as the attendance in Court is an important valuable right of a citizen it cannot be taken away from him by a Court if its jurisdiction has been exercised either illegally or with material irregularity. Consequently the order of a District Judge under S. 36 of the Act declaring a person to be a tout is capable of being revised by the High Court under S. 115, Civil Procedure Code. Such revisional jurisdiction however is of an exceptional character and cannot be invoked except in furtherance of justice.

Order under S. 36, Legal Practitioners' Act set aside in revision.

Case-law discussed.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of East Godavari at Rajahmundry dated 14th April, 1937, and made in I.A. No. 144 of 1937 in O.P. No. 77 of 1935.

*P. Somasundaram* and *Balaparameswara Rao* for Petitioner.

*The Government Pleader (K. S. Krishnaswami Aiyangar)* for the Crown.

The Court delivered the following

JUDGMENT:—This is a petition for revision against the order passed by Mr. Mack, District Judge of East Godavari at Rajahmundry, declaring the petitioner to be a tout under S. 36 of the Legal Practitioners' Act.

A preliminary objection has been raised by the Government Pleader to the effect that the order passed by the lower Court is not open to revision. The point is of considerable importance as it involves the question of valuable rights of a citizen and has therefore to be carefully examined.

The contention raised by the Government Pleader is based on the addition of sub-cl. (2) to S. 224 of the Government of India Act, 1935, which did not find a place in the corresponding S. 107 of the prior Act of 1919. Sub-cl. (2) of S. 224 of the present Act reads as follows:—

"Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision."

Basing his reliance on the amendment, the Government Pleader contends that the High Courts in India could revise orders, similar to the one in question now, either under S. 15 of the High Courts Act or later under S. 107 of the Government of India Act (1919) before the new Act came into force,

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but this power has been taken away by the above-stated amendment. He further urges that the provisions contained in S. 115 and S. 439 of the Code of Civil and Criminal Procedure respectively have no application and the High Court is thus not entitled to revise the order although it is admitted by him that in a suitable case, a petition by way of a writ of *certiorari* might be competent.

The amendment contained in the new Government of 'ndia Act makes it clear that the High Court would not be entitled to revise the order in question under S. 224 of the Act, if it is not capable of being revised under any other provision of law. I am also in agreement with the contention that S. 439 of the Code of Criminal Procedure would have no application to the present case. A bare perusal of the section would show that it is inapplicable. The only question then is whether S. 115 of the Code of Civil Procedure does not authorise the High Court to revise the order.

The learned Government Pleader has placed reliance in support of his contention on a number of decisions and on going through them I find that the rulings given in *In the matter of the petition of Kedar Nath*[1], *In the matter of the petition of Kashi Nath and others*[2] and *Maganbhai* v. *Dinkarrao*[3] have either merely followed *In the matter of the Petition of Madho Ram*[4] or held that an order passed under S. 36 of the Legal Practitioners' Act was capable of being revised under S. 15 of the High Courts Act or S. 107 of the Government of India Act (1919). The last proposition is undoubtedly sound but, as already held by me, has been rendered useless for this purpose by the addition of the amendment to the present Government of India Act. As for *In the matter of the petition of Madho Ram*[4] one would have to examine the pronouncement with respect and care that it deserves as it comes from an eminent Chief Justice like Strachey, C.J., before one respectfully agrees with his conclusion or begs to differ from it with deference. On an examination of this decision I find that although it has been stated in general terms that the provisions of S. 622 of the Code of Civil Procedure (1882) do not apply the learned Chief Justice has given no reason for this opinion.

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1. (1908) I.L.R. 31 All. 59.
2. (1923) I.L.R. 45 All. 676.
3. (1932) I.L.R. 56 Bom. 577.
4. (1899) I.L.R. 21 All. 181.

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This was probably considered to be unnecessary as it was found that the High Courts had very wide powers of superintendence under S. 15 of the High Courts Act, and could in a suitable case interfere with an order passed by a Subordinate Court. Moreover the ground taken in that decision was that the finding was against the weight of evidence. This ground was not available in revision and the petition was dismissed for that reason. It was unnecessary to decide any further. In the circumstances any expression of opinion by the learned Chief Justice on the point that the provisions of the Code of Civil Procedure are inapplicable must be held to be *obiter*. In view of the situation which has now come into existence on account of the addition to sub-cl. (2) to S. 224 of the Government of India Act and in the absence of either any reasons having been specified in *In the matter of the petition of Madho Ram*[1] or the finding on this point to be essential, one would have to examine the terms of S. 115 of the Code of Civil Procedure carefully before one could arrive at a conclusion one way or the other. Before I examine this section, I must say a few words in regard to a Madras case, *Varadachariar* v. *Kalyanasundaram Aiyar*[2] which was decided by an eminent Judge of this Court. A study of that decision however shows that the point which I have been called upon to decide in this case was neither raised before nor considered by him. He had merely laid down that inasmuch as no procedure was provided for an enquiry under S. 36 of the Legal Practitioners' Act, the Court should adopt a procedure which does substantial justice to the parties and the provisions of O. 7, r. 11, Civil Procedure Code, would not apply to the proceedings. This is surely no authority for the contention raised by the learned Government Pleader.

The Government Pleader had also cited *Chatur Bhuj* v. *The Crown*[3] in support of his contention. There is an observation in that case by Jai Lal, J., that the proceedings under S. 36 of the Legal Practitioners' Act are of a *quasi* criminal nature but this was made in order to hold that the consent of the person complained against would not validate the otherwise invalid proceedings. It may be, that according to the practice of that Court, revisions from the orders passed under S. 36 of

1. (1899) I.L.R. 21 All. 181. 2. (1922) 44 M.L.J. 437.
3. (1930) I.L.R. 12 Lah. 385.

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the Legal Practitioners' Act are entertained as Criminal Revisions but in view of what I have stated above, I am of the opinion that S. 439 of the Code of Criminal Procedure would not apply to a case of this kind and the proceedings would not be open to revision under the provisions of the Code of Criminal Procedure.

As for the authorities cited by Mr. Somasundaram on behalf of the petitioner, I find that the learned Judges merely assumed jurisdiction in the decision cited namely, In re *Somayajulu Ramamurthi*[1], In re *Jonnalagedda Sambayya*[2] and *Keramat Ali* v. *Emperor*[3] without any discussion, which they undoubtedly had in any case before the new Government of India Act (1935) came into force and these cases are therefore of no assistance to me in deciding this point. There are some pertinent observations by an eminent Judge of the Calcutta Court in *Hari Charan Sircar* v. *District Judge of Dacca*[4] but even this decision affords no help to me. In the absence of any reference in that ruling to S. 622 of the Code of Civil Procedure I must presume that the provisions of that section were not examined by the learned Judge in that case. The other two cases which were relied on by the Counsel for the petitioner are *Bavu Sahib* v. *The District Judge of Madura*[5] where a portion of the proceedings were ordered to be cancelled under S. 622 of the Code of Civil Procedure by a Bench of this Court consisting of no less eminent a Judge than Bashyam Aiyangar, J., and another Judge. This case was followed by Walsh, J., in *In the matter of the petition of Kalka Prasad and others*[6] where in spite of the fact that the two cases of the Allahabad Court namely, *In the matter of the petition of Madho Ram*[7] and *In the matter of the petition of Kedar Nath*[8] were brought to his notice, he decided to prefer the decision in *Bavu Sahib* v. *The District Judge of Madura*[5] and held that the High Court could interfere in a revision under S. 115 of the Code of Civil Procedure and did not consider that it was necessary to invoke the aid of the superintendence section in the Government of India Act.

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1. (1912) M.W.N. 959.
2. (1915) 28 I.C. 918.
3. (1921) 62 I.C. 829.
4. (1910) 11 C.L.J. 513.
5. (1903) 13 M.L.J. 272: I.L.R. 26 Mad. 596.
6. (1917) I.L.R. 40 All. 153.
7. (1899) I.L.R. 21 All. 181.
8. (1908) I.L.R. 31 All. 59.

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In this state of divergence of opinion amongst the learned Judges of different High Courts, it becomes all the more necessary to examine the provisions of the Code of Civil Procedure more closely.

A reference to S. 115 would show that the High Court is competent to make such order as it thinks fit, if it finds that a case has been decided by any Court Subordinate thereto, and in which no appeal lies, if such subordinate Court has either acted beyond or failed to exercise a jurisdiction or has acted in the exercise of its jurisdiction illegally or with material irregularity. It cannot be denied that the District Judge was acting in this case as a Court and not in an administrative capacity. The question then is whether the finding given by him against the petitioner and declaring him to be a tout would amount to a decision of the case pending before him. It has been held by their Lordships of the Privy Council in *Balakrishna Udayar* v. *Vasudeva Aiyar*[1] that the term 'case' used in S. 115 of the Code is wider than the word 'suit' in which a plaintiff seeks to obtain a particular relief. Their Lordships have recorded their finding in the following words:—

"It was next contended that the matter of the four petitions in which the order of the 19th July, 1913, was made, did not constitute a 'case' within the meaning of the 115th Section of the Code of Civil Procedure. No definition is to be found in the Code of the word 'case'. It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application, such as that made in this case, praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. Their Lordships concur, therefore, with the High Court in thinking that the matter adjudicated upon was a case within the meaning of the 115th Section of the Code."

Applying the abovementioned principle enunciated by their Lordships, I see no justification in rejecting the contention that the decision by the District Judge of the proceedings pending before him in which the petitioner was declared to be a tout would fall within the scope of S. 115 of the Code of Civil Procedure. In a number of cases arising under other enactments like the Guardian and Wards Act, Succession Certificate Act, Indian Arbitration Act, Provincial Insolvency Act etc., it has been held by various High Courts that the orders passed by Subordinate Courts, if not declared to be

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1. (1917) 33 M.L.J. 69: L.R. 44 I.A. 261: I.L.R. 40 Mad. 793 (P.C.).

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appealable under the Special Acts, would none the less be capable of being revised under S. 115, Civil Procedure Code. There is no reason to hold why the Legal Practitioners' Act should not be treated in *pari materia* with other special enactments.

S. 36 of the Legal Practitioners' Act confers a special jurisdiction on Subordinate Courts and inasmuch as the attendance in Court is an important valuable civil right of a citizen it cannot be taken away from him by a Court if its jurisdiction has been exercised either illegally or with material irregularity. I would therefore hold that the decision of the District Judge is capable of being revised by me under S. 115, Civil Procedure Code.

The revisional jurisdiction which I am now invited to exercise is necessarily of an exceptional character and cannot be invoked except in furtherance of justice. I am consequently competent to scrutinise an order which seriously affects the petitioner's character and prospects with the object of satisfying myself if there has been a compliance by the lower Court with the provisions of the law. If I find that the order passed by the Court is justified by the evidence on the record I would decline to interfere with it. If on the other hand I find that there is no legal evidence on the record to justify the conclusion arrived at by the learned District Judge I would be constrained to interfere with his order. I might state here that as a Court of revision I cannot be expected to weigh the evidence which was led before the District Judge but if I find that there was no evidence at all from which the inference as drawn by the learned District Judge could be deduced I would have no alternative but to interfere.

With these remarks I shall first consider as to what is required by law to be proved against the petitioner before he can be declared to be a tout and then proceed to consider whether these requirements of law have been proved in this case. A tout has been defined by S. 3 of the Legal Practitioners' Act to be:

"A person (*a*) who procures, in consideration of any remuneration moving from any legal practitioner, the employment of the legal practitioner, in any legal business; or who proposes to any legal practitioner or to any person interested in any legal business to procure, in consideration of any remuneration moving from either of them, the employment of the legal practitioner in such business; or (*b*) who for the purposes of such procurement

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frequents the precincts of Civil or Criminal Courts or of Revenue offices, or railway stations, landing stages, lodging places or other places of public resort."

Before a person can be declared to be a tout, it must be found for a fact that he has acted in a manner which will bring him within this definition. This necessitates an examination of the evidence on which the District Judge has acted in this case in order to ascertain whether there was any material on the record on which he was entitled to act and arrive at the decision that the petitioner was a tout.

Bearing the principles laid down by me in this judgment and the definition of a tout in mind, I shall address myself to the task of examining the facts and evidence in this case.

[His Lordship dealt with the evidence and concluded.]

In the absence of any evidence, oral or documentary, that any consideration was either received by the petitioner or demanded by him I am constrained to find that there is no evidence in this case from which the learned District Judge could have possibly drawn the conclusion against the petitioner. I am afraid the learned District Judge had no clear conception of the law on the subject and even if he had, he has certainly failed to apply it to the facts of this case. If he had taken the trouble of reading S. 3 of the Legal Practitioners' Act and not relied on his own previous decision which appear to have had nothing in common with the facts of this case, he would have, I am sure, come to a different conclusion. I may add that it is impossible to arrive at a finding on mere suspicions or conjectures. They can never be substitutes for evidence.

I must therefore hold that the learned District Judge has acted illegally and in any case with material irregularity in the exercise of his jurisdiction. The revision petition must therefore be allowed and the order passed by the District Judge quashed.

I cannot part with this case without adverting to the manner in which the lower Court has written its judgment. I should expect experienced officers to be more dignified and restrained in the expression of their opinion. They should try and avoid expressions which may attract a comment that the Judge had either made up his mind even before he had initiated proceedings or had identified himself with a case to an extent that he was unable to appreciate the case or weigh the evidence

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before him impartially and without any bias. It is usually unnecessary and in any case unsafe to indulge in generalisations.

B. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Melepat Madhathil M.R. Venkitaraya Aiyar and another .. *Appellants** *(Defendants 1 and 2)*

*v.*

Neelamane Sankaran Embrandiri and another .. *Respondents (Plaintiff and 3rd Defendant).*

Venkitaraya Aiyar *v.* Sankaran Embrandiri.

*Riparian rights—Adjacent lands—Right to drain off water from higher to lower lands—Limits—Foreign water not to be thrown—Erection of dams to divert water—Permissibility.*

There is a material right of drainage from higher to lower lands of water flowing in the usual course of nature and in undefined channels. The right of the superior proprietor is not however absolute and he cannot introduce water which is foreign to his land. And there is no obligation on the part of the lower owner to submit to an artificial discharge of water from his neighbouring lands.

Where owing to the conduct of the upper proprietor the channel is so trained to run as to divert the water to the lower land, the owner of the lower land is entitled to put up a dam on his land so as to prevent the escape and overflow of the water.

*Peacock on Easements*, 3rd Edn., pages 293 and 294; *Coulson and Forbes on Waters*, 5th Edn., pages 142, 143; *Kerr on Injunctions*, 6th Edn., page 231; *Gale on Easements*, page 267: *Gibbons* v. *Lenfestey*, (1915) 113 L.T. 55; *Ramaswami* v. *Rasi*, (1913) 25 M.L.J. 276: I.L.R. 38 Mad. 149 and *Sinnana* v. *Veerappa*, A.I.R. 1930 Mad. 676, referred to.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice King, dated 14th April, 1936, in S.A. No. 588 of 1932, preferred against the decree of the District Court of South Malabar at Calicut in A.S. No. 97 of 1931, preferred against the decree of the Court of the District Munsiff of Manjiri, in O.S. No. 477 of 1929.

*Ch. Raghava Rao* and *M. Chinnappan Nair* for Appellants.

*P. Govinda Menon* for Respondents.

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* L. P. A. No. 82 of 1936. 25th January, 1938.

Venkitaraya Aiyar *v.* Sankaran Embrandiri.

Venkatasubba Rao, J.

The judgment of the Court was delivered by

*Venkatasubba Rao, J.*—This is a Letters Patent appeal from the judgment of King, J., which has confirmed the concurrent decision of the two Courts below.

The facts are fully stated in the judgment of the learned District Munsiff as well as that of Mr. Stodart the District Judge. The point for decision is whether the plaintiff was entitled to put up a dam to prevent the escape and overflow of water from the land of the defendants over his land. The plaintiff having been held to possess the right, the defendants have filed this Letters Patent Appeal. The relative positions of the lands in question may be briefly described. The plaintiff owns the plot A, which comprises plot D which the lower Courts have found belongs to him; the embankment or dam to prevent the overflow has been erected in the last mentioned plot D. To the south of A and contiguous thereto, are three plots B, B-1 and C; B-1 is to the east of B and C is to the east of B-1. The former two plots belong to the defendants and the latter to a third party with whom we are not concerned. To the south of B-1 is plot E, of which also the defendants are the owners. A channel runs at the southern extremity of B and B-1, dividing B-1 from E and flowing northward into C. Till 1911 the water of this channel dispersed itself over the surface of C and did not come upon either the plaintiff's land or any of the defendant's plots. For the first time in that year, the owner of C turned the water away from his land into plot B-1 owned by the defendants. What really happened is clearly set out by the District Munsiff. The channel in question brought rain water from some parambas a few furlongs off and along with the water, was carried a lot of sand and gravel. The part of C nearest B-1 became blocked up with silt and the owner of C, with a view to protect his lands, put up some dam which had the effect of diverting the water, which then discharged itself over B-1. The defendants complaining that their lands were injured, filed a suit against the owner of plot C, which however owing to some compromise, was later withdrawn. Finding that gradually mischief accrued to their own land, the defendants did certain acts to which we shall presently refer, which made the water overflow plot D, the plaintiff's land. The question, as already stated is, whether the plaintiff

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was justified in putting up the embankment referred to above to prevent the overflow.

The contentions of Mr. Raghava Rao the appellants' learned Counsel, relating to the natural rights and riparian owners, seem quite beside the mark and do not call for notice. The law governing the point is thus stated in *Peacock on Easements*:—

"There is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of nature and in undefined channels." (3rd Edn., page 293.)

This principle is embodied in illus. (*i*) to S. 7 of the Easements Act.

The plaintiff does not dispute that his land is on a lower level than the defendants' plots. The right, however, of the superior proprietor is not quite absolute. It would not, for instance, be within his right to introduce water which was foreign to the land (*Coulson and Forbes on Waters*, 5th Edn., pages 142 and 143). Further, there is no obligation upon the owner of the lower land to submit to an artificial discharge of water from his neighbouring lands (*Peacock on Easements*, 3rd Edn., pages 293 and 294).

*First*, the water would not have entered the defendants' land, as must be evident from what has been stated above, but for the bund put up by the owner of C on his own plot to defend it from injury. The water on the upper land is not thus, what in the ordinary course of nature, rises in or falls upon it; in other words, it is foreign water so far as plot B-1 is concerned. By the act of the owner of C and not in the natural course, did the water discharge itself upon B-1. Having entered that land, it stopped there and it was by a further act of the defendants, as will be shown, that it overflowed the plaintiff's plot. The natural right of the upper owner does not pertain to what may be termed foreign water, and the finding therefore that the water in question is foreign to the defendants' land, is fatal to their claim.

*Secondly*, as already observed, there is no obligation upon the inferior tenement to submit to an artificial discharge of water from the higher ground. When land is so located that water naturally or in the course of ordinary agricultural operations, descends from the estate of the superior proprietor to the inferior estate, the owner of the latter cannot do any-

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thing to prevent the course of such water. The upper proprietor may drain his land, and the proprietor below must receive the water so drained; but the upper proprietor may not by adopting a particular system of drainage or by introducing alterations in the mode of drainage, cause the drainage water to flow on his neighbour's land in an injurious manner (*Kerr on Injunctions*, 6th Edn., page 231). Further, the upper owner is not entitled to do anything that will throw on the inferior tenement any water which would not naturally come there (*Ramaswami* v. *Rasi*[1]). The effect of the finding here is, that the water, after it had been allowed to enter B-1, would in the ordinary course have diffused itself over B, B-1 and E (the defendant's plots); possibly some water might have also escaped on to the plaintiff's plot. But in the course of years since 1911, the channel was "so trained to run" (as the District Judge tersely puts it) by the defendants, that the water was diverted to the plaintiff's plot—that is the clear finding of the District Judge. They did something more; they strengthened a bund where the channel intersected E, with a view to prevent injury to that plot (*see* the Munsiff's judgment). Thus it will be seen that the water descending on the plaintiff's land is not "water which drains naturally" (*Kerr on Injunctions*, page 231). This finding again is equally fatal to the defendants' claim. True, the upper proprietor has the right to collect the water falling from the higher ground in one body in the course of draining his land; but that right again is not absolute. As observed by Lord Dunedin:—

"If the water which would otherwise fall on the higher ground, *without hurting the inferior tenement*, should be collected in one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property." (The material words have been underlined.)

*Gibbons* v. *Lenfestey*[2] cited in *Coulson and Forbes* on Waters, 5th Edition, page 142; see also *Sinnana* v. *Veerappa*[3]. The limit of the right is in the above passage defined and from what has been stated above, it is clear that it has been exceeded.

Whether the water-course here can be properly described as a 'stream' is a question we need not go into; for, by

1. (1913) 25 M.L.J. 276: I.L.R. 38 Mad. 149 at 152.
2. (1915) 113 L.T. 55.
3. A.I.R. 1930 Mad. 676.

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whatever name called, it ended naturally in plot C and did not flow further. But if the description given of it by the learned District Munsiff is correct, it can hardly be regarded a natural stream. There is a distinction to be taken in law between a regular flowing stream of water, though it sometimes may be dry, and those occasional bursts of water which in times of freshes or melting of ice and snow descend from the hills, and inundate the country. (*Angell on Water-courses*, cited in *Gale on Easements*, 11th Edition at page 267 footnote). As already observed, on this distinction nothing turns.

In the result, the Letters Patent Appeal fails and is dismissed with costs.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Ramachandra Madhavadoss Co., by partner K. Raghunatha Mallayya .. *Petitioners* (Plaintiffs)*

*v.*

Moovakat Moidunkutti Birankutti and Brothers, a firm carrying on business in Cannanore .. *Respondents (Defendants).*

Ramachandra Madhavadoss Co. v. Moidunkutti Birankutti. & Bros.

*Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Suit by agent against principal—Four items constituting simple claim for money—Jurisdiction of Small Cause Court—Suit partly within cognisance—Procedure.*

The plaintiff, an agent, sued his principal for a specific sum of money due to him regarding certain dealings. The District Munsif examined the plaintiff and finding that four heads of account were clubbed together in a single *katha* maintained by the plaintiff firm in its books, out of which two only could be properly recovered from the small cause side returned the whole plaint for presentation to the proper Court.

*Held*, in revision, that the suit was for a specific sum of money and not for accounts and that the Court was competent to try and dispose of it on its small cause side.

*Konduru Runga Reddi* v. *Subbiah Chetty*, (1904) I.L.R. 28 Mad. 394, referred to.

*Held, further*, that even if the Court had jurisdiction on the small cause side only in regard to two of the items it should have proceeded to dispose of the suit regarding those items and should not have returned the whole suit.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif

*C. R. P. No. 1127 of 1937. 11th March, 1938.

Rama-
chandra
Madhava-
doss Co.
*v.*
Moidun-
kutti
Biran-
kutti &
Bros.

of Mangalore, dated 30th June, 1937 and made in S. C. S. No. 148 of 1937.

*K. P. Sarvothama Rao* for Petitioners.

*O. T. G. Nambiar* for Respondents.

The Court delivered the following

JUDGMENT.—The only question which I have been called upon to decide in this revision relates to the correctness of the order passed by the District Munsif of Mangalore who, in view of an objection raised on behalf of the defendant, refused to entertain the suit on the ground that being one for accounts it was barred under Art. 31 of Sch. II of the Provincial Small Cause Courts Act.

The suit was, as the plaint would show, for a specific sum of money which was alleged to be due to the plaintiff by the defendant in regard to certain dealings mentioned in paragraph 3 of the plaint. The District Munsif examined the plaintiff and finding that four heads of accounts were clubbed together in a single *katha* maintained by the plaintiff firm in its books, out of which two only could be properly recovered on the Small Cause Side, returned the whole plaint for presentation to the proper Court.

Having heard the Counsel for the parties at some length, I am clearly of the opinion that this is not a suit for accounts within the meaning of Art. 31 of Sch. II of the Provincial Small Cause Courts Act and is, as framed, maintainable by the Court of Small Causes. " A suit for accounts " as observed by Sankaran Nair, J., in *Konduru Runga Reddi* v. *Subbiah Setty*[1]:

> "is a special form of suit. It does not mean that whenever accounts have to be looked into in order to ascertain the amount due by one party to the other that the suit should be technically called a suit for accounts."

The plaintiff has nowhere in his plaint asked for any accounts to be rendered to him and the allegations in the plaint would ordinarily determine the nature of the suit. If the plaintiff fails to substantiate his allegations, his suit will have to be dismissed and not returned for presentation to the proper Court, as ordered by the District Munsif.

Had the District Munsif bestowed any attention to the relationship of the parties, he could not have possibly arrived

1. (1904) I.L.R. 28 Mad. 394.

Ramachandra Madhavadoss Co. *v.* Moidunkutti Birankutti & Bros.

at the conclusion to which he did. Even according to the allegations of the defendant, he was the principal and the plaintiff a mere agent. How could the agent sue his principal for accounts? It is only in exceptional cases where his remuneration depends on the extent of dealings which are not known to him or where he cannot be aware of the extent of the amount due to him unless the accounts of his principal are gone into that a suit by an agent for accounts against his principal might be competent. But where the exact sum of money which the agent claims from his principal is known to him, the only form in which a suit can be filed is the one adopted by the plaintiff here.

It is rather surprising that although the District Munsif was of the opinion that a suit in regard to two of the items was entertainable by the Court of Small Causes, he returned the whole of the suit for reasons which have neither logic nor good sense behind them. If he were of the opinion, that two out of the four items could not be heard by him as a Judge of the Court of Small Causes, he should have simply refused to go into them but should have proceeded to decide the remaining items which could otherwise be determined.

In view of my finding, however that the entire suit is cognisable by the Court of Small Causes, this contingency does not arise. I must therefore reverse the order of the District Munsif and remand the suit for disposal on the merits. The respondent will pay the costs of the petitioner in this Court. The costs in the lower Court will abide the result.

I understand that the plaint was returned to the petitioners. He may file it in this Court, now and will be sent to the District Munsif for disposal as ordered.

B. V. V. *Petition allowed.*

## PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Sind.]

PRESENT:—LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN.

The Commissioner of Income-tax, Bombay Presidency and Aden .. *Appellant**

*v.*

Messrs. Khemchand Ramdas .. *Respondents.*

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*Income-tax Act (XI of 1922), Ss. 23, 29, 30, 34, 35 and 66—Assessment to income-tax and super-tax—Procedure—Levy of income-tax on registered firm—Exemption from super-tax—Firm's registration subsequently cancelled—Fresh assessment to super-tax—Validity—Time-limit for making assessment—Competence of appeal to Assistant Commissioner—Question of law—Meaning of "assessment" in S. 23 (4).*

The method prescribed by the Income-tax Act for making an assessment to tax consists of the following steps. In the first place the taxable income of the tax-payer has to be computed. In the next place the sum payable by him on the basis of such computation has to be determined. Finally, a notice of demand in the prescribed form specifying the sum so payable has to be served upon the tax-payer. The second of these steps involves the determination of two sums, namely, the sum payable for income-tax and the sum payable for super-tax.

The Income-tax Act nowhere imposes any limit of time within which an assessment under the provisions of Ss. 23 and 29 is to be made and the service of the notice of demand can therefore be made at any time. But it cannot be said that after a final assessment under those sections has been made the Income-tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time, or that the Commissioner can direct him to do so. In this respect the provisions of Ss. 34 and 35 of the Income-tax Act are exhaustive and they prescribe the only circumstances in which and the only time in which such fresh assessments can be made and fresh notices of demand can be issued.

A certain firm failed to make a return of its total income for the year ending 31st March, 1926, in compliance with S. 22 (2) of the Income-tax Act and the Income-tax Officer duly made an assessment on the firm under S. 23 (4) of the Act. In January, 1927, the firm were registered by the Income-tax Officer, and consequently became relieved of liability for super-tax for the year in question. In February, 1928, the Commissioner of Income-tax, in consequence of information which he received and acting under S. 33 of the Act, cancelled the firm's registration and directed the Income-tax Officer to take the necessary action upon the cancellation. In May, 1929, that officer assessed the firm to super-tax on their income for the year ending 31st March, 1926, and gave instructions for the issue of a demand note to the firm for the additional amount due. The firm appealed to the Assistant Commissioner, who dismissed the appeal on its merits without considering the question of its competence. The Commissioner, on appeal to him, was

* P. C. Appeal No. 63 of 1937. 7th April, 1938.

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of opinion that the case was one of assessment under S. 23 (4) in respect of which, by virtue of the proviso to S. 30 (1), no appeal lay, and quashed the proceedings before the Assistant Commissioner, and refused to state a case for the opinion of the High Court.

*Held*, (1) that the Commissioner was wrong in refusing to state a case. The question of the competence of the appeal to the Assistant Commissioner was one of law, and the Commissioner could not, by deciding it adversely to the firm, deprive them of their right to have it determined by the High Court.

(2) That the appeal to the Assistant Commissioner was competent because it was not sufficient that the assessment appealed from should have purported to be one made under S. 23 (4); it must first be shown that it was in fact an assessment within that sub-section.

*Dictum* of Sir Shadi Lal in *Duni Chand* v. *Commissioner of Income-tax*, (1929) I.L.R. 10 Lah. 596 at 601 (F.B.), approved.

(3) That, having regard to the time limit of one year imposed by Ss. 34 and 35 of the Act, the order of assessment to super-tax made in May, 1929, was not one which the Income-tax Officer had power to make.

Meaning of the word "assessment" in S. 23 (4) of the Income-tax Act considered.

Decision of the Court of the Judicial Commissioner of Sind affirmed.

Appeal from a decision of the Court of the Judicial Commissioner of Sind, (Aston and Rupchand Bilaram, A. J. CC.), dated 22nd January, 1934, given on a reference under S. 66 (2) of the Income-tax Act, 1922, of questions for the decision of the Court by the Commissioner of Income-tax, Bombay Presidency and Aden.

*J. Millard Tucker, K.C.* and *W. Wallach* for Appellant.—The proviso to S. 30 (1) is quite explicit. An assessment made under S. 23 (4) is final. The Income-tax Officer's order assessing the respondent firm's taxable income could not be appealed against. Consequently the respondents had no right to appeal to the Assistant Commissioner against the demand made upon them for payment of super-tax on that income on any ground whatsoever, the assessable income being fixed for all purposes for the material year by the Income-tax Officer's order of assessment. Accordingly, the order of 4th May, 1929, assessing the firm to super-tax, and the demand note issued in pursuance of that order were valid. In those circumstances, the appellant was justified in making an order quashing the proceedings by way of appeal to the Assistant Commissioner; for, since the assessment on the respondents was final, the appeal to the Assistant Commissioner was incompetent, and there was accordingly no appellate order under S. 31 or 32 of the Act in existence upon which a reference to the High Court under S. 66 (2) could be based. There is no statutory rule or principle of law which requires that demand notes in respect of income-tax

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and super-tax on an assessment should be issued simultaneously or within any specified time of each other.

*J. M. Pringle* for Respondents.—The word "assessment" in S. 23 (4) means, not only the computation of the tax-payer's income, but also the determination of the amount of tax payable by him on the basis of that computation. Consequently, the assessment made by the Income-tax Officer in the first place in respect of the firm's income-tax had the effect, once it had become final, of exhausting the operation of S. 23 (4), with the result that the subsequent assessment to super-tax could not be made under that sub-section, and was not final within the proviso to S. 30 (1). The sections governing the assessment to super-tax were Ss. 34 and 35 only, and they prescribe a time limit which renders the assessment to super-tax made on the respondents invalid as being out of time. In any event, the assessment under S. 23 (4) having been made by computation of the respondents' total income, the demand for super-tax on the basis of the assessment should have been made within a reasonable time of the assessment.

7th April, 1938. Their Lordships' judgment was delivered by

Lord Romer.

LORD ROMER.—The respondents to this appeal are a firm who carry on business at Bunder Abbas and Kerman outside British India but are assessable to taxation in respect of their income under the provisions of the Indian Income-tax Act, 1922. Their total income during the fiscal year ending on the 31st March, 1926, being in the opinion of the Income-tax Officer, Shikarpur, of such an amount as to render them liable to income-tax under that Act for the year ending the 31st March, 1927, a notice was served upon them by that official in accordance with the provisions of S. 22 (2) requiring them to make a return of that income. He also served upon them a notice under sub-S. (4) of the same section requiring production of the relevant accounts and documents. Had the respondents thought fit to comply with these notices they would have avoided a good many of the difficulties in which they subsequently found themselves involved. Unfortunately they completely ignored the notices. The duty of the Income-tax Officer in such circumstances is prescribed by S. 23 (4) of the Act. It is to "make the assessment to the best of his judgment." One of the peculiarities of most Income-tax Acts is that the word "assessment" is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable, and sometimes the whole procedure

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laid down in the Act for imposing liability upon the tax-payer. The Indian Income-tax Act is no exception in this respect, and some discussion took place before their Lordships as to the meaning of the words "make the assessment" in S. 23 (4), the question debated being whether the words mean no more than "compute the total income" or whether they include also the determination of the tax payable. It was pointed out that, by sub-S. (1) of the same section, which deals with the cases where the officer is satisfied with the return made by the tax-payer, the officer is in terms directed both to assess the total income and to determine the sum payable on the basis of such return. So, too, under sub-S. (3), which deals with the cases where the officer is not satisfied that the return is correct or complete. In such cases the sub-section requires that the officer, after hearing evidence as therein mentioned, shall "assess the total income of the assessee and determine the sum payable by him on the basis of such assessment." Sub-S. (4) on the other hand merely directs the officer to "make the assessment to the best of his judgment," and contains no specific reference to a determination by him of the sum payable. Unless, therefore, the word "assessment" in sub-S. (4) is intended to mean something more than the word means in sub-Ss. (1) and (3), (and it may be observed that this is by no means improbable in an Income-tax Act), the officer is not in terms given any power to determine the sum payable by the tax-payer. Their Lordships do not find it necessary to express any opinion upon this question, which seems to them to be merely one of academic interest. For even if such a power be not given expressly by the direction to "make the assessment," it is, in their opinion, plainly implied, reading the section as a whole. And this view is strongly corroborated by S. 29, which is in these terms:—

> "When the Income-tax Officer has determined a sum to be payable by an assessee under S. 23 . . . the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum so payable."

Now the prescribed form in terms applies to an assessment under S. 23 (4).

In the present case the officer in due course acted under the sub-section and made an assessment to the best of his judgment, and at the same time or shortly afterwards served upon the respondents a notice of demand under S. 29. But

before dealing further with such assessment and demand, it is necessary to refer to some other provisions of the Act and the rules made thereunder.

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By S. 55 of the Act it is provided as follows:—

"In addition to the income-tax charged for any year there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature."

By virtue of S. 56, the total income of an unregistered firm is for the purposes of super-tax the total income as assessed for the purposes of income-tax, and an assessment (which here must mean a computation) of total income that has become final and conclusive for the purposes of income-tax is made final and conclusive for the purposes of super-tax for the same year.

By S. 58 all the provisions of the Act (with certain exceptions not material for the present purpose) are made applicable so far as may be to the charge, assessment, collection and recovery of super-tax.

By S. 2 . . . (14) the words "registered firm" are defined as meaning a firm constituted as therein mentioned of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner.

On the 18th May, 1926, the respondents applied to the Income-tax Officer for registration, and such registration was effected by him on the 17th January, 1927.

It is now necessary to return to the "assessment" made by the Income-tax Officer under S. 23 (4) and the notice of demand served by him upon the respondents under S. 29.

The assessment is dated the 17th January, 1927 (the same date, it may be noticed, as that on which the registration of the respondents was effected), and so far as material is in the following terms:—

"The assessee has failed to return form I.

"In spite of several appointments having been given he has failed to produce Bunder Abbas account in Shikarpur books. He is accordingly assessed on enquiries on an income of Rs. 1,25,000 at the maximum rate.

"The firm having applied for registration is registered, therefore no super-tax is levied."

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Their Lordships have no information either as to the terms of the notice of demand under S. 29 following upon this assessment or as to the precise date upon which it was served upon the respondents. It would seem, however, that it was served not later than the month of March, 1927.

After service of that notice, the Income-tax Officer had done all that was required of him under the Act for the purposes of ascertaining the liability of the respondents to income-tax and super-tax for the fiscal year ending on the 31st March, 1927. So far, too, as the respondents were concerned, their assessment for the year (using the word assessment in its most comprehensive sense) had become final and conclusive. For though by S. 30 (1) a right of appeal to the Assistant Commissioner is given to an assessee objecting to the amount or rate at which he is assessed under S. 23 or denying his liability to be assessed under the Act, the sub-section contains a proviso to the effect that no appeal shall lie in respect of an assessment made under S. 23 (4). If, however, the respondents concluded from all this that, after payment of the sum mentioned in the notice of demand, all their taxation troubles for that year were ended, they were reckoning without the Commissioner of Income-tax and the powers conferred upon that functionary under S. 33 of the Act. That section so far as material for the present purpose, is as follows:

"(1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any authority subordinate to him. . . . .

"(2) On receipt of the record the Commissioner may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit:

"Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard."

The circumstances in which in the present case the Commissioner exercised or purported to exercise the powers conferred upon him by the section have been described by him in the following words:

"In January, 1928, it was brought to the notice of the Commissioner of Income-tax that the deed of partnership produced by the firm for the purposes of its registration was not a valid deed of partnership and that therefore the order granting registration was not correct. Hence a notice under S. 33 of the Act was issued to the firm on 9th January, 1928, calling upon it to show cause why the Income-tax Officer's order of 17th January, 1927, registering the firm be not set aside. The firm thereupon sent a written repre-

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sentation and after considering it, the Commissioner, in virtue of his powers under S. 33 of the Act, revised on 13th February, 1928, the Income-tax Officer's order regarding registration of the firm and ordered its cancellation, directing the Income-tax Officer to take the necessary action thereupon."

It is by no means certain that the Commissioner came to a correct conclusion regarding the invalidity of the registration of the respondents. But, as the law stood at that time, no appeal lay from an order made by the Commissioner under S. 33, and it must be taken that the order cancelling the registration was properly made. Nor is it at all certain that such order could operate retrospectively so as to affect the respondents' liability to super-tax for the year 1927-28. It has, however, been conceded by the respondents in effect that by reason of such order they must be treated as having been an unregistered firm during the fiscal year in question and could have been charged with super-tax for that year had the proper steps been taken for that purpose. Their Lordships are willing to deal with the case on the footing of such concession without expressing any opinion upon the question whether the concession was rightly made. The real question between the parties is whether the action taken by the Income-tax Officer consequent upon the Commissioner's order of cancellation has been effectual to charge the respondents with such super-tax.

What he in fact did was to issue an order dated the 4th May, 1929, which (so far as material) is in the following terms:—

"The firm was originally assessed to Income-tax on an income of Rs. 1,25,000 as a registered firm. The registration order was subsequently cancelled. The firm is accordingly assessed to super-tax on Rs. 1,25,000 less Rs. 50,000. Issue N. D. accordingly for super-tax of Rs. 5,468-12-0."

The N. D. (notice of demand) was served upon the respondents three days later.

It is to be observed that the order was issued more than one year after the close of the fiscal year ending on the 31st March, 1927, and more than one year after the date of the earlier demand to which reference has already been made. The significance of this fact will appear presently. It should be added that the respondents in no way challenged the figures contained in the order of the 4th May, 1929. What they did challenge was the power of the Income-tax Officer to make the order at all. Accordingly on the 4th June, 1929, they appealed to the Assistant Commissioner under S. 30 (1) asking that

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the order might be set aside. It is clear from the Commissioner's statement cited above that the Income-tax Officer in making the order complained of was acting in pursuance of the directions given to him by the Commissioner under S. 33; and at that time, as has already been stated, no appeal could be brought against an order made under that section. But no such order can be made as is inconsistent with the other provisions of the Act. One of the questions, therefore, arising upon the appeal, was whether the Income-tax Officer had any power to make the order apart from the direction given to him by the Commissioner. If he had not, the fact that such direction was given was an irrelevant circumstance. Another question arising upon the appeal was as to its competency. Having regard to S. 58 (1) of the Act, the provisions contained in S. 30 (1), giving a right to appeal to the Assistant Commissioner in the case of an assessee denying his liability to be "assessed under the Act," which must mean in that context "charged with tax under the Act," is as applicable to super-tax as it is to ordinary income-tax. But the proviso to that subsection has to be considered. If the order of the 4th May, 1929, can properly be described as an assessment under S. 23 (4), no appeal would lie.

The appeal came on for hearing on the 12th April, 1930, and was dismissed by the Assistant Commissioner upon its merits. He did not deal with the question of the competency of the appeal. He merely held that the order of the 4th May, 1929, was valid, and he confirmed the tax. In so doing he must have been acting under the powers given to him by S. 31 (3) (*a*), which is in these terms:—

"In disposing of an appeal the Assistant Commissioner may in the case of an order of assessment:—

"(*a*) confirm, reduce, enhance, or annul the assessment."

* * * *

In confirming the tax, therefore, the Assistant Commissioner must have regarded the order as an assessment within the meaning of the sub-section, as indeed it was. But he expressed no opinion upon the question whether such assessment was one made under S. 23 (4).

Following upon the dismissal of their appeal, the respondents then applied to the Commissioner himself, asking him to exercise his powers under S. 33 and set aside both the order of the Income-tax Officer "levying super-tax" and the order

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of the Assistant Commissioner that confirmed such tax. Inasmuch as the Income-tax Officer in "levying super-tax" had merely acted in pursuance of the directions given him by the Commissioner, the respondents could not have felt too certain of success. So they asked him in the alternative to refer the matter to the High Court under the provisions of S. 66 (2) of the Act. That sub-section is, or rather was at that time, as follows:—

"(2) Within one month of the passing of an order under S. 31 . . . the assessee in respect of whom the order was passed may by application . . . require the Commissioner to refer to the High Court any question of law arising out of such order and the Commissioner shall within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court."

Sub-S. (3) of the same section ran as follows:—

"(3) If, on any application being made under sub-S. (2) the Commissioner refuses to state the case on the ground that no question of law arises the assessee may . . . apply to the High Court, and the High Court, if it is not satisfied with the correctness of the Commissioner's decision, may require the Commissioner to state the case, and to refer it, and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly."

The application to the Commissioner to set aside the order of the Income-tax Officer was rejected by the Commissioner as was the application to state a case. He regarded the case as a clear one of assessment under S. 23 (4) in respect of which no appeal would lie. The appellate proceedings before the Assistant Commissioner and the appellate order were therefore in his opinion illegal. "Hence", said he, "I quash them under S. 33 of the Act." The proceedings having been quashed, there was in his view no order out of which any questions of law could arise and nothing therefore that could be referred to the High Court under S. 66 (2). He accordingly refused to state a case.

In their Lordships' opinion the Commissioner was plainly wrong in so doing. One of the questions of law arising out of the order of the Assistant Commissioner was whether the appeal to him was competent in view of the proviso to S. 30 (1). By deciding this question himself adversely to the respondents, the Commissioner could not deprive the respondents of the right of having the question decided by the Court. This was the view of the matter rightly taken by the Court, who upon application made to them by the respondents under S. 66 (3) ordered the Commissioner to state a case and refer it to them for their decision.

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The Commissioner accordingly drew up a statement of the case and referred it with his own opinion thereon to the Court, setting out in the statement at some length his reasons for thinking that he ought never to have been ordered to do so.

The case in due course came on for hearing before Additional Judicial Commissioners Aston and Rupchand Bilaram on the 22nd January, 1934. Their decision was in favour of the respondents. The Commissioner then applied for and obtained from the High Court a certificate that the case was a fit one for granting leave to appeal to His Majesty in Council. The present appeal was thereupon lodged.

At the hearing before the Additional Judicial Commissioners the arguments would appear to have covered a wide range and to have raised a number of interesting and important questions of law. Their Lordships do not, however, find it necessary to consider all these questions. It is in their opinion sufficient to dispose of this appeal if the two questions to which they have already called attention be decided, as in their Lordships' opinion they should be decided, in favour of the respondents. These two questions are (1) was the appeal to the Assistant Commissioner from the order of the 4th May, 1929, competent? (2) Had the Income-tax Officer any power to make that order in view of the provisions of Ss. 34 and 35 of the Act to which reference will presently be made?

These two questions are so closely related to one another that they can conveniently be considered together.

In order to answer them, it is essential to bear in mind the method prescribed by the Act for making an assessment to tax, using the word assessment in its comprehensive sense as including the whole procedure for imposing liability upon the tax-payer. The method consists of the following steps. In the first place the taxable income of the tax-payer has to be computed. In the next place the sum payable by him on the basis of such computation has to be determined. Finally, a notice of demand in the prescribed form specifying the sum so payable has to be served upon the tax-payer. The second of these steps involves the determination of two sums, namely, the sum payable for income-tax and the sum payable for super-tax. The notice of demand in the prescribed form also provides for the sums payable for income-tax and super-tax being specified separately. Considerable dis-

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cussion accordingly took place before the High Court on the question whether a demand for super-tax in order to be valid ought to be made simultaneously with the demand for income-tax. Aston, A.J.C., considered that the demand for super-tax should be made within a reasonable time of the assessment for income-tax, meaning, no doubt, by assessment the service of the notice of demand for income-tax which normally completes the assessment. Rupchand Bilaram, A.J.C., was of opinion that the demand for super-tax should be made within a reasonable time, and therefore almost simultaneously with the demand for income-tax. Both of them held for this reason (amongst others) that the service of the notice of demand of the 4th May, 1929, was illegal and inoperative to impose liability upon the respondents. Their Lordships do not find it necessary to express any opinion upon this point inasmuch as in their view and for the reasons which they will now proceed to give it does not call for determination in the present case.

It had been argued on behalf of the appellant that the Act nowhere imposes any limit of time within which an assessment under the provisions of Ss. 23 and 29 is to be made, and that the service of the notice of demand can, therefore, be made at any time. This is true. It had, in effect, been so determined by this Board in the case of *Rajendra Nath Mukerjee* v. *Income-tax Commissioner*[1]. But it is not true that after a final assessment under those sections has been made the Income-tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time.

It is possible that the final assessment may not be made until some years after the close of the fiscal year. Questions of difficulty may arise and cause considerable delay. Proceedings may be taken by way of appeal and cause further delay. Until all such questions are determined and all such proceedings have come to an end, there can be no final assessment. But when once a final assessment is arrived at, it cannot, in their Lordships' opinion, be reopened except in the circumstances detailed in Ss. 34 and 35 of the Act (to which reference is made hereafter), and within the time limited by those sections. In the present case the liability of the respondents both for income-tax and for super-tax was determined by the income-tax officer

1. (1933) 66 M.L.J. 121: L.R. 61 I.A. 10: I.L.R. 61 Cal. 285 (P.C.).

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on the 17th January, 1927. In the order made by him on that date he assessed the respondents to income-tax at the maximum rate, but, as the respondents were at that time a registered firm, he held, as he was bound to hold, that no super-tax was to be levied. On some date before the end of March, 1927, he served on the respondents a notice of demand for the tax that he had determined was properly leviable. The assessment having been made under S. 23 (4), no appeal lay in respect of it. The assessment of the respondents was therefore final both in respect of income-tax and super-tax. Their liability in respect of both taxes had been finally determined, and none the less because the question of their liability to super-tax had been determined in their favour. It was, indeed, contended before their Lordships that the assessment could not be regarded as having been determined inasmuch as the Commissioner might at any time, and apparently after any lapse of time however long, cancel the registration of the respondents as a registered firm and so subject the respondents to liability to pay super-tax. Their Lordships would, in any case, hesitate long before acceding to a contention that would lead to such extravagant results. In their opinion, however, the contention cannot prevail. The Commissioner's powers under S. 33 can only be exercised subject to the provisions of the Act, of which the provisions in Ss. 34 and 35 are in this respect of the greatest importance. These sections are or were at the material time as follows:—

"34. If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year, or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-S. (2) of S. 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

"Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be.

"35.—(1) The Income-tax Officer may, at any time within one year from the date of any demand made upon an assessee, on his own motion rectify any mistake apparent from the record of the assessment, and shall within the like period rectify any such mistake which has been brought to his notice by such assessee:

"Provided that no such rectification shall be made, having the effect of enhancing an assessment unless the Income-tax Officer has given notice to the

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assessee of his intention so to do and has allowed him a reasonable opportunity of being heard.

"(2) Where any such rectification has the effect of reducing the assessment, the Income-tax Officer shall make any refund which may be due to such assessee.

"(3) Where any such rectification has the effect of enhancing the assessment, the Income-tax Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be issued under S. 29, and the provisions of this Act shall apply accordingly."

In view of these express provisions of the Act, it is, in their Lordships' opinion, quite impossible to suppose that the income-tax officer may in every kind of circumstance and after any lapse of time make fresh assessments or issue fresh notices of demand; or that the Commissioner can direct him so to do. In their Lordships' opinion, the provisions of the two sections are exhaustive, and prescribe the only circumstances in which and the only time in which such fresh assessments can be made and fresh notices of demand can be issued. In the present case it is a debatable question whether the circumstances were such as to bring it within the provisions of S. 34. It is not necessary to determine that question inasmuch as, in their Lordships' opinion, the case clearly would have fallen within the provisions of S. 35 had the income-tax officer exercised his powers under the section within one year from the date on which the earlier demand was served upon the respondents. For, looking at the record of the assessments made upon them as it stood after the cancellation of the respondent's registration—and the order effecting the cancellation would have formed part of that record—it would be apparent that a mistake had been made in stating that no super-tax was leviable. The income-tax officer took no further step, however, until May, 1929, and by then he was hopelessly out of time whichever of the two sections was applicable.

Their Lordships are accordingly of opinion that the order of the 4th May, 1929, was one that the Income-tax Officer had no power to make, and that the second of the two questions to which they have referred must be answered in the negative. It necessarily follows that the first of those questions should be answered in the affirmative. For the order could only be justified, if at all, as one made, not under S. 23 (4), but under either S. 34 or S. 35. If it was made, as the Commissioner has found, in purported exercise of the powers given by

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S. 23 (4), the assessee nevertheless had a right of appeal to the Assistant Commissioner under S. 30, and the Commissioner was in error when he quashed the proceedings on that appeal. For, as was truly said by Sir Shadi Lal in the case of *Duni Chand* v. *Commissioner of Income-tax*[1]:

"The mere fact that the assessment purports to have been made under that sub-section does not shut out the appeal; it must be shown that the circumstances of the case bring it within the scope of that sub-section."

For these reasons, which do not differ substantially from the opinions expressed by the Court of the Judicial Commissioner, their Lordships are of opinion that the appeal should be dismissed with costs.

They will humbly advise His Majesty accordingly.

Solicitors for Appellant: *The Solicitor, India Office.*

Solicitors for Respondents: *T.L. Wilson & Co.*

R. C. C. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Kt., Chief Justice,* MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE VARADACHARIAR.

Mathukumalli Ramayya and others .. *Petitioners* (Petitioners in P. C. C. M. P. No. 89 of 1938 on the file of the High Court).*

*v.*

Vuppalapatti Lakshmayya .. *Respondent (Respondent in do.).*

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Ramayya *v.* Lakshmayya.

*Civil Procedure Code (V of 1908 as amended by Act XXVI of 1920), O. 45, r. 7—Privy Council appeal—Time limit for furnishing security and making deposit—Extension—Power of Court—Judicial Committee Rules (1920), r. 9—Effect.*

The High Court has power under r. 9 of the Judicial Committee Rules to extend the period allowed for furnishing the security and the making of the deposit required by O. 45, r. 7, Civil Procedure Code, beyond the periods mentioned therein, but the power should not be exercised without cogent reasons.

*Nilkanth Balwant* v. *Vidya Narsinha Bharati,* (1927) I.L.R. 51 Bom. 430 (F.B.), followed.

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1. (1929) I.L.R. 10 Lah. 596 at 601 (F.B.).

* C. M. P. No. 1439 of 1938. 12th April, 1938.

*Poornananthachi* v. *Gopalaswami Odayar*, (1932) 62 M.L.J. 665: I.L.R. 55 Mad. 835, overruled.

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Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to enlarge the time for making the deposit for security for costs in P. C. C. M. P. No. 89 of 1938 in Appeal Nos. 571 of 1931 and 260 of 1932 on the file of the High Court.

The Civil Miscellaneous Petition came up in the first instance before their Lordships Varadachariar and Pandrang Row, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

There is a conflict of decisions both in this Court and in the other High Courts as to the power of the Court to grant an extension of time beyond the period of six weeks provided for in O. 45, r. 7 of the Code of Civil Procedure. In view of the observation in *Poornananthachi* v. *Gopalaswami Odayar*[1] we think it proper that this question should be decided by a Full Bench.

On this reference the case came up before the Full Bench as constituted above.

*K. Kameswara Rao* for Petitioners.

*B. Somayya* and *M. S. Ramachandra Rao* for Respondent.

The Full Bench expressed the following

OPINIONS. *The Chief Justice.*—The question which has been referred is whether in an appeal to His Majesty in Council the Court has power to extend the time for furnishing the security and making the deposit required by O. 45, r. 7 of the Code of Civil Procedure beyond the periods mentioned therein. The rule provides that where the certificate permitting the appeal is granted the applicant shall furnish the security and make the deposit within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date. The words: Leach, C. J.

"within ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow"

were substituted for the words "within six months" by Act XXVI of 1920. The amendment was made in order to

1. (1932) 62 M.L.J. 665: I.L.R. 55 Mad. 835.

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expedite appeals to the Privy Council by restricting the Court's discretion to extend the time. Up to then it had been the uniform practice in the Courts in India to grant extensions of time and it would appear that the impression had been created that they had been too lenient when dealing with such applications. The rule as it stood before the amendment was regarded by the Privy Council itself as being merely directory, although it had intimated that it should not be departed from without cogent reasons: *Burjore and Bhawani Pershad* v. *Mussumat Bhagana*[1].

Since the amendment there has been a conflict of judicial opinion on the question whether the amended rule has the effect which the legislature intended it to have. The conflict has arisen by reason of the provisions of r. 9 of the rules framed by the Privy Council and S. 112 of the Code of Civil Procedure. R. 9 reads as follows:—

> "Where an appellant, having obtained a certificate for the admission of an appeal, fails to furnish the security or make the deposit required (or apply with due diligence to the Court for an order admitting the appeal), the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate for the admission of the appeal, and may give such directions as to the costs of the appeal, and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises, as in the opinion of the Court the justice of the case requires."

S. 112 (1) (*b*) of the Code of Civil Procedure states that nothing in the Code shall be deemed:

> "To interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee."

Stated broadly the conflict is this: Some Judges have regarded the amendment of O. 45, r. 7 of the Code of Civil Procedure as constituting an over-riding statutory prohibition of extension beyond sixty days after the initial period of ninety days, while other Judges have considered that r. 9 of the Privy Council Rules governs the situation by reason of S. 112 of the Code and still leaves the granting of time a matter of discretion.

In *Nilkanth Balwant* v. *Vidya Narsinha Bharati*[2], a Full Bench of the Bombay High Court expressed itself strongly in favour of the view that r. 9 has left the Court a

1. (1883) L.R. 11 I.A. 7: I.L.R. 10 Cal. 557 (P.C.).
2. (1927) I.L.R. 51 Bom. 430 (F.B.).

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discretion in the matter. The question was referred to a Full Bench as Shah, J. and Fawcett, J., had disagreed, Shah, J., being of the opinion that the Court had still power to extend the time for cogent reasons, while Fawcett, J., considered that the amendment of O. 45, r. 7 in 1920 restricted any extension beyond sixty days after the ninety days had expired. The Full Bench consisted of Marten, C. J. and Crump and Patkar, JJ., and they were unanimous in adopting the opinion of Shah, J. After pointing out that there was no express penalty provided by O. 45, r. 7, for failure to furnish the security and to make the required deposit, Marten, C. J., observed that as there was an inconsistency between O. 45, r. 7 and r. 9 of the Privy Council Rules, the Privy Council rule must prevail by virtue of the provisions of S. 112. On this basis the Court granted an extension beyond the additional period of sixty days. The appeal was in due course heard by the Privy Council and the judgment of their Lordships is reported in Vol. 54 of the Bombay series of the Indian Law Reports, commencing at page 495. The judgment, however, makes no reference to the action of the Bombay High Court in extending the time.

*Nilkanth Balwant* v. *Vidya Narsinha Bharati*[1] was considered by Beasley, C. J. and Curgenven, J., in *Poornananthachi* v. *Gopalaswami Odayar*[2], but they found themselves unable to share the opinion of the Bombay High Court. Beasley, C. J., considered that r. 9 of the Privy Council rules gave nothing more than the right to cancel the certificate, but if it could be read as giving the Court power to extend the time, the extension could not exceed the sixty days provided by O. 45, r. 7. The learned Chief Justice did not imagine that r. 9 was to have a different effect from O. 45, r. 7, as r. 9, and the amendment to O. 45, r. 7 came into effect on the same date (1st January, 1921). Curgenven, J., delivered a separate judgment to the same effect. In *Kachi Reddi Nagi Reddi* v. *Saki Reddi*[3], Oldfield and Ramesam, JJ., also held that the Court had no power to extend the time beyond the sixty days, but this decision was before the decision in *Nilkanth Balwant* v. *Vidya Narsinha Bharati*[1] and Ramesam, J., later changed his opinion. In *Ramakrishna Iyer* v. *Parameswara Iyer*[4], Reilly and

1. (1927) I.L.R. 51 Bom. 430 (F.B.).
2. (1932) 62 M.L.J. 665 : I.L.R. 55 Mad. 835.
3. (1922) 18 L.W. 29.
4. C.M.P. No. 3644 of 1931.

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Anantakrishna Aiyar, JJ., followed *Nilkanth Balwant* v. *Vidya Narsinha Bharati*[1] and their decision was accepted by Ramesam, J., sitting with Madhavan Nair, J., in *Kileru Rama Kottiah* v. *Dharmabotla Subramanya*[2].

The only decision of the Calcutta High Court to which we have been referred to is that of *Raj Kumar Govind Narain Singh* v. *Shamlal Singh*[3] where Rankin, C. J. and Ghose, J., expressed the opinion that r. 9 of the Privy Council rules did not empower the High Court to grant an extension beyond sixty days. The Bombay decision is not referred to in the judgment and presumably was not considered. The Allahabad High Court has also decided that there is no power of extension beyond the sixty days: *Ram Dhan* v. *Prag Narain*[4] and *Bahadur Lal* v. *Judges of the High Court at Allahabad*[5]. The latter case was decided by a Full Bench consisting of Mukerji, A.C.J. and King and Niamatullah, JJ. Mukerji, A.C.J. and King, J., were of the opinion that there was no discretion left in the Court after the expiration of the sixty days, while Niamatullah, J., held that there was. King, J., considered that r. 9 could be read as applying to a failure to comply with an order falling within the maximum period allowed by O. 45, r. 7 and Mukerji, A.C.J., agreed with him. Niamatullah, J., did not consider that O. 45, r. 7 necessarily implied that the Court had no power to grant an extension for more than sixty days, but assuming that it did conflict with r. 9 he agreed with the opinion of the Bombay High Court that the latter rule prevailed. The Patna and the Lahore High Courts have also held that there is no power to extend the time beyond the sixty days: *Sri Kamala Kanta Singh Manki* v. *Bindhumukhi Dassi*[6] and In re *Munna Lal* v. *Gajraj Singh*[7]. The Lahore High Court considers that the words "make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires" are intended to cover merely incidental orders necessitated by the cancellation of the certificate.

I have already pointed out that in amending O. 45, r. 7 the Legislature intended to limit the discretion of the Court in granting further time to a maximum period of sixty days beyond the ninety days which the applicant has of right—there

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1. (1927) I.L.R. 51 Bom. 430 (F.B.).
2. C.M.P. No. 4993 of 1931.
3. (1936) 39 C.W.N. 651.
4. (1921) I.L.R. 44 All. 216.
5. (1933) I.L.R. 55 All. 432 (F.B.).
6. A.I.R. 1929 Pat. 431.
7. A.I.R. 1935 Lah. 733.

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would be no reason for the amendment otherwise—and I am of the opinion that the words of amendment effect their object so far as the Code is concerned. Therefore, if O. 45, r. 7 stood alone I should have no hesitation in holding that the Court had no discretion to grant time beyond the further period of sixty days. But if there is conflict between the Code and the Privy Council rules the rules must prevail. S. 112 of the Code says so in very plain language. Consequently the question is reduced to this: Does r. 9 of the Privy Council rules give a discretion to the Court to extend the time? If it does, nothing in O. 45, r. 7 can take away that discretion. In my opinion r. 9 does leave a discretion in the Court and therefore must prevail over O. 45, r. 7. I read r. 9 in this way. On failure by the applicant for leave to appeal to the Privy Council to furnish the security or make the deposit the Court has two courses open to it. It may cancel the certificate and pass consequential orders or it may instead of cancelling the certificate make such "other" order as it considers requisite. If it does not cancel the certificate the only other order it can pass is to extend the time for furnishing security or making the deposit, or doing both, as the case may be. The furnishing of security and the making of the deposit are conditions which must be complied with before the appeal can be lodged in the Privy Council. It must be cancellation or extension.

We have been asked to hold that the words "make such further or other order in the premises, as in the opinion of the Court the justice of the case requires," are to be read with the words "may give such directions as to the costs of the appeal, and the security entered into by the appellant as the Court shall think fit", but with respect to the judicial opinion which has supported this construction I consider its acceptance would mean violating the plain meaning of the rule.

It is very desirable to guard against delay in the prosecution of appeals to the Privy Council and it is unfortunate that there should be this conflict between O. 45, r. 7 and r. 9 of the Privy Council rules, but at the same time I do not think that it is of much practical importance. With the amendment of O. 45, r. 7, before it, the Court is not likely to grant more than sixty days beyond the initial ninety days, unless the circumstances are very exceptional.

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For the reasons indicated I would answer the reference in this way. The Court has power under r. 9 of the Privy Council rules to extend the period allowed for furnishing the security and the making of the deposit required by O. 45, r. 7 beyond the periods mentioned therein, but the power should not be exercised without cogent reason.

*Madhavan Nair, J.*—I agree.

*Varadachariar, J.*—I agree.

This petition coming on for hearing before the Division Bench after the expression of the above opinion of the Full Bench, the Court made the following

ORDER.—The Full Bench have laid down that the Court can grant an extension of time but it must be for cogent reason. A number of affidavits, counter-affidavits and reply affidavits have been filed before us. They disclose a certain amount of conflict but certain main facts are beyond dispute. The learned counsel for the petitioners has told us that he received intimation by trunk phone from his clients in the mofussil on the 10th March, 1938, that they were in a position to make the deposit but as the time had expired by that date he was asked for advice as to what they ought to do. He replied to them to come over to Madras immediately. This they did but it was too late on the 11th when they arrived to file the petition for extension that day. This petition was accordingly filed on the 12th March, 1938. We accept these statements made by the petitioners' Counsel and according to them the real delay is only of four days. There is also the fact that the petitioners are a large number, who, in different sets, are interested in small portions of the subject-matter of the appeal. It is not unreasonable that they should come to some arrangements between themselves in the matter of the deposit. The mere fact that one or some of them could have made the deposit is not the reasonable test to be applied.

In view of the special circumstances of the case, we excuse the delay. As it is late to-day and to-morrow is a holiday, we extend time till Thursday, the 14th instant. The petitioners will however pay to the respondent the costs of this petition.

B.V.V. *Order made.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE STODART.

Durairangam Pillai .. *Appellant** *(2nd Defendant)*

*v.*

Govindarajulu Naidu and another .. *Respondents (Plaintiff and Nil).*

Durairangam Pillai *v.* Govindarajulu Naidu.

*Civil Procedure Code (V of 1908), S. 149 and O. 7, r. 11—Presentation of plaint on the last day of period of limitation—Nominal court-fee of one rupee paid—Return of plaint allowing two weeks' time for paying deficient court-fee—Application at the end of two weeks for a further two weeks' time—Grant of request by the Court—Required court-fee paid at the end of two weeks—Suit if barred.*

A plaint was presented on the last day of the period of limitation with a one rupee stamp thereon. It was returned with an endorsement giving two weeks' time for payment of the deficient court-fee. Two weeks after it was re-presented praying for a further two weeks' time to comply with the requirements. This was granted the next day and at the end of the two weeks it was re-presented paying the required court-fee.

*Held,* that reading O. 7, r. 11 with S. 149, Civil Procedure Code, the suit is not in the circumstances barred by limitation.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 28 of 1931.

*K. S. Krishnaswami Iyengar* and *S. V. Venugopalachari* for Appellant.

*K. Bhashyam* and *K. Venkataramani* for Respondents.

The judgment of the Court was delivered by

Madhavan Nair, J.

*Madhavan Nair, J.*—Second defendant is the appellant. He is the surviving son of one Ramaswami Pillai who died in October, 1926. The plaintiff instituted a suit against the appellant and his brother for the recovery of a sum of Rs. 5,250 for principal and interest due on a promissory note dated 4th October, 1925, executed by their late father. The promissory note was for Rs. 3,750. The plaintiff's case is that the money was lent to Ramaswami Pillai and that the promissory note was executed by him at Tanjore between 8 and 9 A.M., on 4th October, 1925. The promissory note recites that the money was borrowed by the deceased for his contract business. The deceased was a P.W.D. and Abkari Contractor, on a large scale with his headquarters at Cuddalore in the South Arcot

* Appeal No. 248 of 1932. 29th November, 1937.

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District. The appellant and his brother contended that the promissory note was a forgery, that their father had no necessity to borrow money and that the plaintiff had no means to lend the money. They also contended that the suit was barred by limitation.

The lower Court held that Ramaswami Pillai executed the suit promissory note and borrowed money thereunder from the plaintiff. It also held that the suit was not barred by limitation. We will first deal with the case on the merits and then deal with the question of limitation.

[His Lordship then discussed the evidence and held "that the suit note is genuine, and it was executed by the deceased Ramaswami Pillai, father of the defendants".]

The next point for decision is whether the suit is barred by limitation. The facts relating to this point are as follows. The plaint was presented on 4th October, 1928, the last day of the period of limitation, with a one rupee stamp thereon. It was returned with an endorsement on 5th October, 1928, giving two weeks' time for payment of the deficient court-fee. It was re-presented on 19th October, 1928, praying for a further two weeks' time to comply with the requirements. It was granted on 20th October, 1928, and the plaint was re-presented on 3rd November, 1928, paying the required court-fee. Full court-fee having been paid only on 3rd November, 1928, it is argued that in the circumstances the suit is barred by limitation. O. 7, r. 11 (*c*), Civil Procedure Code, suggests that the Court may admit a plaint though it is written on paper insufficiently stamped if the plaintiff on being required by the Court supplies the requisite stamp paper within the time allowed by it. That is what has been done in this case. Under the Code of 1882 there was a conflict of decisions on this point. This conflict has now been set at rest by the enactment in the new Code of S. 149 which runs as follows:

"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

It follows from this section that when in circumstances like the present the deficient court-fee was paid and accepted

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by the Court the document should have the same effect as if the court-fee had been paid in the first instance, that is, on the date when the plaint was first presented. This date was before the expiry of the period of limitation though it was on the last day of the period. We must therefore hold that the suit is not barred by limitation. The whole point is very clearly considered in Mullah's Commentaries on the Code of Civil Procedure in Point No. 3 under clause (*c*) of O. 7, r. 11, to which reference may be made in this connection. As in the circumstances of this case no question of limitation arises, the decision in *Krishnasami Panikondar* v. *Ramasami Chetty*[1] relied on by the appellants' learned Counsel does not apply. We may also draw attention to the decision in *Priyanath* v. *Meajan*[2] which says that discretion exercised by the Court below according permission for paying the deficient court-fee should not be interfered with by a Court of appeal. Reading O. 7, r. 11 with S. 149 of the Code of Civil Procedure, it is clear that the contention that the suit is barred by limitation should be overruled.

For the above reasons the appeal fails on both the points argued before us and is dismissed with costs.

S. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

N. Kayambu Pillai .. *Appellant* (Respondent in C.M.P. Nos. 3458 and 3459 of 1937 in Appeal No. 343 of 1931 on the file of the High Court)*

*v.*

Lakshmi Ammani Ammal by Guardian *ad litem* the Manager of Court of Wards for Marungapuri Estate .. *Respondent (Petitioner in do.).*

Kayambu Pillai v. Lakshmi Ammani Ammal.

*Civil Procedure Code (V of 1908), O. 33, r. 5 (c), r. 9 (c)—Appeal* in forma pauperis—*Representative of plaintiff continuing the appeal—Agree-*

1. (1917) 34 M.L.J. 63: L.R. 45 I.A. 25: I.L.R. 41 Mad. 412 (P.C.).
2. (1915) 24 C.L.J. 88.

* L. P. A. Nos. 107 and 108 of 1937. 4th January, 1938.

Kayambu Pillai *v.* Lakshmi Ammani Ammal.

*ments entered into by which the representative benefited—Whether coming within O. 33, r. 5 (c)—Meaning of word 'plaintiff' in r. 9 (c).*

Where the appellant, a representative of the plaintiff in appeal *in forma pauperis* entered into agreements by which he received benefit and the objection was that the appellant obtained an interest in the subject-matter of the litigation within the meaning of the cl. (*e*), O. 33, r. 5, Civil Procedure Code.

*Held*, (1) that the provisions in this order are intended to aid a pauper suing for his own benefit, but not to enable an ostensible pauper to figure as plaintiff, when in the fruits of litigation a third party has been given an interest. The only responsible way of construing the word 'interest' is to hold that it is used in its general and ordinary sense and not in the technical sense that unless by reason of the agreement, a transferee or assignee is brought into existence, who is a mortgagee or co-owner or charge-holder the section will have no application.

*Manohar Ramchandra* v. *Lakshman Mahadev,* (1885) I.L.R. 9 Bom. 371 and *Sivarama Aiyar* v. *Ahilambal Ammal,* (1937) 46 L.W. 649, followed.

(2) That the word 'plaintiff' appearing in cl. (*c*), r. 9 of O. 33 means the 'plaintiff or his representative'; otherwise the section will lead to an absurdity.

Appeal under cl. 15 of the Letters Patent from the order of the Hon'ble Mr. Justice Horwill dated 4th November, 1937, and made in Civil Miscellaneous Petition No. 3458 of 1937 to direct the respondent therein to furnish security for costs for Rs. 8,000 being the probable costs in Appeal No. 343 of 1931 on the file of the High Court (O. S. No. 71 of 1928, Sub-Court, Trichinopoly) and the costs in the lower Court.

*C. S. Venkatachariar* for *S. Sundaresa Aiyar* and *C. R. Pattabhirama Aiyar* for Appellant.

*K. Kuttikrishna Menon* for Respondent.

*L. P. A. No. 108 of 1937.*

The judgment of the Court was delivered by

Venkatasubba Rao, J.

*Venkatasubba Rao, J.*—Horwill, J., made an order dispaupering the appellant and its correctness is questioned in this Letters Patent Appeal.

The suit was filed by one Duraiswami in 1928 against the Court of Wards for the recovery of Marungapuri estate. He was allowed to institute the suit *in forma pauperis,* and died in 1929, and was succeeded by his son Ponnuswami, who brought himself on the record and continued the action. The suit was dismissed in 1930. Ponnuswami was allowed to file the appeal as a pauper and died in 1935 during its pendency. The present appellant Kayambu Pillai, being the executor under Ponnuswami's will was then brought on the record as his legal representative. The petition in question was filed by the Court of Wards to dispauper the appellant on the ground that his predecessors in interest, *i.e.*, Duraiswami and Ponnuswami

had entered into certain agreements of the kind contemplated by cl. (*e*) of O. 33, r. 5, Civil Procedure Code.

The first question that arises is, whether the agreements, having regard to their nature, fall within the provision above mentioned, in other words, does a third party obtain under them an interest in the subject-matter of the action? The agreements referred to were executed in favour of this very Kayambu Pillai. Besides these agreements, there were also in his favour two powers of attorney. The effect of these transactions was, that Kayambu Pillai was to be the agent, first of Duraiswami, and then of Ponnuswami, for conducting the litigation, receiving in the first instance, a salary of Rs. 1,000 a month—to be increased to Rs. 2,000 after possession of the estate was obtained. He had the right to remain as agent for a period of 25 years, this period, as Horwill, J., points out

> " being sufficient not only to carry the appellant over the present litigation but to enable him to continue in possession of the estate and the collection of its moneys for a considerable time after the zamindari was recovered —if the litigation should prove successful."

Under Ponnuswami's will, though the appellant appears in the guise of an executor, he gets as legacy about nine lakhs, which presumably represents the aggregate amount payable to him under the original contracts. The will also shows that the appellant's predecessors had stipulated to pay some advocate about one and a half lakhs for his services. The estate is devised eventually in favour of the appellant's son.

On these facts the question arises, as already stated, does Kayambu Pillai under the agreements referred to above obtain an interest in the subject-matter of the litigation within the meaning of cl. (*e*) of O. 33, r. 5, Civil Procedure Code. Mr. Venkatachari for the appellant contends that nothing is an "interest" under this section, which does not amount to such, under the combined effect of the provisions of the Transfer of Property Act and the Registration Act. This contention is totally opposed to, and frustrates the intention of the section. The contention really amounts to this: unless by reason of the agreement, a transferee or assignee is brought into existence, who is a mortgagee or co-owner or charge-holder, the section will have no application. The provisions in this order are intended to aid a pauper suing for his own benefit, but not to enable an ostensible pauper to figure as plaintiff, when in the

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fruits of the litigation, a third party has been given an interest. The only responsible way of construing the word 'interest' is to hold that it is used in its general and ordinary sense and not in the technical sense ascribed to it by the appellant's counsel. This has been so held by Sargent, C.J., and Birdwood, J., in *Manohar Ramchandra* v. *Lakshman Mahadev*[1] where a similar contention was repelled. The judgment is short, but it rejects the contention that the interest must be a vested and completed interest under the section. In a recent decision (*Sivarama Aiyar* v. *Ahilambal Ammal*[2]) to which one of us was a party the same view was taken. Several cases have been referred to where this principle has been tacitly accepted and Mr. Venkatachari has not been able to point to a single decision in his favour.

The next argument turns upon the meaning of the wording of cl. (*c*), r. 9 of O. 33, Civil Procedure Code, the material portion of which reads thus:—

> " The Court may on the application of the defendant order the plaintiff to be dispaupered, if he (the plaintiff) has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter."

The argument is that this section can apply only to the party who has entered into the agreement. In both the places where the word 'plaintiff' occurs, it means either the original plaintiff or his representative; it would be wrong to make the 'plaintiff' in one place mean the original party and in the other, his representative. The short answer to this is undoubtedly what is suggested by Mr. Kuttikrishna Menon; in both the places the word 'plaintiff' means 'the plaintiff or his representative'; otherwise the section will lead to an absurdity. Any other construction will make the dispaupering of the representative impossible, where the original plaintiff entered into the agreement. In other words, by reason of the death of the plaintiff his representative would be in a better position than himself, an anomaly which, by a reasonable construction can be prevented.

In the result, the appeal fails and is dismissed with costs.

*L. P. A. No. 107 of 1937.*

The order of Horwill, J., directing the appellant to furnish security is perfectly right. There is no reason why

1. (1885) I.L.R. 9 Bom. 371.   2. (1937) 46 L.W. 649.

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we should interfere with the exercise of his discretion. The appeal fails and is dismissed with costs.

K. C. —— *Appeals dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Sankara Mining Syndicate, Ltd., Nellore, by its Managing Agent R. Pattabhirama Reddi (*vide* Affidavit filed along with appeal) and another .. *Appellants* (Plaintiff and another)*

*v.*

The Secretary of State for India in Council represented by the Collector of Nellore and others .. *Defendants (Defendants 1 and 2 and nil).*

Sankara Mining Syndicate Ltd., Nellore v. Secretary of State for India in Council.

*Lease—Mining lease—Mining Rules, rr. 4 and 46—Authority to grant lease—Delegation to the Board of Revenue by the Local Government—Board of Revenue refusing to grant lease—Interference by Local Government—If* ultra vires*—Appeal to Government of India—Cancellation of the Local Government order—Legality—Government of India Act (1919), S. 45—No formal lease by Collector—Right to specific performance against Secretary of State—Rule framed by Government of India under S. 30 (2) of the Government of India Act—Right of appointment in r. 46—If amounts to vested right.*

In respect of a certain area the Board of Revenue refused to grant a mining lease. The Local Government interfered with the above order of the Board and directed it to assign it to a particular party *A*. The Board then passed an order granting lease to *A*. Meanwhile, another party *B* appealed to the Government of India, who cancelled the order of the Local Government on the ground that it was *ultra vires*. The Board of Revenue then granted a lease to *B*. *A* filed a suit for a decree cancelling the lease to *B* and granting one to him (*A*).

The authority of the Local Government, to grant mining leases had been delegated to the Board of Revenue under r. 4 of the Mining Rules.

*Held*, that the statutory authority to grant mining rules passed from the Local Government to the Board of Revenue by the order made under r. 4. So the Local Government had no power to reverse the order of the Board of Revenue. The order of the Government of India setting aside the Local Government's order is *intra vires* under S. 45 of the Government of India Act (1919).

* Appeal No. 346 of 1932. 11th February, 1938.

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As no formal lease had been executed by the Collector in accordance with the rules framed by the Government of India under S. 30 (2) of the Government of India Act, 1919, there was no valid and enforceable contract entered into by the Local Government with *A*. Hence *A* is not entitled to a decree for specific performance on the strength of the order of the Board of Revenue. The words 'right of the applicant' in r. 46 of the Mining Rules cannot be read as a recognition of a vested right in him.

Appeal against the decree of the Court of the Subordinate Judge of Nellore in O. S. No. 67 of 1929.

*S. Srinivasa Aiyangar* and *B. Jagannadha Das* for Appellants.

*The Government Pleader* (*K. S. Krishnaswami Aiyangar*) for 1st Respondent.

*The Advocate-General* (*Sir A. Krishnaswami Aiyar* and *K. Umamaheswaran* for 2, 3 and 4 Respondents.

The judgment of the Court was delivered by

Leach, C. J.

*The Chief Justice.*—This appeal arises out of a suit filed in the Court of the Subordinate Judge of Nellore by the appellant against the Secretary of State for India in Council (the first respondent) and Yettigadda Audemma (the second respondent), for a declaration that an order of the Local Government granting a mining lease to Yettigadda Audemma is illegal and for a decree for specific performance of a contract which he alleged had been entered into between him and the Local Government for a lease of the area in suit. In 1903 the Local Government granted a mining lease of the area known as Survey No. 499 to one R. V. Kuppuswami Aiyar. The lessee subsequently transferred this lease to the appellant company. In 1904 the Local Government granted a mining lease in respect of the area known as Survey No. 500 to Kalappa Chetti, the husband of the second respondent. Kalappa Chetti is now dead and the lease of this area has vested in the second respondent. From the second respondent's area a strip of land three furlongs in length and 133 feet in breadth, lying on the boundary of Survey No. 499, was excluded from Kalappa Chetti's lease. This area has been referred to as the "margin" and I will so refer to it in this judgment. The object in reserving the margin was to prevent disputes between the two lessees. On the 5th August, 1923, the appellant company applied to the Collector for a lease of the margin. A similar application was filed by the second respondent on the 4th September, 1923. The Collector considered both the

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petitions and by an order dated the 1st October, 1923, rejected them as he was of the opinion that it was not desirable to grant a lease of the margin to either of them. The second respondent appealed against this order to the Board of Revenue, which confirmed the Collector's order on the 8th November, 1924. The second respondent then preferred an appeal to the Local Government, which by an order dated the 31st July, 1925, granted her petition. The appellant company was dissatisfied with this decision and applied to the Local Government to reconsider it and to grant the area to the appellant company. The Local Government did consider the matter and decided to cancel the lease of the margin to the second respondent on the ground that its previous order was *ultra vires* and had been passed without full knowledge of the fact that the second respondent, or her predecessors in title, had undermined the margin of the land to a considerable extent and had extracted mica therefrom. The Local Government left it to the Collector to determine whether any portion of the margin should be leased and, if so, to whom.

On the 15th March, 1926, the second respondent filed another petition asking that a lease of the margin be granted to her, and two days later the appellant company applied. The Sub-Collector thereupon held an inquiry into the matter and found that there had in fact been encroachment by the second respondent after the Collector's order of the 1st October, 1923. He was, however, unable to ascertain the extent of the encroachment that had taken place and therefore recommended that the Collector should allot a moiety of the margin to each of the petitioners, leaving a strip of 10 feet in breadth between the two holdings. The Collector accepted this recommendation, but the parties were dissatisfied with it and further appeals were preferred to the Board of Revenue. By an order dated the 7th February, 1927, the Board of Revenue reversed the Collector's order and directed that neither party should be given any portion of the margin. The appellant company appealed against the Board's order to the Local Government, which by an order dated the 7th May, 1927, directed that the margin should be given to the appellant company after the reservation of a strip of five links lying on the second respondent's boundary. The Local Government considered that the second respondent had forfeited any claim to consideration.

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In pursuance of this direction of the Local Government, the Collector on the 27th March, 1927, passed a formal order directing that the margin originally excluded from Survey No. 500 should be assigned to the appellant company, after reserving a strip of five links as suggested in the order of the Local Government. The order of the Collector was communicated to the appellant company on the 10th June, 1927, and the appellant company was required to deposit in the Treasury a sum of Rs. 3 as a sketch fee and Rs. 100 by way of security deposit. Before the order of the Collector of the 27th March, 1927, could be complied with the second respondent appealed to the Government of India and asked the Local Government for a stay of all proceedings pending the receipt of the order of the Government of India. The stay was granted on the 20th July, 1927. The orders of the Government of India were communicated to the Board of Revenue in a letter dated the 14th June 1928. In this letter the Government of India expressed the opinion that as the power to grant mining leases had been delegated to the Board of Revenue, the Local Government could not interfere with the Board's orders so long as the Board had acted, whether by granting a lease or refusing to grant a lease, and that the Local Government could not direct the Board to grant a mining lease to a particular person. All that the Local Government could do was to give a direction to the Board of Revenue that a particular area should be assigned on a mining lease. In view of this decision the order passed by the Local Government directing the Board of Revenue to assign to the appellant company the area was *ultra vires* and was accordingly cancelled. In accordance with this order of the Government of India the Board of Revenue on the 11th October, 1928, granted a lease of the margin to the second respondent, leaving a strip of five links as visible boundary between the two areas. On the 4th December, 1928, a formal lease of this area was granted to the 2nd respondent. The present suit was filed on the 11th October, 1928, for a decree cancelling the lease to the 2nd respondent and granting one to the appellant company. The trial Court found against the appellant company on all of its contentions and dismissed the suit.

Before us three arguments have been advanced in support of the appeal. In the first place, it is said that the Government

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of India exceeded its powers when it cancelled the order of the Local Government and left the matter open. In the second place, it is said that even if the Local Government was bound to obey the order of the Government of India, the order of the Board of Revenue dated the 27th May, 1927, granting the lease to the appellant company, amounted to an acceptance of an offer to take the lease on the usual terms and therefore there was a binding contract which entitled the appellant-company to a decree for specific performance. The third argument is that, even if there was no contract in law, the appellant company was entitled to the lease as the Mining Rules recognised that by virtue of the order of the 27th May, 1927, it had got a vested right in the margin.

The arguments involve the consideration of certain sections of the Government of India Act, 1919, and certain statutory rules. The Government of India Act, 1935, does not apply because the case concerns events which took place before that Act was placed on the Statute book. S. 28 (1) of the Act of 1919 states:—

"The Secretary of State in Council may, with the concurrence of a majority of votes at a meeting of the Council of India, sell and dispose of any real or personal estate for the time being vested in His Majesty for the purpose of the Government of India, and raise money on any such real (or personal) estate by way of mortgage (or otherwise) and make the proper assurances for any of those purposes."

S. 30 (1) provides that the Governor-General in Council and any Local Government may, on behalf and in the name of the Secretary of State in Council, and subject to such provisions or restrictions as the Secretary of State in Council with the concurrence of a majority of votes at a meeting of the Council of India, prescribe, sell and dispose of any real or personal estate vested in His Majesty for the purposes of the Government of India. Like powers are given for mortgaging and the granting of assurances. But it has to be borne in mind that with regard to the exercise of powers conferred on the Governor-General in Council or Local Government, the exercise must be on behalf of and in the name of the Secretary of State in Council. S. 30 (2) is in these terms:—

"Every assurance and contract made for the purposes of sub-S. 1 of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises, and if so executed may be enforced by or against the Secretary of State in Council for the time being."

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The only other section which this case is concerned with is S. 45 (1) which says:—

"Subject to the provisions of this Act and rules made thereunder, every Local Government shall obey the orders of the Governor-General in Council, and keep him constantly and diligently informed of its proceeding and all matters which ought, in its opinion, to be reported to him, or as to which he requires information and is under his superintendence, direction and control in all matters relating to the Government of its province."

This sub-section is very wide in its application.

The Government of India have framed certain rules regulating the grant of mining concessions, and the validity of these rules is not in question. Under R. 1 no mining lease can be granted by a Local Government otherwise than in accordance with the rules, except with the previous sanction of the Secretary of State for India in Council, or with that of the Governor-General in Council under any general or special authority which he may have received in this behalf from the Secretary of State in Council. R. 4 states that for the purpose of the rules the Local Government may, in provinces where there is a Board of Revenue, delegate to such authority all or any of the powers conferred on the Local Government by the rules. The authority of the Local Government to grant mining leases has been delegated to the Board of Revenue, and it was for this reason that the Government of India cancelled the order of the Local Government with regard to the margin. At one time it was thought that the Local Government had the power to revise the orders of the Board of Revenue and a note to this effect was inserted in the previous edition of "The Mining Manual". The deletion of this note was, however, directed by an order of the Local Government dated the 19th November, 1925, the Local Government recognising that it had not the power to revise.

The learned advocate for the appellant company contends that, inasmuch as the rule refers to delegation and not to devolution, the Local Government must be deemed to have still vested in it powers of granting leases, irrespective of the power granted in this behalf to the Board of Revenue. The acceptance of this contention would mean that in this province there would be two authorities with equal powers of granting leases. The learned Advocate for the appellant company would have it that the ordinary law of principal and agent must be applied. We are unable to accept this contention. In

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our opinion, the statutory authority to grant mining leases passed from the Local Government to the Board of Revenue by the order made under r. 4. The Local Government agrees with the Government of India that this is the effect of the order; and we see no ground for disputing this. Consequently we hold that the Local Government had no power to reverse the order of the Board of Revenue granting the lease to the second respondent. We are also of the opinion that the order of the Government of India setting aside the Local Government's order was *intra vires*. S. 45 gives the Government of India full power to interfere with the orders of the Local Government in matters of this nature. This disposes of the first argument.

With regard to the contention that a valid contract had been entered into by the Local Government with the appellant company and consequently the appellant company is entitled to a decree for specific performance, we have seen that by reason of S. 30 (2) of the Government of India Act, 1919, contracts have to be executed by the person and in the manner directed by the Governor-General in Council and until they are so executed they cannot be enforced by or against the Secretary of State in Council. The short answer to the second argument is that the Governor-General in Council has prescribed rules governing the execution of contracts with the local Government and they required a formal lease to be executed by the Collector. They have been framed in the exercise of the powers conferred by sub-S. 2 of S. 30, and are published in the Manual of Statutory Rules and Orders. Therefore, until a formal lease has been signed, there can be no enforceable contract against the Secretary of State in Council. The wording of the sub-section in my opinion leaves no room for any other construction; but, if authority is required it is to be found in the case of the *Municipal Corporation of Bombay* v. *Secretary of State for India in Council*[1] and in *The Secretary of State for India in Council* v. *The Chettyar Firm of S.R.M.M. R.M.*[2] In this case no lease was executed and therefore there is no enforceable contract. The third argument hardly calls for serious consideration. It is based on the fact that r. 46 of the Mining Rules states:—"If a lease is not

1. (1932) I.L.R. 58 Bom. 660 at 706.
2. (1926) I.L.R. 4 Rang. 291 at 300.

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executed within six months after leave has been granted for it, the right of the applicant to such lease shall be held to have lapsed, unless the Local Government for special reasons consents to grant the same notwithstanding the delay, or considers that the delay is not attributable to the applicant". Emphasis is laid on the words "right of the applicant". These words cannot be read as a recognition of a vested right. The effect of the rule merely is that if the applicant does not complete the contract within six months, the order directing the lease to issue will lapse unless the time is extended.

For these reasons we consider that the decision of the trial Court is right and the appeal must be dismissed with costs, one set to the first respondent and one set to the second respondent.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Rathnaswami Nadar and others .. *Appellants* (Defendants)*

*v.*

The Prince of Arcot's Endowments, Trichinopoly under the control of His Highness the Prince of Arcot, G. C. I. E., represented by his authorised agent Shamsul Ulama Moulvi Mohammad Abdur Rahman Sahib Bahadur 'Shakeer' .. *Respondent (Plaintiff).*

Rathnaswami Nadar *v.* Prince of Arcot's Endowments, Trichinopoly.

*Civil Procedure Code (V of 1908), O. 1, r. 8—Representative suit—Decree for mesne profits against defendants—Lands held by defendants under Karaiyedu tenure—Decree non-maintainable—Karaiyedu tenure, nature of.*

Where the defendants were sued under O. 1, r. 8, Civil Procedure Code, as representing a large number of villagers too numerous to be individually impleaded and from the facts it was clear that there was sufficient community of interest as to render the recourse to the r. 8 of O. 1 applicable but where the judge granted a decree for a consolidated sum as representing the mesne profits,

*Held*, that the Court was wrong in passing a decree for mesne profits as the law seems quite clean under the corresponding English rule that the procedure pertaining to representative suits is inapplicable to actions of debt, to money claims or to liabilities in contract or in tort.

* Appeals Nos. 324 of 1933 and 88 of 1934. 30th March, 1938.

*Hardie and Lane, Ltd.* v. *Chiltern*, (1928) 1 K.B. 663, followed.

The decree in this respect could not be maintained as against the named defendants, no attempt having been made to apportion the liability, as what had been found due was the amount supposed to be payable by the entire group.

A representative suit will lie as much in respect of a declaration as for an injunction.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. Nos. 84 and 109 of 1931.

*A. V. Narayanaswamy Aiyar* for Appellants.

*T. M. Krishnaswamy Aiyar* and *A. Balasubramania Aiyar* for Respondent.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

*Venkatasubba Rao, J.*—Mr. Narayanaswami Aiyar, the appellants' learned Counsel, set himself to the task of showing that the judgment is wrong from the judgment itself, as beyond the pleadings nothing has been printed. His contention, that the lower Court's view that the lands form part of an "estate", or that they answer the description of "old waste", is wrong, does not require serious notice, as we cannot discover from the judgment that the appellants had any sort of possession, whether under the Act or outside it—which would confer on them any legal right.

Then as to his next contention, the facts are briefly these: The defendants were sued under O. 1, r. 8, Civil Procedure Code, as representing a large number of villagers (about 150 in number) too numerous to be individually impleaded. In the plaint it is stated that in pursuance of a conspiracy, they combined in order to deny the plaintiffs' title and to take unlawful possession of the land. All that we need say is, that it does not appear from the judgment that this allegation has been made out. But we think on the facts as found, the plaintiffs were entitled to have recourse to O. 1, r. 8. The fact seems to be that the tenure obtaining in respect of the lands held by the defendants, is that which goes by the name of *karaiyedu*. Under that system the lands are temporarily cultivated in separate shares by the co-sharers and are subject to periodic re-distribution. The defendants' case, as may be inferred from the meagre record appears to be that in virtue of their holding certain other lands in the village under *karaiyedu* form, they are entitled to similar rights in the suit land. That is to say, the right of the whole community extends to the whole land and the right of each member is similar to

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the right of every other. We are therefore inclined to think that there is sufficient community of interest as to render the rule applicable. Even so, the lower Court in our opinion is wrong in passing a decree for mesne profits. Though the point is not covered by Indian authority, the law seems quite clear under the corresponding English rule, that the procedure pertaining to representative suits is inapplicable to *actions of debt, to money claims* or to *liabilities in contract or in tort.* The principle has been lucidly explained, and the authorities have been fully reviewed, by Fraser, J., in *Hardie and Lane, Ltd.* v. *Chiltern*[1] whose judgment has been upheld by the Court of Appeal. *Walker* v. *Sur*[2] is one of the several cases cited by the learned Judge. In a common law action of debt for professional services rendered, the plaintiff sued four named defendants on their behalf and on behalf of all other members of an incorporated religious society, most of the members of which resided abroad. *Buckley, L. J.*, observed in the course of his judgment in *Walker* v. *Sur*[2]:—

> "If this order had not been appealed, and the plaintiff had gone to trial and asked for judgment, what judgment could he have obtained? At the most an order against these four persons * * * *. But when he had obtained his judgment he could have had execution only against the share of these four persons in that property. There is nothing representative about that." (Page 935.)

Then the learned Lord Justice goes on to point out the distinction between an action for declaration and an action of debt:

> "The plaintiff has not asked for any declaration of right * * * * which, if affirmed in his favour, could be enforced against individual members of the class. He is only suing for money, for which he wants judgment against certain persons, and he wants by this order to be in a position to say that he is pursuing his remedy against persons who are not parties in the sense of being parties on the record. It is true that Mr. Lowenthal has disclaimed that if he got judgment in this action he could enforce it against a person who is not a party; but that is not the question for our determination. We have to determine whether this action ought to go on so as that execution could be maintained against all the persons represented. In my judgment that would be impossible." (Cited in *Hardie and Lane, Ltd.* v. *Chiltern*[1].)

*Sargent, L.J.*, while upholding the judgment of Fraser, J., in the case of *Hardie* already referred to, after adverting to two important decisions (one relating *to contract* and the other *to tort*) declares:—

1. (1928) 1 K.B. 663 at 684 and 685.
2. (1914) 2 K.B. 930.

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"The judgments of this Court in both these reported cases show decisively how impossible it is that the named defendants can adequately represent for the purposes of defence the different individual members of the Association, since these individuals may obviously have defences separate and distinct from those of the named defendants and of each other." (Page 699.)

In the present case the Judge has granted a decree for a consolidated sum as representing the mesne profits. It is to be held that each individual of the 150 odd villagers is liable for mesne profits in respect of the entire land, although under the *Karaiyedu* form of enjoyment, no ryot is in occupation of more than a fractional share of the whole land. The injustice of such a decree is obvious and the principle of the English decision already quoted clearly applies. Nor can the decree in this respect be maintained as against the named defendants, no attempt having been made to apportion the liability, as what has been found due is the amount supposed to be payable by the entire group. We say nothing as to the plaintiffs' right to recover mesne profits, future or subsequent, in any separate proceeding; with that we are not concerned and we express no opinion on that matter.

In so far as the decree is for possession, different considerations apply. The facts are common, giving rise to the same liability in regard to each member. Let us apply the test laid down by Buckley, L.J. There can be no difficulty in executing the decree against the person either on the record or absent; the liability of one individual does not differ from the liability of another,—all being equally liable to be ejected. Then again, can it be said in the words of Sargent, L.J., that the absent members have defences separate and distinct from those of the named defendants and of each other? Here also the answer must be in the negative. In so far the decree is for possession, it should, we think, be upheld.

From the judgment of Fraser, J., cited above, it is clear that a representative suit will lie as much in respect of a declaration as for an injunction (*Hardie and Lane, Ltd.* v. *Chiltern*[1]). In respect of these two reliefs also the lower Court's decree must be confirmed.

In the result, in appeal No. 324 of 1933 the decree of the Court below is affirmed except in so far as it pertains to the

1. (1928) 1 K.B. 663 at 686.

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recovery of mesne profits; that portion of the decree, as already stated is vacated. The order of that Court in regard to costs is maintained; in the appeal each party will bear his costs.

As to Appeal No. 88 of 1934 it is dismissed with costs.

*Decree modified in one appeal and*
K. C. ——— *dismissed in the other.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Balian .. *Accused* in Bench Case No. 29 of 1937 on the file of the Court of the First Class Bench Magistrates, Negapatam.*

Balian, *In re.*

*Criminal Procedure Code (V of 1898), S. 106—Conviction under S. 3 (12), Madras Town Nuisances Act, 1889—Simultaneous order under S. 106—Propriety.*

Where the accused was charged with causing disturbance by using abusive language and by behaving in a riotous and disorderly manner and the First Class Bench Magistrates who heard the case found the accused guilty and sentenced him to pay a fine for an offence under S. 3 (12) of the Madras Town Nuisances Act and further bound him over under S. 106, Criminal Procedure Code,

*Held*, that the judgment of the Bench of Magistrates was not illegal, though it would be ordinarily objectionable, when the accused is convicted of some petty offence under the Town Nuisances Act that he should also be bound over for a considerable time under S. 106, Criminal Procedure Code.

In re *Appachi Goundan*, (1937) Mad. Cr.C. 316 and *District Magistrate of Coimbatore* v. *Dasappa Naicken*, (1933) M.W.N. 548, referred to.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code, by the Sessions Judge of East Tanjore Division at Negapatam in his Letter No. 7814 dated 6th December, 1937.

*The Public Prosecutor (V. L. Ethiraj)* on behalf of the Crown.

The Court made the following

ORDER:—The First Class Bench Magistrates, Negapatam, convicted one Balian under S. 3 (12) of the Madras Town Nuisances Act and sentenced him to pay a fine of Rs. 10 and further bound him over under S. 106, Criminal Procedure Code, for six months.

The case has been referred to this Court by the Sessions Judge of East Tanjore on the ground that the judgment of the

* Crl. R.C. No. 993 of 1937. 31st March, 1938.
Case Ref. No. 54 of 1937.

Balian, *In re.*

Bench Court does not disclose any reason for the order binding over the accused to keep the peace. The accused was charged with causing disturbance by using abusive language and by behaving in a riotous and disorderly manner. *Prima facie,* behaving in a riotous and disorderly manner amounts to a breach of the peace, and as the Bench of Magistrates accepted the evidence and found the accused guilty of behaving in a riotous and disorderly manner, I do not see why one should doubt that the accused committed a breach of the peace.

Newsam, J., in *Appachi Goundan,* In re[1], seemed to be of the opinion that an offence under S. 3 (12) of the Town Nuisances Act would not involve a breach of the peace; but I do not think that he intended to lay down a general principle that no offence punishable under S. 3 (12) of the Town Nuisances Act would involve a breach of the peace. If he did, it would be in direct opposition to the finding of a Bench of this Court in *District Magistrate of Coimbatore* v. *Dasappa Naicken*[2].

I am however of opinion that it is ordinarily objectionable, when the accused is convicted only of some petty offence under the Town Nuisances Act, that he should also be bound over for a considerable time under S. 106; for this binding over would involve a far more serious punishment than the main sentence. Those guilty of disorderly and riotous conduct are usually poor men who may not be able to find security, in which case they would be liable to be imprisoned for a substantial period, although the maximum punishment awarded under S. 3 (12), Town Nuisances Act, is only one month's rigorous imprisonment. On the other hand, binding over an accused for only two or three months would not serve the purpose for which the order was passed. S. 106, Criminal Procedure Code, should therefore be very sparingly invoked where the offence committed is a petty one.

However, I do not know what public policy lies behind the order of the Bench Court, and as long as this Court has no reason to believe that Bench Courts are abusing their powers to bind over accused under S. 106, Criminal Procedure Code, this Court will not readily interfere. I do not therefore find sufficient reason for cancelling the order calling upon the

1. (1937) Mad. Cr. C. 316.
2. (1933) M.W.N. 548.

Balian, *In re.*

accused to find security for keeping the peace for a period of six months.

The reference is accordingly returned.

B.V.V. *Reference answered.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Ryots of Garabandha, Sariapalli and Ramachandrapuram Village, Garabhandha Group, Parlakimidi Estate represented by Peddini Ramalingam Subudhi and others.. *Petitioners* (Petitioners in C. M. P. No. 1832 of 1937 on the file of the High Court)*

*v.*

The Zamindar of Parlakimidi .. *Respondent (Respondent in do.).*

Ryots of Garabandha *v.* Zamindar of Parlakimidi.

*Civil Procedure Code (V of 1908), S. 109 (b) and (c)—Appeal to His Majesty in Council—Order refusing* Writ of Certiorari *in proceedings taken under Chapter XI of the Madras Estates Land Act—Exercise of original civil jurisdiction—Certificate obtainable.*

Where the High Court refused to issue a *Writ of Certiorari* to the Madras Board of Revenue as it felt bound by the decision of the Madras High Court in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli,* (1925) I.L.R. 49 Mad. 499, but the petitioners applied for a certificate to appeal to His Majesty in Council under cls. (*b*) and (*c*) of S. 109, Civil Procedure Code.

*Held,* that under cl. (*b*) of S. 109, Civil Procedure Code, the petitioners were entitled to the certificate, as the order complained of referred to a civil matter as opposed to a criminal matter, namely, a decision of a Revenue Court in a revenue case. It was admittedly passed in the exercise of the original jurisdiction and in the circumstances it would only have been passed in the exercise of civil jurisdiction.

Petition under Ss. 109 and 110 and O. 45, rr. 5 and 8 of the Code of Civil Procedure, praying that the High Court will be pleased to grant a certificate enabling the petitioners herein to appeal to His Majesty in Council against the order of the High Court in C. M. P. No. 1832 of 1937 presented to the High Court for the issue of a *Writ of Certiorari* to the Board of Revenue, Madras, to submit the records relating to Revision Petition No. 79 of 1936 on its file and to quash the proceedings.

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*C. M. P. No. 1119 of 1938. 4th April, 1938.

of the Board of Revenue in B. P. Mis. No. 3523 dated 9th October, 1936, in the said R. P. No. 79 of 1936.

Ryots of Garabandha v. Zamindar of Parlakimidi.

*B. Jagannadha Das* for Petitioners.

*N. Srinivasa Aiyangar* for *The Government Pleader* on behalf of the Board of Revenue.

*L. S. Veeraraghava Aiyar* for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

*The Chief Justice*.—The petitioners ask for a certificate permitting an appeal to His Majesty in Council. They claim to be entitled to a certificate under cl. (*b*) or failing that under cl. (*c*) of S. 109 of the Code of Civil Procedure. The petitioners desire to appeal from an order of this Court refusing to issue a *Writ of Certiorari* to the Madras Board of Revenue. Proceedings* were taken place under Chapter XI of the Madras Estates Land Act and as the result of those proceedings the Board of Revenue enhanced the rents of three villages by 37½ per cent. The petitioners contended that by reason of S. 168 (2) read with S. 30 (*b*) of the Act, the power of the Board of Revenue was limited to an enhancement of 12½ per cent. This Court refused to order a writ to issue as it considered that the argument advanced was a fallacious one and had previously been rejected by this Court in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[1]. If the present application were made merely under S. 109 (*c*) of the Code of Civil Procedure, we should not be prepared to grant the certificate; but as we consider that the case does fall within cl. (*b*) of the section, the certificate will issue.

Under cl. (*b*) a litigant has the right of appeal to His Majesty from any decree or final order passed by a High Court in the exercise of its original civil jurisdiction. It is conceded by the learned advocate for the respondent that the issue of a *Writ of Certiorari* means the exercise of original jurisdiction, but he says that it does not mean the exercise of "original civil jurisdiction" within the meaning of the clause. The distinction here is between "civil" and "criminal". The order complained of referred to a civil matter as opposed to a criminal matter, namely, a decision of a Revenue Court in a revenue case. It was admittedly passed in the exercise of original jurisdiction and in the circumstances it could only

1. (1925) I.L.R. 49 Mad. 499.

* *See* (1937) 1 Madras Law Journal Reports Supp. p. 1.

Ryots of Garabandha v. Zamindar of Parlakimidi.

Leach, C. J.

have been passed in the exercise of civil jurisdiction. Therefore it was an order passed in the exercise of original civil jurisdiction.

I might add that the order of the Board of Revenue which these applicants wished to have set aside directs the payment of large sums by way of increased rents. The order affects the applicants to the extent of Rs. 31,503-12-0 and it is not disputed that it is the intention of the Board of Revenue to extend the enhancement to the other villages of the Zamindari which when carried out will mean an annual increase in the rents of the tenants by over Rs. 1,50,000 annually. The amount involved is, therefore, very considerable. The certificate will issue on the usual conditions.

K. C. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Sankaralingam Pillai and others .. *Petitioners* (Respondents 8 to 10) (Defendants 8 to 10)*

*v.*

Arumugam Pillai and another .. *Respondents (Petitioner-Transferee-Decree-holder and 11th Respondent-Plaintiff).*

Sankaralingam Pillai v. Arumugam Pillai.

*Merger—Doctrine of—Assignee of promissory note becoming entitled to a fourth share of the estate on the death of the assignor in his own capacity as heir—Decree on the note, executable against others entitled to the three-fourths share.*

Where the plaintiff, the assignee of a promissory note obtained a decree against the executants of the note and the seventh defendant the payee and the assignor, but the seventh defendant died and the plaintiff and defendants 8 to 10, her reversionary heirs, became entitled each to a fourth share of the property belonging to her, on the question whether the decree became unexecutable by virtue of the doctrine of merger,

*Held*, that the decree became unexecutable to the extent of the one-fourth share of the plaintiff. Defendants 8 to 10 could be proceeded against for the three-fourths of the amount of the decree.

*Asia Bibi* v. *Malik Aziz Ahmad*, (1931) I.L.R. 54 All. 448 at 450 and *Subramania Chetty* v. *Kasi Chetty*, A.I.R. 1927 Mad. 937, followed.

*Muhammad Abdul Kadir Sahib* v. *Syed Abdur Kadir*, (1926) 51 M.L.J. 443: A.I.R. 1926 Mad. 1141, overruled.

* C. R. P. No. 1126 of 1933. 22nd April, 1938.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Tuticorin dated 1st March, 1933 and made in E. A. No. 844 of 1932, Small Cause Suit, No. 522 of 1930. Sankaralingam Pillai *v.* Arumugam Pillai.

*B. C. Seshachala Aiyar* and *V. K. Mahadeva Sastry* for Petitioners.

*S. Thyagaraja Aiyar* for *A. Swaminatha Aiyar* for Respondents.

The judgment of the Court was delivered by

*Venkatasubba Rao, J.*—This revision petition has been referred to a Bench as it raises an important question of law. The plaintiff, as the assignee of a promissory note, obtained a decree against defendants 1 to 6 the executants of the note (with whom we are not concerned) and the seventh defendant, the payee and the assignor, a Hindu female. The seventh defendant died and the plaintiff and defendants 8 to 10 her reversionary heirs became entitled each to a fourth share of the property held by her. The plaintiff then transferred the decree to the petitioner in the lower Court, who applied for execution; but nothing turns upon the transfer, as the transferee stands in the shoes of the plaintiff. The question to decide is, has the decree become inexecutable by virtue of the doctrine of merger? The Court below has allowed execution and its order is challenged here by defendants 8 to 10. Venkatasubba Rao, J.

O. 21, r. 16, Civil Procedure Code, has been relied upon by their learned Counsel, but there can be no doubt that the provision does not in terms apply. It enacts that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others. True, this rule applies, whether the transfer has been effected by operation of law or by act of parties. To give an example of the former class of transfer, let us suppose that *A* obtains a decree against *X* and *Y*. *A* dies and *X* as his heir becomes under the law the assignee of the decree. The rule enacts that the decree should be deemed extinguished and that *X* should not be permitted to execute it as against *Y*. But the case in hand is the converse of the illustration just put. If in the example given *X* dies and *A* as his heir becomes liable under the decree (which is very different from becoming

Sankaralingam Pillai v. Arumugam Pillai.

Venkatasubba Rao, J.

entitled to rights under the decree), the section in terms, it is obvious, does not apply. Here there has been no transfer of the decree and what is equally patent, there has been no transfer in favour of one of the judgment-debtors—that being what the rule cited above contemplates. But apart from the letter of the section, there is a principle which it embodies, namely, where the decree-holder's right and the judgment-debtor's liability become united in one and the same individual, it stands to reason that the decree should be treated as satisfied. The question then is, whether there has been such a merger in the case as to render the decree inexecutable. As has been pointed out by Sulaiman, C. J. and Young, J., *complete merger* involves the co-extensiveness of the right and the liability (*Asia Bibi* v. *Malik Aziz Ahmad*[1]). Lut us now look at the position that has resulted from the death of the seventh defendant. The plaintiff has remained the judgment-creditor, but who are those that have become the judgment-debtors? The plaintiff himself and defendants 8 to 10. In other words, the plaintiff holds a decree against himself and the three other persons. To the extent to which the plaintiff has become partially liable under the decree, to that extent there has undoubtedly been a merger. But the consequences of a *partial* merger are totally different from those of a *complete* merger. Let us again take an example. *A* obtains a decree against *X* for Rs. 300; *X* dies leaving *A*, *B* and *C* as his heirs, each being entitled to an equal third of his estate. The true position then is, that *A* has a decree against *A*, *B* and *C*; the decree is extinguished to the extent of *A's* share, but he can execute it against *B* and *C* to the remaining extent of Rs. 200. This is in consonance with reason and justice, but the learned Counsel for defendants 8 to 10 contends on the authority of *Muhammad Abdul Kadir Sahib* v. *Syed Abdur Kadir*[2], decided by Madhavan Nair, J., that the decree has become inexecutable in its entirety. That is a decision we are unable to follow, as it ignores the distinction between a partial and a complete merger. Indeed, this case must be treated as having been overruled by a later Bench decision (*Subramania Chetty* v. *Kasi Chetty*[3]) to which Madhavan Nair, J., was a party.

1. (1931) I.L.R. 54 All. 448 at 450.
2. (1926) 51 M.L.J. 443: A.I.R. 1926 Mad. 1141.
3. A.I.R. 1927 Mad. 937.

Sankara-lingam Pillai v. Arumugam Pillai. — Venkatasubba Rao, J.

The learned Judges there purport to distinguish the earlier case; but as has been pointed out in *Asia Bibi* v. *Malik Aziz Ahmad*[1] already referred to, it is difficult to discover on what basis the decision has been distinguished. The later ruling is clearly opposed to the earlier one and in our opinion lays down the correct principle. The Allahahad High Court in the decision already cited has discussed the matter clearly and adopted the same view.

But adopting the same principle, the Allahabad case and the Madras Bench case have applied it differently. In the former, the decree has been treated as having become satisfied *pro tanto*; in the latter, the judgment-creditor hasbeen directed to execute his decree in its entirety against the entire property both in his possession and in the possession of the other heirs. In our opinion, the more logical course is that adopted in the Allahabad case. In so far as the judgment-creditor and the judgment-debtor happen to be the same person, to that extent, it is reasonable and correct on principle, to hold that the decree is satisfied. In the ultimate result it makes no difference or, to be more accurate, it ought to make no difference, which of these two methods in the process of execution is adopted, for, it must be noted that the real rights of parties can be worked out only in a suit for contribution. Let us suppose, for instance, that *A* obtains a decree against *B* the principal debtor and *C* the surety. *A* transfers the decree to *C*, which thereupon must be treated as having become satisfied for the purpose of execution. But that does not prevent *C* from pursuing his remedy against *B* by a suit for contribution.

In the result, we must hold that the decree has become inexecutable to the extent of the one-fourth share of the plaintiff. Defendants 8 to 10 can be proceeded against for the three-fourths of the amount of the decree that has been passed. The execution petition will therefore be remitted to the lower Court for being dealt with in the light of our judgment.

We direct that each party shall bear his costs both here and in the Court below.

K. C. ——— *Petition remanded.*

1. (1931) I.L.R. 54 All. 448 at 450.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Shanmuga Pandaram .. *Petitioner** (*Counter-Petitioner*)

*v.*

K. Ponnuswami Aiyar and others .. *Respondents* (*Petitioners*).

Shanmuga Pandaram *v.* Ponnuswami Aiyar.

*Criminal Procedure Code (V of 1898), S. 144—Procession—Rights of parties to conduct—Grounds to be sufficient for passing an order.*

Ordinarily, those responsible for law and order should see that persons exercising their rights have the support of the Police and the Magistracy; but cases do arise where in the interest of public peace, persons should be prevented from exercising their rights. Unless the Magistrate is satisfied that the persons had no *bona fide* desire to conduct the procession in peace he should not pass an order under S. 144 and refuse them protection in the exercise of their full rights.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional District Magistrate of Tanjore, dated 25th September, 1937, and made in M. C. No. 49 of 1937 (M. C. No. 13 of 1937 on the file of the Court of the Second Class Stationary Magistrate of Nannilam).

*A. S. Sivakaminathan* for Petitioner.

*V. T. Rangaswami Aiyangar* and *K. Ramaswami Aiyangar* for Respondents.

*N. Somasundaram* for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—In 1936 the Adi Dravidas of Peralam began to conduct processions in honour of Sri Thiruvalluvar, to the annoyance of the caste residents of the village. On the occasion to which this Criminal Revision Case relates they wished to take a procession through the four streets along which the car is taken at the annual car festival and through which the caste Hindus conduct their procession. The Stationary Sub-Magistrate, Nannilam, and the Additional District Magistrate of Tanjore were of opinion that the Adi Dravidas were putting forth fresh claims and thereby causing annoyance to the residents of Peralam who have houses on the processional route; and an order under S. 144 was therefore passed.

*Crl. R. C. No. 844 of 1937. (Crl. R. P. No. 792 of 1937.) 28th March, 1938.

Although the order under S. 144 has long ago worked itself out; yet it is urged for the petitioner that this petition should be considered on its merits, as otherwise the same situation will arise in subsequent years. There can be no doubt that the Adi-Dravidas have a civil right to take a procession along all public streets, just as any other persons may have: whereas the caste residents have no right at all to object. Ordinarily, those responsible for law and order should see that persons exercising their rights have the support of the Police and the Magistracy; but cases do of course arise where in the interest of public peace, persons should be prevented from exercising their rights. If the Adi-Dravidas, for example, are anxious to conduct this procession, not to honour Sri Thiruvalluvar, but in order to irritate and annoy the caste residents of those streets, then the Magistrate would be justified in placing some restraint upon their processions; but unless the Magistrate is satisfied that the Adi-Dravidas had no *bona fide* desire to do honour to the Saint he should not pass an order under S. 144 unless he is quite satisfied that there is no other means within his power of preventing a breach of the peace. The fact that the Adi-Dravidas have been exercising restricted rights in the past was rightly taken into account; but it is not itself a sufficient ground for refusing them protection in the exercise of their full rights. With these remarks this petition is dismissed.

Shanmuga Pandaram *v.* Ponnuswami Aiyar.

K. C. *Petition dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Nemichand Parakh .. *Petitioner** (*Accused*).

Nemichand Parakh, *In re.*

*Penal Code (XLV of 1860), Ss. 435 and 439—Pledgee of goods—Sub-pledge of goods pledged—Legality—Prosecution for criminal breach of trust—Sustainability—Contract Act (1872), S. 179.*

The words "a person" in S. 179 of the Contract Act include a pledgee as he has a limited interest in the goods pledged with him. The pawnee or pledgee of the goods has the right to make a sub-pledge of the goods pawned to him to the extent of his interest, and he cannot be prosecuted for criminal breach of trust merely because he effects such a sub-pledge of the goods pledged to him.

*Donald* v. *Suckling*, (1866) 1 Q.B. 585, relied on.

*Proceedings, 23rd May*, (1871) 6 M.H.C.R. (App.) 28, considered.

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*Cr. R.C. No. 747 of 1937. 26th January, 1938.
Cr.R.P. No. 700 of 1937.

Nemichand Parakh, *In re.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the third Presidency Magistrate of the Court of Presidency Magistrate, Egmore, Madras, in C. C. No. 565 of 1937.

*V. T. Rangaswamy Aiyangar* and *P. S. Kothandapani* for Petitioner.

*The Crown Prosecutor* (*T. S. Anantaraman*) on behalf of the Crown.

The Court made the following

ORDER:—The petitioner in this case, Nemichand Parakh, was convicted of criminal breach of trust on three counts and sentenced to undergo rigorous imprisonment for six months on each count, the three sentences to run concurrently. The charge against him was, "that you on or about the under-mentioned dates at Madras being entrusted with properties stated below committed criminal breach of trust (1) on or about 4th April, 1935, gold chain of the value of Rs. 175 belonging to P.W. 1; (2) on or about 18th September, 1935, ruby necklace of the value of Rs. 50 belonging to P.W. 3; and (3) on or about 21st March, 1936, ring of the value of Rs. 12-8-0 belonging to P.W. 1". The dates given in the charge are the dates on which the actual pledges were made of these jewels by the prosecution witnesses concerned with the accused. It is not pretended that the receipt of the pledged jewels was itself a criminal breach of trust. Presumably the criminal breaches of trust alleged against the accused were the sub-pledges effected by the accused of the same jewels, for the same amounts, and on the same dates as the pledges with his financiers or *Khatadars* Kanhiya Lal P.W. 6 and Amir Chand P. W. 7. It is unfortunate that the charge should have been so badly drawn up as not to indicate clearly to the accused what it was that was charged against him as criminal breach of trust. It is however now conceded that what was charged against the accused was that the accused's sub-pledging all the jewels on the same dates for the same amounts amounted to criminal breach of trust. This raises a pure question of civil law, that is, whether such sub-pledging to the same extent, that is to say, for the same amount as the debt for which the original pledge was made, is a wrongful act, for if such sub-

Nemichand Parakh, *In re.*

pledging was within the rights of the pledgee, that is the petitioner, any sub-pledging by him cannot be regarded as amounting to a criminal offence, as it is obvious that what a man does within the limits of the right given to him by the law cannot amount to a criminal offence. The question was perhaps at one time not entirely free from doubt, but it is clear to me that the authorities on the point are in favour of the petitioner's contention, namely, that as pledgee, he had a right to sub-pledge to the extent of his interest in the pledged properties. The law on the subject in this country is to be found in S. 179 of the Indian Contract Act IX of 1872 which runs as follows:—

"Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest."

The words 'a person' found in this section would certainly include a pledgee, if it can be said that he has a limited interest in the goods pledged with him. The leading English case on the point is *Donald* v. *Suckling*[1]. In that case the following passage from Story on Bailments is quoted without dissent, namely:

"the pawnee may, by the common law, deliver over the pawn into the hands of a stranger for safe custody without consideration; or he may sell or assign all his interest in the pawn; or he may convey the same conditionally by way of pawn to another person, without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property for a debt beyond his own . . . . . it is clear that in such a case he would be guilty of a breach of trust; and his creditor would acquire no title beyond that held by the pawnee."

This statement of the law in Story on Bailments and *Donald* v. *Suckling*[1] which was a case of 1866 were in all probability the source from which the rule laid down in S. 179 of the Indian Contract Act of 1872 was taken. In any case it is not contended that the Indian law on the subject is different from the English law. In *Donald* v. *Suckling*[1], it is clearly laid down that the pawnee has a special property in the pawned goods, that is, he is invested with a right which is something more than the mere right of possession as in the case of a lien. Cockburn, C.J., describes it as a right to deal with the thing pledged as his own, if the debt be not paid and the thing redeemed at the appointed time; it is also described as inchoate right of property conferred upon him by the contract. In

1. (1866) 1 Q.B. 585.

Nemichand Parakh, *In re.*

Halsbury's Laws of England, Vol. 25, Hailsham Edition, it is stated that:

"the pawnee's special property in the thing pledged may be assigned to a third party by way of assignment of the pawnee's interest or of a sub-pledge by him. Such a transfer is not inconsistent with the contract of pawn so long as it purports to transfer no more than the pawnee's interest against the pawner, the pawnee in the meantime being responsible for due care being taken for the custody of the property."

It is unnecessary in my opinion to go further into the matter as the authorities already quoted are sufficient to show that the pawnee or pledgee has the right to make a sub-pledge of the goods pawned to him to the extent of his interest, and that is exactly what the petitioner did in the present case. My attention has been called by the Crown Prosecutor to the proceedings of the High Court in *Proceedings, 23rd May,*[1] in which it is stated that a person who pledges what is pledged to him may be guilty of criminal breach of trust where the disposal is in violation of any direction of law or contract, express or implied, prescribing the mode in which the trust ought to be discharged and when such disposal is done with a dishonest intention. There is nothing in the present case to show that there was any express contract taking away the right given by the ordinary law to make a sub-pledge and there is certainly no other evidence to show that the sub-pledges were made with a dishonest intention. On the other hand, there is no reason to suppose that the defence of the petitioner on this point, namely, that he was doing this in the regular course of business, is not true. Apparently the petitioner is not a man with a large capital and he carries on his money-lending business by lending money on pledge of jewels and getting the capital necessary for the purpose of sub-pledging the same jewels with his financiers for the same amounts at a lower rate of interest. There is nothing to show that this course of business was followed with any dishonest intention. The High Court in the proceedings mentioned above also stated that great caution ought to be used in drawing the inference of dishonesty from a breach of duty imposed by civil law and that whether it should be drawn or not is a question to be decided in each particular case. The High Court also added that:

"when the law bearing upon the case is doubtful, *Donald* v. *Suckling*[2], it

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1. (1871) 6 M.H.C.R. (App.) 28. 2. (1866) 1 Q.B. 585.

would be most indiscreet to raise the inference of dishonesty against a man who has mistaken it, simply because he has mistaken it."

It would therefore follow that even if the view that I have taken of the rights of the petitioner in this case is not correct, still the petitioner must be deemed to have acted honestly under the mistaken belief as to the extent of his rights as pledgee, and the sub-pledges of the pledged goods cannot be regarded as amounting to criminal breach of trust. It is unfortunate that this aspect of the case was not dealt with by the learned Magistrate but it is quite possible that this omission is due to the fact that this aspect was not brought to his notice either by the prosecution or by the accused. In any case, the unfortunate result is the conviction of a man in respect of acts done by him within the exercise of his rights, and the only consolation is that he was let on bail very soon after he was committed to jail as a result of the conviction. In my opinion he ought never to have been prosecuted. If the prosecution had informed itself of the law on the subject, as it ought to have done, there would have been no prosecution at all, as it would have then been found that, according to the case for the prosecution itself, no offence had been committed. The conviction and sentence are set aside and the petitioner is acquitted honourably. His bail bond is cancelled.

B.V.V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA RAO.

Kambham Kaveri Rangiah Chetty and others .. *Appellants (Plaintiffs)*

*v.*

Khaji Syed Hassumiah and others .. *Respondents (Defendants).*



*Indian Penal Code, S. 296—Communal strife regarding music before mosque—Decree of lower court allowing music with an exception prohibiting it during the hours of public congregational worship in the mosque according to the Islamic religion—Propriety of such a decree—Modification if necessary.*

In a dispute between the Muhammadans and the Hindus of a place regarding music before the mosque, whether music could be played during the time of worship, the District Judge decreed that the Hindus were permitted to conduct procession with music 'except during the hours of public congregational worship in the mosque according to the Islamic religion' and this

* Appeal No. 242 of 1932. 13th September, 1937.

Rangiah Chetty v. Khaji Syed Hassumiah.

was objected to by the Hindus who were met by the cross-objections of the Muhammadans saying that because some congregational worship was going on at all hours of the day and night music should be stopped at all times and not merely during particular hours,

*Held*, (1) that the objection of the Hindus was not sound as it is clear that to play music when public congregational worship was going on in the mosque would practically amount to an offence under S. 296, Indian Penal Code, and would certainly be a serious infraction of the Muhammadans' right to engage in public congregational prayer without disturbance.

(2) That in view of the existing state of law it would be impossible also to prohibit music at all times in front of the mosque.

(3) Hence if the exception in the decree of the lower court was to be made to operate within the area constituted by a circle drawn round the mosque building proper of a radius of fifty yards "the centre of the mosque being treated for the purpose as the mosque", it would in all probability prevent any real disturbance of public congregational worship in the mosque.

Appeal against the decree of the District Court of Cuddappah in O. S. No. 24 of 1929.

*B. Somayya* and *S. Subramania Sastri* for Appellants.

*B. Pocker* and *K. T. M. Ahmed Ibrahim* for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

*Pandrang Row, J.*—This appeal arises out of a dispute between the Muhammadans and the Hindus of Muddanur in the Cuddappah District, the Hindus being the plaintiffs who sued for a declaration of their right to carry in procession their idols with the usual accompaniments through the public streets of the village attended with music and also their right to go in procession on occasions of marriage, etc., with music. The suit was one of the usual type that comes to Courts now and then when the two rival communities claim protection from each other and cannot bring themselves to respect each other's feelings. The law is fairly well-settled as regards the rights of the different communities in this matter and the rights which the law will recognise and declare have been clearly laid down from *Muthialu Chetti* v. *Bapun Saib*[1] onwards. It is enough to refer to the decision of the Judicial Committee in *Manzur Hasan* v. *Muhammad Zaman*[2] and the discussion of the general principles contained in a later Allahabad case *Muhammad Jalil Khan* v. *Ram Nath Katua*[3]. Generally speaking, the law laid down by this High Court was accepted by the Privy Council as correct.

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1. (1880) I.L.R. 2 Mad. 140.
2. (1924) 48 M.L.J. 23: L.R. 52 I.A. 61: I.L.R. 47 All. 151 (P.C.).
3. (1930) I.L.R. 53 All. 484.

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There is really no dispute about the facts in this case and the rights of the parties are equally not in dispute, for the law is well-settled. Any community can use a public street for processions attended with music provided that they do not thereby cause a disturbance to any other community when assembled for prayer or worship. In this connection, reference may be made to Ss. 296 and 298 of the Indian Penal Code. The decree given by the Court below, that is, the District Judge of Cuddappah is to the following effect:—

> "(1) That the plaintiffs are entitled to carry in procession the idols of their Gods and sudibandies and panyaram, carts, etc., through all the public streets of Muddanur, attended with music of all kinds on all lawful and customary occasions of feasts or festivals, whether synchronising with the Mohurram or not, and are entitled also to go in procession on occasions of marriage and other events in the public streets attended with music of all kinds, except during the hours of public congregational worship in the mosque according to the Islamic religion, and subject to any lawful orders or directions by the Magistrates or the police for preventing breaches of the public peace or obstructions of the thoroughfares or for other matters mentioned in S. 144 of the Criminal Procedure Code or under other statutory provisions for regulation of traffic;
>
> (2) That the defendants and other Muhammadans of Muddanur are hereby restrained by means of a permanent injunction from objecting and obstructing or otherwise interfering with the exercise of the abovesaid rights by the plaintiffs and other Hindus of Muddanur."

The appellants who are the Hindu plaintiffs object to the inclusion of the words in the decree, namely,

> "Except during the hours of public congregational worship in the mosque according to the Islamic religion."

They further contend that the exception should be confined only to music in front of the mosque and not anywhere else in any public street. There is a Memorandum of Cross-objections filed by the Muhammadan respondents and their complaint is that congregational worship goes on throughout all hours of the day and night, and that music should be stopped in the front of the mosque at all times and not merely during particular hours. Apparently both parties would prefer the times of the congregational worship to be prescribed in the decree if music is to be prohibited only during the hours of public congregational worship, but there is no evidence in the record of the case which would permit the determination of these hours nor can the parties agree before us as to what the hours are or should be. It is therefore not possible for us to be more particular than the Court below has been in fixing the intervals

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during which music should not be permitted in the neighbourhood of the mosque.

So far as the objection of the appellants is concerned to the exception introduced in the decree, we are of opinion that the objection taken is not sound, for, it is clear that to play music when public congregational worship is going on in the mosque would practically amount to an offence under S. 296 of the Indian Penal Code and would certainly be a serious infraction of the Muhammadans', right to engage in public congregational prayer without disturbance. We therefore think that the learned District Judge was right in introducing the exception, though he should have limited that exception to the neighbourhood of the mosque prescribing a certain radius with the mosque as the centre inside which area there should be no music during the hours of public congregational worship in the mosque. As the decree stands, the exception reads as if while public congregational worship is going on in the mosque, no procession with music could go along any public street anywhere. This was obviously not meant by the learned District Judge, and even if he did mean it, there is no justification for prohibiting music everywhere in the village. The complaint of the Muhammadan respondents has no doubt a certain amount of practical common sense behind it in view of the fact that it would not be easy in a village like Muddanur to know exactly when public congregational worship is going on and there might be some difficulty in the way of the police protecting the rights of the one community from attacks by the other community. Nevertheless, though there is something to be said in support of the suggestion of the respondents, namely, to prohibit music in front of the mosque at all times, as a practical solution of the ever-recurring disputes that occur between the two communities, it is not possible to give a judicial *imprimatur* to such a solution as that would be inconsistent with the law as laid down for very many years. It is therefore impossible in view of the existing state of the law to prohibit music at all times in front of the mosque. Such a suggestion was considered in more than one case and was negatived, and we are unable to give effect to it as the law stands at present. It therefore follows that the only change that has to be made in the decree of the Court below is to make it clear that the exception contained in the decree is limited only to a

certain area round the mosque. We consider, in the circumstances, that if the exception is made to operate "within the area constituted by a circle drawn round the mosque building proper of a radius of fifty yards (the centre of the mosque being treated for this purpose as the mosque)", it would, in all probability, prevent any real disturbance of public congregational worship in the mosque. The words enclosed in inverted commas in the preceding sentence will therefore be inserted in the decree after the words "the Islamic religion".

Subject to the above modification in the decree both the appeal and the Memorandum of Cross-objections are dismissed; in the circumstances of the case, the parties will bear their own costs.

K. C. *Appeal and Memo. of Objections dismissed.*

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## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD WRIGHT, SIR SHADI LAL AND SIR GEORGE RANKIN.

The Secretary of State .. *Appellant**

*v.*

The Bank of India, Limited .. *Respondents.*



*Indian Securities Act (X of 1920), Ss. 12 and 21—Effect—Renewal of Government promissory note—Forged endorsement forwarded to Bank—Renewal of note without taking security—Recovery of damages by owner of note—Suit for indemnity by Secretary of State against Bank—Claim based on implied indemnity under common law—Maintainability—Representation of Bank—Discretion conferred on Government Officer to renew note—Effect—Interpretation of statutes—Modification of pre-existing law.*

One *G* was the indorsee of a Government promissory note. A broker named *A* having possession of the note on *G's* behalf forged her indorsement to it in his favour and indorsed it for value to the *B* bank. The *B* bank, acting in good faith, applied to the Public Debt Office under the Indian Securities Act, 1920, to have a renewed promissory note payable to them in exchange for the note which they gave up in exchange. *G* becoming aware of the fraud practised by *A* sued the Secretary of State in conversion and recovered damages. The Secretary of State then sued the *B* bank claiming to be indemnified against the loss sustained on the principle that the Public Debt Office had issued the renewed note at the request of the *B* bank and was accordingly entitled to be indemnified against the damages resulting from the fact that what had been done involved an injury to a third party's rights.

*Held,* that an undertaking to indemnify the Secretary of State should be implied from the request of the *B* bank for the renewal of the note, that the

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* P. C. Appeal No. 55 of 1937. 2nd May, 1938.

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fact that the Government Officer issuing the renewed note had a discretion in acting on the assertion of the applicant did not modify the law in this respect, and that the Secretary of State was consequently entitled to the indemnity claimed. The Secretary of State was not debarred from relying on an indemnity implied under the common law of India merely because S. 21 of the Indian Securities Act provides for an express indemnity in such a case. S. 21 in this respect should be construed as giving an added statutory right which is different from and in no way inconsistent with the common law right. The latter right however is not complete merely because the Officer has acted upon the request; to make it effective it is further necessary that the act must turn out to be injurious to the rights of a third party.

*Dugdale* v. *Lovering*, (1875) L.R. 10 C.P. 196; *Sheffield Corporation* v. *Barclay*, (1905) A.C. 392 and *A. G.* v. *Odell*, (1906) 2 Ch. 47, referred to.

A statute is *prima facie* to be construed as changing the law to no greater extent than its words or necessary intendment require.

Decision of the Bombay High Court reversed.

Appeal from a decision of the High Court, Bombay, in its appellate jurisdiction (Beaumont, C.J. and Rangnekar, J.) dated 10th September, 1936, affirming a decision of that Court in its ordinary original civil jurisdiction (Wadia, J.) dated 6th March, 1936.

*H. U. Willink, K.C.* and *Sir T. J. Strangman* for Appellant.—The provisions of S. 21 of the Indian Securities Act, 1920, in no way limit the Government's common law right to an indemnity where a request is made to the Securities Department for renewal of an old note. The section is permissive. The express indemnity is something which the Government are entitled to ask for if they want it, for example, in cases where the personal solvency of parties involved is in doubt. To ask for the indemnity bond with two sureties which they could have required under the Act would have been ridiculous in the present case in view of the sum involved. The bank's very request to the Government to issue them a new note in exchange for the old one involved an implied undertaking to indemnify the Government in respect of all claims arising out of compliance with the request. The bank made their application for renewal after they had been guilty, albeit in good faith, of an act of conversion in respect of the old note, and it follows that they became liable by operation of law to indemnify the Government against the subsequent claim of the true owner of the note. Moreover, the bank by tendering the old note warranted that they were the true owners of it and that they were entitled to a new note, and that warranty, which turned out not to be true, was a part of the new contract which a renewal constitutes. Counsel referred to *Hunsraj Parmanand* v. *Ruttonsee Walji*[1], *Mascarenhas*

1. (1899) I.L.R. 24 Bom. 65.

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v. *Mercantile Bank of India, Ltd.*[1] and *Mercantile Bank of India, Ltd.* v. *Mascarenhas*[2].

*Sir William Jowitt, K.C.* and *C.P. Harvey* for Respondents.—The holder of a bill of exchange does not, by presenting it for acceptance or payment, impliedly warrant or even represent that it is a genuine document or that he has a good title to it. See *Guaranty Trust Company of New York* v. *Hannay & Co.*[3] A person applying for renewal of a Government promissory note which he holds is in the same position as the holder of a bill of exchange. By S. 12 the prescribed officer must be satisfied of the justice of the applicant's claim to renewal before he grants it. In those circumstances it would be an actual failure in his duty if the officer were to rely on any implied warranty. An implied warranty by the applicant for renewal as to the genuineness of all the endorsements on a promissory note would be inconsistent with the provisions of the Act of 1920 in more than one way: for example, he would, if he were held to have given such a warranty, be in the position of a person negotiating the note in the ordinary way of business, in which case the facilities for renewal specially provided by the Act would have no purpose. Again, even if there were any evidence that the respondents gave an implied undertaking of indemnity when applying for renewal, which, it is submitted, they never did, the rights and duties of the prescribed officer in relation to the whole transaction of renewal are inconsistent with such an undertaking and with reliance by the officer upon it. For the Act places the Government in a position to require an express indemnity, and, in fact, to insist upon having it. That ability to have an express indemnity precludes the Government from relying on an implied indemnity. The application for renewal involved no assertion of title by the applicant, and the granting of the request by the officer was consequently not the result of any assertion as to title by the applicant for renewal. The renewal was effected by the officer on his own responsibility and judgment, and his decision to effect it was a judicial or semi-judicial decision in view of his right to refuse the application in the event that an express indemnity which had been asked for was refused. Counsel referred to *Sheffield Corporation* v. *Barclay*[4].

2nd May, 1938. Their Lordships' judgment was delivered by

Lord Wright.

Lord Wright.—This is an appeal from a judgment of the High Court in appeal at Bombay, which affirmed a judg-

1. (1931) 61 M.L.J. 837: L.R. 58 I.A. 433: I.L.R. 56 Bom. 1 (P.C.).
2. (1928) I.L.R. 52 Bom. 792.
3. (1918) 2 K.B. 623.
4. (1905) A. C. 392.

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ment of Wadia, J., as trial Judge. These judgments rejected the claim of the appellant to be indemnified by the respondents against a liability, which he had incurred and been compelled to satisfy in the circumstances of the case which were shortly as follows. A lady named Gangabai was the indorsee and holder of a Government promissory note for Rs. 5,000. A broker named Acharya, having possession of the note on the lady's behalf, forged her indorsement to it in his favour and indorsed it for value to the respondents. The respondents, acting in good faith, applied to the Public Debt Office under the Indian Securities Act, 1920, to have a renewed promissory note payable to them issued in exchange for the note which the respondents gave up in exchange. The lady, becoming aware of the fraud practised by Acharya, and the dealing with her note on the part of the respondents and the appellant, which constituted a conversion of her property by either or both as well as by Acharya, sued the appellant in conversion and recovered the appropriate damages. The appellant then brought the present action against the respondents, claiming to be indemnified against the loss thus sustained by him, on the principle that the Public Debt Office had issued the renewed note at the request of the respondents and was accordingly entitled to be indemnified against the damage resulting from the fact that what had been done involved an injury to a third party's rights. So far as the renewed note was concerned, it was rightly accepted on both sides before their Lordships that it constituted a new contract between the Government and the respondents which was not affected by the circumstances in which it was issued, and certain contentions raised in the Courts below were abandoned by the appellant. Only questions of liability and of principle were argued before their Lordships, matters of amount being left for subsequent settlement if the necessity should arise.

It is convenient first of all to refer to the material sections of the Indian Securities Act, 1920, which, having replaced the repealed Act of 1886 dealing with the same matters, now regulates the legal position of these Government promissory notes. Such notes circulate in large numbers in India; hence the importance to the parties and to the Indian public generally of the question of principle involved in this appeal. It appears from the print of the note in question contained in the record

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that the note was originally issued in 1854 and payable to a named payee or order. The actual note in question was a renewal note which had been issued in April, 1925. On its back spaces had been provided for 10 indorsements. The forged indorsement occupied the fifth space, and Acharya's indorsement to the respondents occupied the sixth space. At the foot of these spaces was a receipt signed by the respondents for a renewed note in lieu of the note. It is clear that the system of renewing notes is largely used in ordinary practice. It is obviously convenient to have a clean note, in addition to the circumstance that in the course of years the spaces available for indorsements become exhausted. And the holder of a renewed note obtains a new promise from the Government free from any equities or disputes which might have attached to the prior note. S. 16 of the Act provides in terms that a renewed Government promissory note is to be deemed to constitute a new contract between the Government and the person to whom it is issued and all persons deriving title through him.

The Act contains express provisions for regulating the issue of renewed notes. In particular, S. 12 provides that, subject to the provisions of S. 13, a person claiming to be entitled to a Government promissory note may on applying to the prescribed officer and on satisfying him of the justice of his claim and delivering the promissory note receipted in the prescribed manner, and paying the prescribed fee, if any, obtain from such officer a renewed promissory note payable to him. S. 13 deals with a case where there is a dispute as to the title to one of these notes, and enables the officer to refuse to act save on a judicial decision or on the result of a formal enquiry. S. 21, on which the judgment under appeal was based, provides that notwithstanding anything in certain specified sections, including S. 12, the prescribed officer may, in any case arising, (*i*) issue a renewed security upon the applicant's giving the prescribed indemnity against the claims of all persons claiming under the security so renewed, or (*ii*) refuse to issue a renewed security unless such indemnity is given. Rules have been made under the Act to "prescribe" the indemnity which may be exacted, which is to be a bond of the applicant with two sureties in double the face amount of the note.

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In the present case the Government officer, when issuing the renewed note to the respondents, did not exact a security under S. 21. The question is whether the appellant is debarred from relying on an indemnity implied under the common law of India, which, in this respect, is identical with that of England. The statement of the principle under which such an indemnity is implied is stated by Lord Halsbury, L.C., in *Sheffield Corporation* v. *Barclay*[1] to be correctly expressed in a quotation from counsel's argument in *Dugdale* v. *Lovering*[2], which runs as follows:

"It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done."

This principle, which in England must now be read in connection with recent legislation as to contribution between tortfeasors, is of the widest general application. It is often, as in the statement by Lord Davey in the same case, to which reference will shortly be made, said to be based on a contract implied by law, the request importing a promise to indemnify the other party against the consequences to him of acting upon the request. But in the words adopted by Lord Halsbury it is merely said that the person is entitled to an indemnity. The fiction of a contract implied by law adds nothing, though it may seem to justify the Court in holding as a matter of law that the party is entitled to the indemnity on the basis that the assertion by the applicant of his request is the offer of a promise to indemnify if the other party acts upon that request to his damage. Sir William Jowitt has contended that the necessary elements are the assertion and the action taken upon that assertion by the other party. He has contended that neither element is present in the case of the performance of a statutory duty like that in question. There was, he says, no assertion by the respondents but only a claim in respect of which the Government official had to act on his own responsibility and judgment. His conduct, it is said, was not ministerial, but judicial or semi-judicial, since the statute by S. 21 gave him the right to refuse the renewed note except on the terms of his being granted the prescribed indemnity. Reliance was parti-

1. (1905) A.C. 392 at 397. 2. (1875) L.R. 10 C.P. 196.

cularly placed on the form in which the rule was stated by Lord Davey in *Sheffield Corporation* v. *Barclay*[1] where Lord Davey thus stated the principle:—

"I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal but is, in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence have discovered it."

It seems that it was on this line of reasoning that Wadia, J., decided in favour of the respondents. Beaumont, C.J. (with whose judgment Rangnekar, J., agreed) was not prepared to accept this reasoning, but preferred to rest his decision upon a different ground which will be explained later in this judgment. Their Lordships are with respect unable to agree with Wadia, J. Lord Davey, in their opinion, did not mean, when he used the word "ministerial", to indicate that the act done must be done without any element of choice, deliberation or decision on the part of the doer. All, it seems, that he meant was that the official had no interest except to perform his statutory duty. But the mere performance of that duty may involve some degree of deliberation and judgment. Thus in *Sheffield Corporation* v. *Barclay*[1] which dealt with the requesting of transfers of stock in the Corporation's register, the indemnity was implied though S. 30 (1) of the Sheffield Corporation Act, 1883, provided that "the Corporation or the registrar before allowing any transfer of stock may, if the circumstances of the case appear to them or him to make it expedient, require evidence of the title of the person claiming a right to make the transfer". Similarly in *A.G.* v. *Odell*[2], the Court of Appeal were, it seems, prepared to hold that a person who, acting in good faith, brought to the Land Registry a transfer apparently executed by the registered proprietor of the piece of land, but in fact a forgery, became subject to a contract implied by law to indemnify the person, whose duty under the Land Transfer Acts was to register transfers, against any liability resulting

1. (1905) A.C. 392 at 399. 2. (1906) 2 Ch. 47.

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from the exercise of the duty. There may indeed be cases where the person charged with the statutory duty is also charged with the responsibility of deciding in a judicial or quasi-judicial capacity whether it is proper to exercise the duty in any particular case, so that he could not be regarded as acting on the applicant's request, but solely on his own statutory responsibility. Such cases which are contemplated as possible in *A. G.* v. *Odell*[1] would depend on the particular construction of the particular statutes, but would involve considerations which are different from those presented in *Sheffield Corporation* v. *Barclay*[2] or *A. G.* v. *Odell*[1]. It is on the analogy of these latter authorities that in their Lordships' judgment the present case must be determined. There is nothing anomalous in the presence of some element of choice or deliberation on the part of the officer who is the person doing the act, so long as he proceeds on the assertion or claim or direction or evidence of the applicant. Indeed, in the simpler type of case illustrated by *Dugdale* v. *Lovering*[3], it is not necessary that the plaintiff should have been other than a free agent. He may act on the defendant's request not under compulsion but of choice. That does not, however, deprive him of the right, if the circumstances are appropriate, to the implied indemnity, though no doubt he may waive the right. Similarly, where the duty is statutory and must be performed if the statutory conditions are fulfilled, the fact that the official may have to see that these conditions are fulfilled, does not *per se* debar him from saying that he has acted upon the assertion or claim or request of the applicant. In this connection Beaumont, C.J., says, "If he [the prescribed officer] acts upon the request, I doubt if it is relevant to say that he has also considered the matter for himself". Their Lordships agree in this with the Chief Justice except that they do not *prima facie* regard it as a matter of doubt.

This view is fortified by considering the language of S. 12, which clearly puts the onus on the applicant: "...... a person claiming to be entitled to a Government promissory note, may, [that is, is entitled] on applying to the prescribed officer, and on satisfying him of the justice of his claim and

1. (1906) 2 Ch. 47. 2. (1905) A.C. 392.
3. (1875) L.R. 10 C.P. 196.

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delivering the promissory note receipted in the prescribed manner, and paying the prescribed fee, if any," obtain the renewed note. "Claiming" involves an assertion of title; the act of applying is the applicant's act; "satisfying" is, as Mr. Willink pointed out, in the active not passive and is a condition to be fulfilled by the applicant. These matters clearly, in their Lordships' judgment, constitute a request, from which the common law indemnity may properly be *prima facie* implied, none the less because some deliberation may be involved on the part of the officer before he submits to be satisfied by what the applicant puts before him.

But the Chief Justice held that the common law indemnity could not be implied under this Act because of S. 21, which in his judgment excludes any implied indemnity because it gives a right to demand an express indemnity and to refuse to give the renewed note unless an express indemnity is given. He thought that the express provision by S. 21 of the statutory right is inconsistent with the existence of an implied right if the section is not acted upon. He concluded that the Legislature must be deemed to have intended that there should not be a right of indemnity in every case, but only under the special conditions of S. 21. Their Lordships are, with respect, unable to accept this view. As a matter of construction they do not accept the view that S. 21 has not merely the positive effect of giving the special right which it provides for, but has also the negative effect of cutting out the implied right of indemnity undoubtedly, in their judgment, existing under the Act of 1886, which embodied the law on this matter until it was repealed and replaced by the Act of 1920. A statute is *prima facie* to be construed as changing the law to no greater extent than its words or necessary intendment require. S. 21 was not in the Act of 1886. If it had been intended by the insertion of that section in the Act of 1920 to abrogate the common law indemnity existing under the repealed Act, the Legislature would, it seems, have used words clearly expressing that intention, so as to secure that save as provided by S. 21, there should be no right of indemnity. Their Lordships see no reason to justify reading in or implying such words. On the contrary, they construe S. 21 as giving an added statutory right, which is different from, and in no way inconsistent with, the common law right. That latter right is not complete

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merely because the officer has acted upon the request; to make it effective it is necessary that a further condition should be fulfilled, namely, that in the words used in *Dugdale* v. *Lovering*[1] that "the act should turn out to be injurious to the rights of a third party." Thus the common law right is required in a case where the officer, though satisfied by the applicant when he issues the renewed note of the justice of his claim, is wrongly satisfied. Though both he and the applicant were acting in perfect good faith and without suspicion, they may be, as they were in this case, unconsciously infringing the rights of the true owner of the note, and guilty of converting it. Cases in which the common law implies the indemnity are generally cases when the officer would not have thought of demanding an indemnity under S. 21. These are mostly, if not always, cases where the risk is due to the fraud of some other person. S. 21, if construed as it is by the Chief Justice, would put the burden of this risk on the Government, unless in every case the officer exacted the statutory indemnity under S. 21. This, however, would place a serious and unnecessary burden on the course of renewing these notes, which is a practice in constant use, and to be facilitated, not obstructed. On the construction which their Lordships think is, merely as a matter of construction, correct, the common law indemnity would be operative in the cases, presumably rare on the average, where it turns out eventually to be wanted because of some concealed fraud. On the other hand, the officer would generally exercise the right to require the express indemnity before issuing the renewed note, wherever he can say that he is satisfied, but still he is conscious that there are circumstances of doubt or otherwise which lead him to refuse to issue the renewed note without the express indemnity. It may be noted that under S. 21 what can be demanded as a condition of issuing the renewed note is the "prescribed" indemnity which under the rules prescribed under the statute is to be the bond of the applicant with two sureties for twice the amount of the note. This is obviously different from the common law indemnity. It may further be observed that, if the matter were to be decided on the basis of the equities between the parties, the loss would more properly, it seems, be borne by the respondents, who have thought fit in the course of their business,

1. (1875) L.R. 10 C.P. 196.

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which they carry on for profit, to purchase the note from Acharya on the forged indorsement, and have assumed the responsibility of putting forward the note as being their own property, whereas the Government officer has merely performed his statutory duty in a ministerial capacity on the claim and assertion of the respondents. There is, in their Lordships' judgment, every reason why the Court should imply an indemnity in this case and no sufficient reason why they should treat S. 21 as excluding that implication. It is no doubt true that if an express indemnity were exacted under S. 21 it would exclude any implied or tacit indemnity. But that is a different matter from construing S. 21 as removing from the scope of the statute the possibility in a proper case of the implied indemnity where no express indemnity has been required.

For all these reasons, their Lordships are of opinion that the appeal should succeed, that the judgments of the Courts below should be set aside, and that it should be adjudged that the appellant recover from the respondents the proper amount under his claim and should also have the costs of this appeal and his costs in the Courts below. If the parties can agree what is the proper amount, it can be inserted in the Order in Council; if they cannot agree, the case must be remitted to the High Court at Bombay to assess the amount.

They will humbly so advise His Majesty.

Solicitors for Appellant: *The Solicitor, India Office.*

Solicitors for Respondents: *C.F. Turner & Sons.*

R.C.C. *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice.*

P. S. Ramaswamy Aiyar and another .. *Petitioners* (Petitioners)*

*v.*

Al. Sp. Pl. Subramanian Chettiar by Agent, Lakshmanan Chettiar Banker at Gobichettipalayam .. *Respondent in both (Respondent).*

Ramaswamy Aiyar *v.* Subramanian Chettiar.

*Provincial Insolvency Act (V of 1920), Ss. 25 and 26—Petition to adjudicate father and sons insolvents—Debt incurred by father—Petition*

* C. R. P. Nos. 1702 and 1703 of 1935. 17th February, 1937.

Rama-swamy Aiyar *v.* Subra-manian Chettiar.

*withdrawn—Subsequent application by sons for compensation—If maintainable—Sons, if can be adjudicated insolvents on debt incurred by father.*

An insolvency petition was presented by a creditor of a Hindu father against the father and his two sons on a promissory note executed by the father. The petition was filed against the sons on the ground that the debt was a family debt and that the sons and the father had brought about a number of sales in favour of their relations, friends and others quoting fictitious debts. Some months later the creditor withdrew the petition as his claim was satisfied. The sons then filed an application for compensation under S. 26 of the Provincial Insolvency Act. It was contended that the petition was not maintainable on the grounds (1) that the petition was withdrawn and therefore not dismissed under S. 25; (2) that S. 26 can only be applied if at the time of dismissal the Court is satisfied that the petition is frivolous or vexatious and not by a subsequent enquiry into the matter; and (3) that the sons were not 'debtors'.

*Held,* that the petition was maintainable. The petition must be taken to be dismissed under S. 25 (1) as it says " or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition ". There is no restriction on the power of the Court to enquire into the question of compensation under S. 26 after dismissal under S. 25 (1). Further " debtor " in the section means any one against whom an insolvency petition has been presented by a creditor and it is not necessary that the person applying for compensation need in truth have been a debtor.

The question of the liability of sons in a Hindu undivided family to be adjudicated insolvents in respect of a binding family debt incurred by their father discussed and left open.

Petition under S. 75 of Act V of 1920 praying the High Court to revise the orders of the District Court of Coimbatore dated 27th July, 1935 and made in C. M. A. Nos. 28 and 29 of 1935 respectively preferred against the orders of the Court of the Subordinate Judge of Coimbatore dated 6th October, 1934 and made in I. A. No. 1324 of 1932 and I. A. No. 1663 of 1933 respectively in I. P. No. 205 of 1932.

*N. Sivaramakrishna Aiyar* for Petitioners.

*K. S. Jayarama Aiyar* and *P. S. Sarangapani Aiyangar* for Respondent.

The Court delivered the following

JUDGMENT.—The respondent presented a petition in insolvency against a Hindu father and his two sons to have them declared insolvents. The two sons are the petitioners. Their father executed a promissory note in favour of the respondent for Rs. 1,500 on 6th June, 1931. On 4th March, 1932, the respondent made a demand upon the father for payment of the promissory note debt. Between that date and 14th March, 1932, there were a series of alienations of joint family property, the petitioners with their father being parties to these alienations. On 27th June, 1932, the respondent presented the

insolvency petition already referred to on the ground that the father in his capacity as family manager had executed the promissory note in question and alleging that the debt was binding on all the members of the family and that the debt had not been discharged in spite of repeated demands. He alleged that the three respondents to the insolvency petition had brought about a number of sales in favour of their relations, friends and others quoting fictitious debts. This petition was returned on the ground *inter alia* that the creditor must state how the respondents 2 and 3 to the petition were liable to be adjudged insolvents. It was re-presented with the following endorsement:



" The first respondent is the family manager. Respondents 2 and 3 are liable for the debt and they have joined the first respondent in fraudulently dealing with the property. They are therefore liable to be adjudged."

On 30th November, 1932, the creditor filed a statement to the effect that his claim was satisfied and that the insolvency petition might therefore be dismissed. On 1st December, 1932, the petitioners put in an application for compensation under S. 26 of the Provincial Insolvency Act and the Additional Subordinate Judge on 2nd December, 1932, passed the following order on the insolvency petition:

"Petitioner's vakil files memo. that claim is satisfied and that the petition may be dismissed. Respondents press for costs. So, the point whether this petition was filed on sufficient grounds has to be gone into. Respondents 2 and 3 have filed a petition for compensation. For enquiry, 20th January, 1933."

On the application for compensation the following order was made, " counter in a week. Enquiry on 20th January, 1933". Later, the matter came up before Mr. Narayana Menon, the then Additional Subordinate Judge, whose predecessor had passed the orders to which I have referred. As regards the father, he passed the following order:

" The first respondent admittedly owed the money to the petitioner when the insolvency petition was filed. He had also admittedly alienated a major extent of his properties. The first respondent did not pay the petitioner's debt for nearly four months after the alienation. The petitioner had therefore some justifiable apprehension that the alienation was intended to defeat him. The first respondent paid the debt due to petitioner after filing of the insolvency petition. In these circumstances I order the first respondent to bear his costs."

With regard to the petitioners he held that on the face of the insolvency petition they were not necessary parties and could not be adjudged insolvents as they were not personally

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liable and he ordered the creditor to pay their costs. It is clear that the creditor's statement where he says that the debt had been settled by payment asks for a dismissal of the petition. I think that it must be taken that the petition was dismissed under S. 25 of the Provincial Insolvency Act and it is not suggested by Mr. K. S. Jayarama Aiyar for the respondent that it could be dismissed under any other section though he contends that it was merely withdrawn and not dismissed. With this contention I do not agree as in my view this comes within the words of the section:

"Or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition."

The petition having been dismissed under S. 25 (1), the debtor is entitled to apply for compensation under S. 26 (1) but Mr. Jayarama Aiyar argues that the provisions of S. 26 can only be applied if at the time of the dismissal under S. 25 (1) the Court is satisfied that the petition was frivolous or vexatious and that it does not have in view a subsequent enquiry into that matter. No such restriction, in my view, is to be gathered from the words of the section. The Court can, in my opinion, consider the matter on this application even though it has not done so at the time of the dismissal of the petition under S. 25 (1). Next Mr. Jayarama Aiyar contends that the petitioners were not entitled to apply under that section because they were not "debtors". This argument is founded on the petitioners' own case that they were not personally liable for the debt, it having been contracted by their father. I think this contention is unsound and that "debtor" in the section means any one against whom an Insolvency Petition has been presented by a creditor and that the person applying for compensation need not in truth have been a debtor at all. Suppose, for example, that some one wishing to harass another files an Insolvency Petition against that other person falsely alleging that he is indebted to him and his petition is on that ground dismissed, why should not the alleged debtor be entitled to have compensation awarded to him under S. 26 (1) instead of being driven to the expense of a suit? In my opinion, the petitioners were "debtors" within the meaning of the section. The applications were considered by the learned Subordinate Judge who held that the petition was not dismissed under S. 25 (1) and therefore the applica-

tions under S. 26 (1) could not be entertained and that it was not open to the Insolvency Court to enquire into the matter further. For the reasons I have already given the opinion of the learned Subordinate Judge was wrong. On appeal, the learned District Judge held that the applications were rightly dismissed, the Court having in his opinion rightly exercised its discretion to refuse to award compensation. He also agrees with the Subordinate Judge that S. 26 is intended to meet cases where a creditor's application has not only been dismissed on the merits after taking evidence but also held to be frivolous or vexatious, that is, the present petition was not dismissed under S. 25 (1). My view upon the law which is contrary to that of both the lower Courts does not however dispose of these petitions as, in my opinion, the applications for compensation stood to be dismissed upon the facts already on the record. In paragraph 13 of his order the learned Subordinate Judge says:



"It is not necessary to state anything further on these petitions but this. I am in no way persuaded, having regard to the records before me and the allegations of the petitioners that the petition filed by the creditor was not justified and that it was fraudulent or frivolous. As it is, we have the fact that in June 1932 the creditor filed the Insolvency Petition consequent on the fact that there were four alienations by the father and the sons. His claim was satisfied only in November . . . ."

The learned Subordinate Judge who originally dealt with the matter as regards the father as I have already observed stated that the petitioner had some justifiable apprehension that the alienation was intended to defeat him and he therefore ordered him to bear his own costs. That order does not reflect upon the conduct of the petitioners at all but the learned District Judge in his judgment says:

"A Brahmin father and his two sons—one a doctor and the other a lawyer—were heavily involved in debt. The father was personally liable but the family being joint the sons' shares were also liable. The creditors of the family insisted on the appointment of a trustee to make a rateable distribution of the family assets or that the family should sell its lands, etc., in parcels to each creditor according to the amount of his debt. In other words, there was to be a voluntary liquidation."

I doubt very much whether the creditors of the family did insist on the appointment of a trustee. It is merely so alleged in the counter-petitions. What the father stated in his statement was that various creditors were pressing for payment of their dues, that he had no ready money on hand, that therefore with a view to pay off all the creditors fully he entered into an arrangement with the creditors with their full consent and

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co-operation and with the help of respectable mediators, that it was decided under the arrangement that each of the creditors should take a sale of a portion of the family properties equal in value to the debt due to him, that accordingly on 14th March, 1932, sale deeds were executed to the creditors in full discharge of their settled debts and that it was clearly recited that a portion of the properties had been reserved for the petitioner in discharge in full of his debt and that the property so reserved was sufficient to the petitioner's knowledge to fully discharge his debt. I must mention here that the creditor in his petition alleged that the property was worthless or inadequate. The father further alleged that the creditor had been throughout made aware of the arrangements and never objected at any time thereto, that he and his sons believed that he would also give effect to it and that they were always ready and willing to execute a sale deed of the property reserved to him. The petitioners filed a joint counter-petition in which they denied that they were heavily involved. Their counter-petition follows closely on the lines of their father's. The creditor in answer to the petitioner's application for compensation denied that he knew or acquiesced in the alleged agreement with the creditors and said that he was never at any time told by anybody about the mediation, which took place behind his back; and the learned Counsel for the petitioners was unable to contend before me that any notice of the alleged meeting of the creditors and mediation was ever given to the creditor and I can see no reason for believing that he ever knew of it, or afterwards acquiesced in it. The fact that he filed a petition in insolvency indicates the contrary. This alleged arrangement with the creditors was all effected within the space of 10 days immediately following on the notice of demand for payment given by the creditor. Certainly on the record before the Court it is very probable that the whole thing was done behind the creditor's back. On the record it seems to me that the Insolvency Court could not find that the petition against the two sons was not put in without some reason. The legal position with regard to the liability of sons in a Hindu undivided family in respect of a binding family debt incurred by their father to be adjudicated insolvents is even to-day none too clear though in *Purnayya* v. *Basava Kottayya*[1] Krishnan

1. (1931) 61 M.L.J. 518.

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Pandalai, J., held that the son of a Hindu father who died after incurring debts upon promissory notes apart from some special circumstances which would make him personally liable for the family debt cannot be adjudged insolvent on account of his liability as a member of the family to pay those debts out of the family properties. In the course of his judgment he refers to an unreported decision in C.M.A. No. 47 of 1916 where it was held that members of joint families liable as such for a family debt but not otherwise are debtors within the meaning of the Insolvency Act and therefore can be adjudged insolvent on those debts. He does not follow that case and refers also to *Muthu Veerappa Chettiar* v. *Sivagurunatha Pillai*[1] which to some extent followed the unreported decision though the judges there say that each case would depend upon its circumstances and that, if the petitioner makes the necessary allegations and proves them, then the Court would be justified in adjudging the members of a joint family insolvents. He also refers to *Nagasubramania Mudali* v. *Krishnamachariar*[2]. In that case it was held by Odgers and Venkatasubba Rao, JJ., that a decree against a son for the debt of his deceased father to the extent of the assets in his hands does not make him (the son) liable to adjudication and he cannot be so adjudicated unless the decree is a personal decree. The conditions necessary to impose a personal liability upon the members of an undivided family in respect of money borrowed for family purposes are stated in *Chelamayya* v. *Varadayya*[3]. In *Mamayya* v. *K. R. Rice Mill Co.*[4], Sadasiva Aiyar and Napier, JJ., held that the members of a joint Hindu family can be adjudicated insolvents on a single petition by a creditor if they are liable on a joint debt and have been guilty of a joint act or acts of insolvency. Although this case was relied upon by Mr. Jayarama Aiyar, I do not think that it is of much assistance. This matter has also been dealt with by Cornish, J., in *Krishna Aiyar* v. *Pierce Leslie & Co.*[5], where he holds that the members of the family must be under a personal liability before they can be adjudicated. Even assuming that the petitioners would not be personally liable

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1. (1925) 49 M.L.J. 697: I.L.R. 49 Mad. 217.
2. (1927) 53 M.L.J. 403: I.L.R. 50 Mad. 981.
3. (1898) 9 M.L.J. 3: I.L.R. 22 Mad. 166 at 167 and 168.
4. (1921) 40 M.L.J. 570: I.L.R. 44 Mad. 810.
5. A.I.R. 1936 Mad. 64.

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for this debt and that they could not therefore be adjudicated insolvents in respect of it, I am far from thinking that the petitioning creditor must have known that the sons could not be made insolvents. This was a debt binding on the family for which certainly the sons' shares could be made liable and they together with their father set about alienating a large portion of the family property under circumstances which the petitioning creditor might very reasonably suppose indicated that a fraud upon him was being attempted; and clearly the financial position of the family was such that its debts could not be discharged without such alienations. I am satisfied that there was quite sufficient ground on the facts for the lower Court's refusal to award compensation. Both Civil Revision Petitions are dismissed with costs.

S. V. V. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Villupuram Urban Co-operative Bank by its Secretary Mr. Kuppuswamy Mudali .. *Appellant** *(Respondent)*

*v.*

Balasubramania Mudali .. *Respondent* *(Petitioner).*

Villupuram Urban Co-operative Bank v. Balasubra-mania Mudali.

*Executing Court—Powers of—Award of Arbitrator under S. 43, Co-operative Societies Act (II of 1912)—Joint Hindu family as member of society—Award against manager and minor member—Validity—Service of notice in arbitration proceedings—Power of executing court to enquire—Civil Procedure Code (V of 1908), S. 47.*

It is not open to an executing court to sit in judgment over the court which passed the decree which has to be executed. It cannot, except in certain limited recognised cases, conduct enquiries to ascertain whether the decree was properly passed. If on the face of the record it is clear that some illegality has been committed, the executing Court can refuse to execute. In a dispute between the Secretary of a Co-operative Bank and a member of that Company an award was passed by the Arbitrator under r. 14 of the Rules framed under S. 43 of the Co-operative Societies Act by which the manager of a Hindu joint family and two undivided members of the family were directed to pay a certain sum to the Society and in default the property was ordered to be brought to sale. When the award was sent to the District Munsif for execution it was contended that the third defendant was not served in the proceedings before the Arbitrator and he refused to execute the decree against the share of the third defendant. In appeal the decision

*A.A.A.O. No. 151 of 1934. 5th January, 1938.

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of the Munsif was confirmed not only on the ground that the third defendant was not served but also on the ground that the third defendant, because he was a minor, could not be a member of the Society and because the rules relating to arbitration provide for the decision of disputes to which members only were parties.

*Held*, that in as much as there was nothing in the decree which showed that the minor was not served the executing court had to presume that the decree was properly passed against the minor, that in the particular case the whole joint family was a member of the Co-operative Society and that it was not open to the executing Court to hold that the award passed by the Arbitrator was illegal.

*Koyal* v. *Bhondlal*, A.I.R. 1931 Nag. 48 and *Laxman* v. *Dhamori Co-operative Society*, A.I.R. 1933 Nag. 211, referred to.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore dated 9th April, 1934 and made in A. S. No. 317 of 1933 (A. S. No. 148 of 1932, on the file of the District Court, South Arcot) preferred against the order of the Court of the District Munsiff of Villupuram in C.M.P. No. 247 of 1931 in Claim A.F. No. 349 of 1929-1930.

*M. S. Venkatarama Aiyar* for Appellant.

*V. Krishnamachari* for Respondent.

The Court delivered the following

JUDGMENT.—In a dispute between the Secretary of the Villupuram Urban Co-operative Bank and member No. 719 of that Company an award was passed by the Arbitrator under r. 14 of the Rules framed under S. 43 of the Co-operative Societies Act, in which one Vaithilinga Mudaliar and two undivided minors of his family were ordered to pay Rs. 281-6-9 to the Society with interest and costs and upon failure to do so the property was ordered to be brought to sale. This award was sent to the District Munsiff of Villupuram for execution; and he held after enquiry that the third defendant had not been served in the Proceedings before the Arbitrator; and he therefore refused to execute the decree against the share of the third defendant in the family property. In appeal the Additional Subordinate Judge of Cuddalore confirmed this decision, not only on the ground that the third defendant was not served; but also on the ground that the third defendant, because he was a minor, could not be a member of the Society and because the rules relating to arbitration provide for the decision of disputes to which members only were parties.

It has been made clear by this Court in a series of decisions—and the decision in appeal against Appellate Order

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No. 146 of 1933 is one of the latest—that it is not open to an executing Court to sit in judgment over the Court which passed the decree which has to be executed. It cannot, except in certain limited recognised cases, conduct enquiries to ascertain whether the decree was properly passed. If on the face of the record it is clear that some illegality has been committed, the executing Court can refuse to execute. The question that has to be decided is whether there is anything in the award passed by the Arbitrator in this case that shows that it is illegal. Clearly there is nothing in the decree which shows that the minor was not served; and the executing Court therefore had to presume that the decree was properly passed against the minor. Whether a joint family can be a member of the Co-operative Society is a question that may be open to discussion, although I think with due respect that the learned Judges who decided *Laxman* v. *Dhamori Co-operative Society*[1] were right in holding that a corporation, and therefore a joint family, could be a member of the Co-operative Society. That in certain circumstances a family can be a member of the Society is also recognised in an earlier case of the same Court, *Koyal* v. *Bhondlal*[2], which has been referred to by the learned Advocate for the third defendant in this Court. It is argued that there is nothing in the decree which shows that the whole family was a member of the Society; but the question is not whether the decree shows that the whole family was a member of the Society; but whether there is anything in the decree which shows that the whole family was not a member, On the contrary, the award sets out the names of all the members of the family; and therefore it would seem that all the members of the family were liable, because the family and not only the manager was a member of the Society. I am therefore of opinion that there is nothing in the award which indicates that it is incorrect and ought not to be executed. If in fact the third defendant was not liable, either because he was not served or otherwise properly represented before the Arbitrator, he is not without a remedy; but the executing Court must take the decree as it stands and allow the Society to execute. If a minor is not properly represented in a suit, he is not a party to the suit, although his name may appear in the records and in

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1. A.I.R. 1933 Nag. 211.

2. A.I.R. 1931 Nag. 48.

the decree. That being so, the executing Court is given no jurisdiction under S. 47, Civil Procedure Code.

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The appeal is therefore allowed with costs throughout. Leave refused.

B. V. V. — *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR, MR. JUSTICE VARADACHARIAR, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE STODART.

Perumal Chettiar .. *Petitioner** (*Defendant*)

*v.*

Kamakshi Ammal .. *Respondent* (*Plaintiff*).

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*Promissory note—Insufficiently stamped—Admissibility of—Evidence Act, S. 91—Indian Stamp Act, S. 35—Effect of.*

*Held*, by the Full Bench (Stodart, J., dissenting) that the answer to the question whether a person who has lent money on a promissory note, which is inadmissible in evidence owing to a defect in the stamping, can sue to recover the debt apart from the note, depends on the circumstances under which the instrument was executed. If the note was given in respect of an antecedent debt, or as collateral security or by way of conditional payment or if the note does not embody all the terms of the contract the true nature of the transaction can be proved. But if the promissory note embodies all the terms of the contract, no suit on the debt will lie as S. 91 of the Evidence Act and S. 35 of the Stamp Act bar the way.

Case-law discussed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of Small Causes at Trichinopoly dated the 18th day of July, 1935, and passed in S. C. S. No. 1378 of 1931.

*K. V. Srinivasa Aiyar* for Petitioner.

*N. Suryanarayana* for Respondent.

The Court delivered the following

Leach, C. J.

JUDGMENTS: *The Chief Justice.*—The question which the Court is called upon to decide in this case is whether a person who has lent money on a promissory note can sue to recover the debt apart from the note when the note embodies the terms of the contract with the borrower but is inadmissible in evidence owing to a defect in the stamping. In England the right to sue on the original consideration is recognised, and the same principle has

*C. R. P. No. 883 of 1935. 10th February, 1938.

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been applied by some Judges in India, but S. 91 of the Indian Evidence Act says that no evidence shall be given in proof of the terms of the contract except the document itself, or secondary evidence where secondary evidence is admissible and other Judges have held that this section prohibits a suit on the original consideration. This Court, except in two cases to which I shall in due course refer, has held that S. 91 of the Evidence Act is a bar to a suit on the debt when the loan and the instrument are contemporaneous. Before turning to examine the decisions of this Court and certain of the other authorities to which reference has been made I should point out that the Court is not considering the case where a promissory note has been given in respect of an antecedent debt. It is well settled both in England and in this country, that where a negotiable instrument is given in respect of an antecedent debt the creditor may sue on the debt and ignore the note. We are merely concerned here with the case where the note has been given at the time of the loan or in pursuance of the arrangement then made and embodies in full the terms of the contract.

The earliest reported case of this Court to which our attention has been drawn is that of *Krishnaswami Pillai* v. *Rangaswami Chetty*[1], where a promissory note had been given by two members of a joint Hindu family in consideration of a loan to the family. The instrument was improperly stamped, but the Court held that this was no bar to the suit because the cause of action for the money lent was complete in itself before the giving of the note. The report does not set out the facts and apparently the Court was of the opinion that the instrument had been given for an antecedent debt. The question was raised before Collins, C. J. and Parker, J., in *Pothi Reddi* v. *Velayudasivan*[2]. There the loan having been arranged and the money paid a promissory note specifying the terms of the contract was executed later in the day. The note was not duly stamped and the Court held that the suit was not maintainable. It was recognised that there might be circumstances under which the loan could be recovered apart from the note, but the Court was firmly of the opinion that when the contract is reduced to writing the instrument itself is the only evidence

1. (1883) I.L.R. 7 Mad. 112. 2. (1886) I.L.R. 10 Mad. 94.

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of the transaction. This decision was followed by Boddam and Sankaran Nair, JJ., in *Yarlagadda Veera Raghavayya* v. *Gorantla Ramayya*[1], by Sadasiva Aiyar and Spencer, JJ., in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[2] and by Varadachariar and Burn, JJ., in *Chockalingam Chettiar* v. *Palaniappa Chettiar*[3]. The same principle was applied by Madhavan Nair, J., in *Pulugurta Somaraju* v. *Machiraju Venkatasubbarayudu*[4] and Reilly and Anantakrishna Aiyar, JJ., in *Gura Sahu* v. *Tangi Krishnamma* alias *Babu Patro*[5], by Krishnan Pandalai, J., in *Chandrasekharam Pillai* v. *Srinivasa Pillai*[6] and again by Anantakrishna Aiyar, J., in *Alimane Sahiba* v. *Kolisetti Subbarayudu*[7].

In *Ramaswami Pillai* v. *Murugiah Padayachi*[8], a Full Bench consisting of Beasley, C. J., Cornish and Pandrang Row, JJ., had to consider a promissory note which was expressed in these terms:—

"We have taken from you on credit this day 10 kalams of Kuruvai paddy at Rs. 3 a kalam for Rs. 30 and we have executed this hand-letter promising to pay the sum of Rs. 30 with interest thereon at 3 pies per rupee per mensem to you or to your order."

The document was unstamped and it was conceded that it was inadmissible in evidence. It had not been given in respect of an antecedent debt, but was a contemporaneous document executed at the time of the sale of the paddy. The Court held that the suit was maintainable on the debt. In the course of his judgment Beasley, C. J., recognised that where a promissory note is in consideration of a loan the debt cannot be proved *aliundi.* The learned Chief Justice and Pandrang Row, J., were of opinion that in all such cases the Courts must be guided by what appears on the face of the promissory note. If it is expressed in such a way as to leave what was intended by the parties in any way in doubt, then the facts must settle the question. If it is clear on the face of the promissory note that it is the contract, then no further evidence can be permitted. The Court held that the suit was maintainable because it considered that the promissory note was merely given as a

1. (1905) 15 M.L.J. 484: I.L.R. 29 Mad. 111.
2. (1913) 26 M.L.J. 19: I.L.R. 38 Mad. 660.
3. (1934) 67 M.L.J. 595: I.L.R. 58 Mad. 261.
4. (1924) 20 L.W. 943.
5. (1932) 36 L.W. 432.
6. (1932) 37 L.W. 723.
7. (1932) 63 M.L.J. 303.
8. (1935) 70 M.L.J. 267: I.L.R. 59 Mad. 268 (F. B.).

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conditional payment for the paddy. Cornish, J., reserved his opinion on the question whether the payee of a note given for a contemporaneous loan has or has not a right of action on the debt. In *Chockalingam Chetti* v. *Annamalai Chetti*[1], Coutts-Trotter and Srinivasa Aiyangar, JJ., expressed the opinion that the giving of an instrument in recognition of a pre-existing debt does not extinguish, but merely suspends the cause of action on the original debt. The giving of an instrument is merely conditional to its discharge. I do not regard this judgment as questioning the correctness of the decision in *Pothi Reddi* v. *Velayudasivan*[2]. Stone, J., in *Murugappa Chetti* v. *Nachiappa Chetti*[3], held that where the cause of action is complete before the giving of the promissory note the creditor may sue on the debt. This is another case in which the promissory note was given in respect of an antecedent debt.

The two cases which conflict with *Pothi Reddi* v. *Velayudasivan*[2] are *Gopala Padayachi* v. *Rajagopal Naidu*[4] and *Chinnayya Naidu* v. *Srinivasa Naidu*[5]. In *Gopala Padayachi* v. *Rajagopal Naidu*[4], Wallace, J., stated that when a promissory note is taken for a contemporaneous debt, the balance of opinion is that the execution of the instrument does not discharge the debt, but only suspends the remedy on the debt. I am unable to agree that this is the balance of judicial opinion in India. The learned Judge made no reference to the decision in *Pothi Reddi* v. *Velayudasivan*[2] or to that in *Muthu Sastrigal* v. *Visvanatha Pandara Sannadhi*[6]. In *Chinnayya Naidu* v. *Srinivasa Naidu*[5], Venkatasubba Rao, J., expressly held that where the loan and the giving of the promissory note are contemporaneous the lender may fall back on the original contract. This decision is, therefore, in direct conflict with *Pothi Reddi* v. *Velayudasivan*[2] and the cases which followed it. The learned Judge in the course of his judgment, referred to a marked conflict of judicial opinion in this High Court. He regarded the decision of Stone, J., in *Murugappa Chetti* v. *Nachiappa Chetti*[3], as being in conflict with the judgment of

1. (1915) 34 I.C. 417.
2. (1886) I.L.R. 10 Mad. 94.
3. (1934) 67 M.L.J. 30.
4. A.I.R. 1926 Mad. 1148.
5. (1934) 67 M.L.J. 912.
6. (1913) 26 M.L.J. 19: I.L.R. 38 Mad. 660.

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Varadachariar and Burn, JJ., in *Chockalingam Chettiar* v. *Palaniappa Chettiar*[1]. With great respect I do not look upon these decisions as being in conflict and until the judgment of Venkatasubba Rao, J.; the only previous departure from the general trend of decisions of this Court was to be found in the judgment of Wallace, J. The correctness of the decision in *Pothi Reddi* v. *Velayudasivan*[2] has, however, now been called in question and in view of the importance of the matter the present case has been placed before a bench of five Judges.

The question under discussion was considered by a Full Bench of the Rangoon High Court of which I was a member in the case of *Maung Chit* v. *Roshan N. M. A. Kareem Oomer & Co.*[3] and there all the important decisions, both Indian and English, were discussed in the course of the arguments. The judgment of the Court was delivered by Page, C.J., who deduced the following propositions of law from the authorities:—(1) When a loan is contracted it is an implied term of the agreement that it shall be repaid. (2) When a promissory note is given by the borrower either at the time when the loan is contracted or afterwards, the terms upon which it is given and taken is a question of fact and not of law. (3) The giving of a negotiable security by a debtor to his creditor operates *prima facie* as a conditional payment only, and not as a satisfaction of the debt unless the parties so regard it. (4) If the promissory note is itself the consideration for the loan or if it is accepted as an accord and satisfaction of the original debt, the lender is restricted to his rights under the instrument. (5) The lender is entitled to sue on the original consideration if the instrument is given merely as a collateral security. (6) If the terms of the agreement under which the loan was made have been embodied in an instrument no evidence can be adduced in proof of the terms of the contract except the document itself, and if the document is not admissible in evidence as the result of its being improperly stamped the suit must fail. I concurred in this judgment and subject to one qualification I still consider that it correctly states the law. The qualification which I would now make has reference to the

1. (1934) 67 M.L.J. 595: I.L.R. 58 Mad. 261.
2. (1886) I.L.R. 10 Mad. 94.
3. (1934) I.L.R. 12 Rang. 500 (F.B.).

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statement that the giving of a negotiable instrument operates *prima facie* as a conditional payment of the debt. On further consideration I have come to the conclusion that this must depend on the facts of the particular case and that there is no presumption that the instrument has been given as conditional payment. Therefore, in my opinion, when the lender wishes to sue on the original contract on the ground that the instrument was given by way of conditional payment he must prove facts which warrant the inference.

I am in agreement with the observations of Sulaiman and Kendall, JJ., in *Kundan Lal* v. *Bhikari Das-Ishwar Das*[1]. The learned Judges there said:—

" It is true that in considering this point we cannot be solely guided by the equitable considerations which are given effect to in English cases. The express provisions of S. 91 of the Indian Evidence Act cannot be ignored. Under that section, where the terms of a contract have been reduced to the form of a document, no evidence can be given in proof of the terms of such contract except the document itself or secondary evidence of its contents where it is admissible. If therefore the *hundis* are the embodiment of the whole contract between the parties and those *hundis* are not admissible in evidence and cannot be looked at for the purpose of finding out the terms of the contract, the plaintiffs cannot be allowed to adduce other evidence to prove the terms of such contract. It is conceivable that in special cases a bill of exchange or a promissory note may be the only document containing the terms of the contract between the parties, and in such a case if that document cannot be adduced in evidence the creditor may be prevented from recovering the amount. This is clear from illustration (*c*) to S. 91. On the other hand, from the mere fact that a bill of exchange or *hundi* has been executed it does not necessarily follow that the whole of the contract between the parties has been reduced to the form of such a document. A *hundi* is principally a written promise to pay a fixed amount on or after a certain date. It does not necessarily contain all the terms of the agreement between the parties as a bond, for instance, would do. In many cases, a promissory note or a *hundi* may merely be a written security taken for the loan. The promise to pay the amount may be only a part of the whole contract between the parties, in which case it cannot be said that that contract has been reduced to the form of a *hundi*. In such cases it would be impossible to hold that the provisions of S. 91 would exclude evidence showing the terms of the whole contract which cannot be determined from the *hundi* alone."

A decision to the same effect was given by this Court in *Chidambaram Chettiar* v. *Ayyasami Tevan*[2], an appeal heard by Oldfield and Krishnan, JJ. Oldfield, J., said:

" The second question referred to us is whether the lender can be given a decree apart from the note for the money lent upon the note. It is not possible to answer this question without further knowledge of the facts."

1. (1929) I.L.R. 51 All. 530.
2. (1916) 31 M.L.J. 401: I.L.R. 40 Mad. 585.

Krishnan, J., observed:

"If there is an obligation apart from the one under the note itself it may clearly be enforced. The fact that the 'loan and the note are contemporaneous' is not conclusive of the non-existence of such obligation."

In my opinion the law may be stated shortly in this way. If the promissory note embodies all the terms of the contract and the instrument is improperly stamped no suit on the debt will lie. S. 91 of the Evidence Act and S. 35 of the Stamp Act bar the way. But if it does not embody all the terms of the contract the true nature of the transaction can be proved and where an instrument has been given as collateral security or by way of conditional payment a suit on the debt will lie. The fact that the execution of the promissory note is contemporaneous with the borrowing cannot exclude the possibility of the instrument having been given as collateral security or by way of conditional payment. Whether a suit lies on the debt apart from the instrument therefore depends on the circumstances under which the instrument was executed.

It has been stressed in argument that the English rules of evidence do not run counter to S. 91 of the Indian Evidence Act, and therefore it is said that the section cannot be regarded as a bar to the application of the principle accepted in England that a suit lies on the debt apart from the instrument. This argument ignores two important factors. In the first place, the English rules of evidence are not statutory, but Judge made, and in the second place the tendency in England has always been to ignore as far as possible stamp objections, as is pointed out in Taylor on Evidence, Vol. I, page 276 (12th Edition). In India the law is statutory and the Courts are given no latitude in matters of this nature. S. 35 of the Stamp Act absolutely prohibits a negotiable instrument improperly stamped being put in evidence, and S. 91 of the Evidence Act insists that where a contract has been reduced to writing the document alone shall be looked at.

The suit out of which the present petition arises was for the recovery of a sum of Rs. 400 lent on a promissory note on the 17th June, 1928. The plaintiff's case was that there had been payments to account and that these payments had been endorsed on the instrument. The defences were: (1) the promissory note was not supported by consideration; (2) there had been no payments to account and the endorsements

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were false; (3) the suit was barred by limitation; and (4) it was not maintainable as the promissory note was insufficiently stamped. The promissory note was insufficiently stamped, but the trial Judge found against the defendant on the facts and granted a decree on the ground that the plaintiff was entitled to sue on the original consideration, because the promissory note had been executed 1½ hours after the lending of the money. The learned trial Judge did not consider the question whether the promissory note embodied the whole of the terms of the contract between the parties. The case should, therefore, be remanded to the trial Court for further consideration and decision in the light of this judgment. The petitioner is entitled to his costs in this Court.

Madhavan Nair, J.

*Madhavan Nair, J.*—I agree.

Varadachariar, J.

*Varadachariar, J.*—I agree. In deference however to the decisions which have laid down a different rule, I feel bound to explain my inability to follow them, especially when that rule has the attraction of avoiding apparent injustice, while the conclusion stated in the judgment just delivered has been described as "needlessly technical" by an eminent Judge (Jenkins, C.J.) in *Krishnaji* v. *Rajmal*[1].

As indicated by me in the order of reference*, the question for consideration is, what is the purpose and effect of the pro-

1. (1899) I.L.R. 24 Bom. 360 at 362.

* ORDER OF REFERENCE TO A FULL BENCH.

*Varadachariar, J.*—I am not prepared to accept the view of the lower court that the difference of four *naligais* (about one hour and a half) between the giving of the money and the giving of the note furnishes a basis for a legal distinction. Though the word 'contemporaneous' is used in some of the judgments, the true test is not one based on hours and minutes but on a *real dissociation* according to the intention of the parties. If the intention was to lead *on the note* the fact that the note is given a few minutes or a few hours later than the advance of the money cannot make the loan *independant* of the note. The question under S. 91 of the Evidence Act is whether the parties intended the contract between them to be embodied in the note or did they contemplate an independant contract. With reference to the reasoning of Venkatasubba Rao, J., as to the possible hardship arising from a strict application of S. 91 to such cases, I only wish to say that the question for consideration is, what is the object of the prohibition enacted by the legislature in S. 35 of the Stamp Act. By excluding unstamped and insufficiently stamped promissory notes from the benefit of the proviso to S. 35 of the Stamp Act, the legislature made it clear that this class of cases was intended to be harshly dealt with, because the possibility of evasion was greater in such cases. It is not for the Court to circumvent this possible hardship by giving a decree in such cases on the consideration itself. It was

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hibition contained in S. 35 of the Stamp Act? It seems to me there can be little doubt that in enacting that prohibition, the legislature expected that it would be made *effective*, by the combined operation of that section, and S. 91 of the Indian Evidence Act. The possible hardship to the lender was noted by Sir Richard Couch, as early as 1873 in *Ankur Chunder Roy Chowdhry* v. *Madhub Chunder Ghose*[1]. The learned Chief Justice observed that the law has to be so, for the reason that "if the consequence of not stamping a document of this kind was not serious, the stamp laws would very frequently be disregarded?" If I am right in my interpretation of these provisions of the statute law, I venture to think that it is not for the Court to attempt to circumvent the law, even for the laudable purpose of advancing substantial justice.

There has been little or no controversy as to the effect of S. 35 of the Stamp Act. The divergence of opinion disclosed in the decided cases relates to the bearing and effect of S. 91 of the Evidence Act. Even on this point, the general principle underlying the section hardly admits of any doubt. In the words of Sir Richard Couch (quoted by the Judicial Committee in *Subramanian* v. *Lutchman*[2]), "the rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing". The question is, how far does this rule or the reason of the rule apply to cases in which a person borrowing money executes as part of the same transaction a promissory note in favour of the lender? That the terms as to rate of interest, date of payment, etc., form part of the contract and cannot be proved except by proof of the note seems to be more or less admitted (see *Ram Bahadur* v. *Dusuri Ram*[3]). Is there an *obligation to repay* divorced from these terms and can such obligation be proved independently of the note is the point in controversy. The answer seems to me to depend on, whether it is not true even in this case that the writing,

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not the policy of the legislature merely to exclude the best evidence—that is the document—and leave it to the Court to fall back on other evidence as to the loan. In view of the divergent opinions expressed in the different judgments delivered in *Ramaswami Pillai* v. *Murugiah Padayachi*, (1935) 70 M.L.J. 267: I.L.R. 59 Mad. 268 (F.B.), I think it better that this case should be heard by a bench of two Judges.

1. (1873) 21 W.R. 1.
2. (1922) 44 M.L.J. 602: L.R. 50 I.A. 77: I.L.R. 50 Cal. 338 at 344 (P.C.).
3. (1912) 17 C.L.J. 399.

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namely, the promissory note is "tacitly considered by the parties as the only repository and the appropriate evidence of their agreement" (*per* Sir Richard Couch in the case* already quoted from).

The course of decisions in the Indian High Courts may be briefly stated. The Allahabad and Lahore High Courts have after some fluctuation of opinion adopted the stricter view in their latest Full Bench pronouncements. The Madras decisions have been dealt with by my Lord who has also referred to the judgment of the Full Bench of the Rangoon High Court. In Calcutta, the stricter rule was laid down in *Ankur Chunder Roy Chowdhry* v. *Madhub Chunder Ghose*[1] but this was virtually departed from the *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree*[2]. Judging from the statement of facts, the last mentioned case seems to have arisen out of a suit by an indorsee of the unstamped promissory note; with all respect, it is difficult to see how the indorsee who could not even prove the note could sue on the *original consideration between the maker and the payee.* (See *Waynam* v. *Bends*[3].) In *Sheikh Akbar* v. *Sheikh Khan*[4], Garth, C. J., re-affirmed the stricter rule; but in *Pramatha Nath Sandal* v. *Dwarka Nath Dey*[5], his statement of the law was interpreted in a manner not easily reconcilable with the way that Garth, C.J., had himself applied it in *Radhakant Shaha* v. *Abhoychurn Mitter*[6]. Later decisions of the Calcutta High Court seem to have alternated between the two views (cf. *Ranendramohan Tagore* v. *Keshabchandra Chanda*[7], *Indra Chandra* v. *Hiralal*[8], *Ram Bahadur* v. *Dusuri Ram*[9] and *Tarachand Protapmal* v. *Tamijuddin Sheikh*[10]); but *Pramatha Nath Sandal* v. *Dwarka Nath Dey*[5] was followed by the Bombay High Court in *Krishnaji* v. *Rajmal*[11]. In *Jacob & Co.* v. *Vicumsey*[12], the learned Judge seems to be adopting the view of Page, C.J., in the Rangoon case. In Patna, the question can scarcely be regarded as settled (cf. *Dhaneswar Sahu* v. *Ramrup Gir*[13] where Macpherson, J., concurred only on the ground of *stare decisis*).

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* *Kedarnath Dutt* v. *Shamloll Khettry*, (1873) 11 Beng.L.R. 405.

1. (1873) 21 W.R. 1.
2. (1878) I.L.R. 3 Cal. 314.
3. (1808) 1 Camp. 175 : 170 E.R. 918.
4. (1881) I.L.R. 7 Cal. 256.
5. (1896) I.L.R. 23 Cal. 851.
6. (1882) I.L.R. 8 Cal. 721.
7. (1934) I.L.R. 61 Cal. 433.
8. A.I.R. 1936 Cal. 127.
9. (1912) 17 C.L.J. 399.
10. A.I.R. 1935 Cal. 658.
11. (1899) I.L.R. 24 Bom. 360 at 362.
12. (1926) 29 Bom.L.R. 432.
13. (1928) I.L.R. 7 Pat. 845.

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As some of the Indian decisions purport to follow the English rule, it is necessary to note the exact terms of the relevant rules of the English law and the basis on which they rest, with a view to see how far they can be followed in this country; for, as pointed out by the Judicial Committee in *Maung Kyin* v. *Ma Shwi La*[1], Courts in India cannot depart from the provisions of the Indian Evidence Act merely on the ground that the laws of evidence in England, when similar questions come before the English Courts, permit certain facts to be esablished by proof at large. Though it may generally be true to say that S. 91 of the Indian Evidence Act embodies what is known as the 'best evidence' rule in the English law, the terms in which the rule has been codified here do not permit to the Courts in India the latitude which English Courts enjoyed at a time when the rule was being developed and administered there substantially as a rule of *caution* in leaving evidence to the jury. Thus, the same learned Chief Justice (Lord Tenterden) who in *Vincent* v. *Cole*[2] said that he had always acted most strictly on the rule that what is in writing shall only be proved by the writing itself, observed in *Reid* v. *Battee*[3]:

"So much injustice has frequently been done by rigid adherence to this rule that I should certainly be reluctant to carry it into strict execution." (*See* Taylor on Evidence Volume, 1, S. 397.)

Further, rules of exclusion which had been developed mainly with a view to avoid ignorant juries being misled or confused, were not scrupulously adhered to by Courts of Chancery where the Judge himself adjudicated both on law and on fact, especially when the exclusion of a writing by reason of the prohibition arising from the Stamp laws threatened to defeat a just claim. In *Huddlestone* v. *Briscoe*[4] when pressed with an objection based on the Stamp laws, Lord Eldon stated that it was his 'duty to struggle to support what has been the practice of the Court'.

Bearing these considerations in mind, I proceed to deal with the relevant rules of the English law which are thus stated in Roscoe's Treatise on Evidence in Civil Actions (20th Edition, Vol. 1, p. 226):

"When the transaction is capable of being legally proved by other evidence than that of the instrument which ought to bear a stamp, such evidence,

1. (1917) 33 M.L.J. 648: L.R. 44 I. A. 236: I.L.R. 45 Cal. 320 at 333 (P. C.).
2. (1828) M. & M. 257: 173 E.R. 1151.
3. (1829) M. & M. 413: 173 E.R. 1207.
4. (1805) 11 Ves. 583 (597): 32 E.R. 1215 at 1220.

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if allowed by the pleadings, may be resorted to. Thus (*A*) Where a promissory note appears to be improperly stamped, the plaintiff may resort to the original consideration . . . . . . (*B*). If a plaintiff succeeds in making out a case of implied or oral contract and it does not appear on the cross-examination of his witnesses that there was any contract in writing, the defendant will not be allowed to give an unstamped written contract in evidence for the purpose of non-suiting the plaintiff."

The proposition that I have marked (*B*) in the above extract need not detain us because I have never found it adopted in those terms in any Indian case and it is scarcely conceivable that the legislature would have intended to permit an evasion of S. 91 in the manner suggested. Some of the English decisions cited in connection with the question now before us seem however to rest on this principle. (Cf. *Magnay* v. *Knight*[1] and *The King* v. *The Inhabitants of Padstow*[2].) The proposition that I have marked (*A*) in the above extract purports to be based on *Farr* v. *Price*[3] and *Tyte* v. *Jones* reported as a foot-note to *Farr* v. *Price*[3].

*Farr* v. *Price*[3] will on examination be found to be an action by an *indorsee* of a pronote; and in view of what is taken by Lord Ellenborough in *Waynam* v. *Bend*[4] to be indisputable, that is, that the indorsee cannot recover under any of the money counts "as he was not an original party to the bill and there was no evidence of any value being received by the defendant from him", it is doubtful if the reference in the report of *Farr* v. *Price*[3] to the general counts in the declaration and to possible evidence of payment of consideration by the *plaintiff* to the defendant was intended to relate to the original loan between the maker and the payee. If it did, it can perhaps be explained as resting on the principle which had at one time been enunciated in England that an unstamped document was a mere paper which did not amount to an 'agreement' and which therefore left the plaintiff's evidence where it stood (*The King* v. *The Inhabitants of Padstow*[2]). Such a theory is scarcely maintainable in view of later authorities (see *Alcock* v. *Delay*[5]; Roscoe, p. 227, Evidence in Civil Actions; see also *Ram Bahadur* v. *Dusuri Ram*[6]). If, as held by the Judicial Committee in *Subramanian* v. *Lutchman*,

1. (1840) 1 Man. & G. 944: 133 E.R. 615.
2. (1832) 4 B. & Ad. 208: 110 E.R. 434.
3. (1800) 1 East. 55: 102 E.R. 22.
4. (1808) 1 Camp. 175: 170 E.R. 918.
5. (1855) 4 El. & Bl. 660: 119 E.R. 243.
6. (1912) 17 C.L.J. 399.
7. (1922) 44 M.L.J. 602: L.R. 50 I.A. 77: I.L.R. 50 Cal. 338 at 3'4 (P.C.).

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a document which was excluded from evidence under S. 49 of the Registration Act was nevertheless a written contract in the sense that its existence precluded oral evidence of the same being given, it is difficult to see how a different principle will apply to cases where the document is excluded by S. 35 of the Stamp Act.

*Tyte* v. *Jones* (referred to in the foot-note to *Farr* v. *Price*[1]) seems to rest on another principle of the English law which the Indian Legislature had deliberately departed from, in enacting S. 22 of the Evidence Act. The proof that was permitted in *Tyte* v. *Jones* was to the effect that when the money for which the unstamped promissory note had been given was demanded of the defendant, he acknowledged the debt. This is explicable in the light of the rule supported by some authority in England that *admissions* by a party, even when proved by parol evidence, constitute an exception to the 'best evidence' rule (see *Singleton* v. *Barrett*[2]). This view has been criticised even in England (*see* Taylor on Evidence, Ss. 410 to 412), and S. 22 of the Indian Evidence Act adopted the stricter view and relegated 'oral' admissions as to the contents of a document to the category of "secondary evidence". The result, in India, is that if by reason of the document being unstamped, no evidence of its contents whether primary or secondary is admissible, evidence of admissions by the defendant is equally inadmissible. The position may be different where admissions are made in the pleadings themselves (cf. *Huddleston* v. *Briscoe*[3] and *Thynne* v. *Protheroe*[4]), because by reason of S. 58 of the Evidence Act, it may not be necessary to prove admitted facts and the objection under S. 91 will not arise unless the plaintiff is called upon to go into evidence. (*Mallappa* v. *Matan Naga Chetty*[5].) This was the position in *Pramatha Nath Sandal* v. *Dwarka Nath Dey*[6]; *cf.* however *Chenbasappa* v. *Lakshman Ramchandra*[7], where it was suggested that in a suit on an unstamped promissory note, even an admission in the written statement may not avail the plaintiff, as the Court when giving a decree on such admission may be "acting on" the document within the meaning of S. 35 of the Stamp Act;

1. (1800) 1 East. 55: 102 E.R. 22.
2. (1832) 2 C. & J. 368: 149 E.R. 157.
3. (1805) 11 Ves. 583 (596): 32 E.R. 1215 (1220).
4. (1814) 2 M. & S. 553: 105 E.R. 488.
5. (1918) 35 M.L.J. 555: I.L.R. 42 Mad. 41 (F.B.).
6. (1896) I.L.R. 23 Cal. 851.
7. (1893) I.L.R. 18 Bom. 369.

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see also *Ankur Chunder Roy Chowdhry* v. *Madhub Chunder Ghose*[1].

It seems to me that the other English authorities which have been referred to in this connection by text writers or in the Indian decisions do not really bear on the objection arising under S. 91 of the Evidence Act, *Henry Gompertz* v. *Thomas Bartlett*[2] turned on the rights and obligations of vendor and vendee, though an unstamped bill came into the picture. The defendant had sold a bill as a 'foreign' bill when in fact it was not. If it were a foreign bill, it could have been subsequently stamped; but not being a foreign bill it became worthless on account of the absence of a stamp. The claim of the vendee for money had and received was sustained on the ground that the vendor had sold as a foreign bill what in fact was not a foreign bill. It seems to me that this decision does not warrant the conclusion that a person *lending* money on an unstamped note can maintain an action for money had and received. I shall recur to this point later.

*Sutton* v. *Toomer*[3] proceeded on the footing that though by reason of the alteration, the promissory note had become unenforceable, the alteration did not extinguish the debt "and that it was competent to the plaintiff to give the paper in evidence to prove the terms on which the money was deposited." It is noteworthy that Bayley, J., instanced the case of a usurious security being taken for a pre-existing debt. *Wilson* v. *Kennedy*[4] was a case of an unstamped note given for a pre-existing debt (in lieu of an acceptance of the defendant which was due when the note was given) and the language of Lord Kenyon is almost identical in terms with the first rule stated by Garth, C.J., in *Sheikh Akbar* v. *Sheikh Khan*[5]. The same remark applies to *Brown* v. *Watts*[6] and to *Cundy* v. *Marriott*[7] which was a case of a bill given for goods sold (see also *Plimley* v. *Westley*[8]).

It may be convenient to refer next to those of the Indian decisions which when dealing with claims for money lent under unstamped notes invoke the principle that the giving of a

1. (1873) 21 W.R. 1. 2. (1853) 2 El. & Bl. 849: 118 E.R. 985.
3. (1827) 7 B. & C. 416: 108 E.R. 778.
4. (1794) 1 Esp. 245: 170 E.R. 345. 5. (1881) I.L.R. 7 Cal. 256.
6. (1808) 1 Taunt. 353: 127 E.R. 870.
7. (1831) 1 B. & Ad. 696: 109 E.R. 945.
8. (1835) 2 Bing. N.C. 249: 132 E.R. 98.

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negotiable instrument only operates as a 'conditional discharge' or merely suspends the plaintiff's remedy and that the plaintiff's right to sue is revived if the instrument turns out to be worthless or is not discharged by payment in due course. I see no difficulty in applying this principle to cases where money is *already* due to a person—as for goods sold or for a pre-existing debt—and the debtor gives his own note to the creditor or draws a bill or cheque in his favour. It is legitimate to presume in such cases that the creditor is not accepting the instrument in *satisfaction* of his existing claim but only as a security or as means of obtaining satisfaction from the drawee of the bill or cheque. Even in cases where money is lent contemporaneously with the giving of a cheque by the borrower or the drawing of a bill on a *third* party, it may be reasonable to treat the bill or cheque as an attempt *at payment* and to presume that it was only a 'conditional' payment. The difficulty created by S. 91 of the Evidence Act will not arise in this case because the cheque, bill or hundi does not embody a *promise* to pay by the *promisor* but only a direction to another person and the lender can fall back on the 'implied' promise in the absence of a *promise* 'in writing'. But where the borrower gives his own *promissory note* as part of the loan transaction, it seems to me artificial to treat that very 'promise to pay' obtained in that note as amounting to a payment and then to seek to import the theory of 'conditional' payment.

So far as I have been able to examine the English cases which enunciate the doctrine of 'conditional' payment, I do not find that any of them relates to a promissory note executed as part of the loan transaction itself. I am therefore with all respect unable to concur in the proposition stated by Page, C. J., as proposition No. 3 in *Maung Chit* v. *Roshan N. M. A. Kareem Oomer & Co.*[1] and statements to the same effect in other reported decisions (*see* for instance *Maung Kyi* v. *Ma Ma Gale*[2]). With the like respect I must add that my experience does not coincide with what the learned Chief Justice states (on page 508) to be his experience that 'it rarely if ever happens that the whole of the terms of the agreement under which a loan is made are embodied in a promissory note given to the lender by the borrower except in cases in which the parties contract that the negotiable instrument shall itself be

1. (1934) I.L.R. 12 Rang. 500 at 504 (F.B.). 2. (1919) 54 I.C. 84 at 91 (F.B.).

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the consideration for the loan,'' if, as later observations in the judgment imply, a promissory note cannot, according to the learned Judge, be reasonably presumed to have been taken as 'consideration' for the loan. I am free to confess to some difficulty in understanding what the learned Chief Justice had in mind when he postulated the possibility of a promissory note by the borrower being 'consideration' for the loan as distinguished from the 'contract' of loan. I can understand the position taken in *Kundan Lal* v. *Bhikari Das-Ishwar Das*[1] that from the mere execution of a note it does not *necessarily* follow that the *whole* of the contract between the parties has been reduced to the form of such a document (see *Chidambaram Chettiar* v. *Ayyaswami Thevan*[2]) and I respectfully agree that in this sense it will be a question of fact in each case whether or not the note represents the whole contract between the parties. I am unable to hold that there is any presumption that a promissory note taken from the borrower as part of the loan transaction is taken merely as 'collateral security'; but in particular cases the evidence may lead to that conclusion. (*See* per Pratt, J., in *Maung Kyi* v. *Ma Ma Gale*[3].)

The theory propounded by Ormond, J., in *Maung Kyi* v. *Ma Ma Gale*[3] that in every case of a promissory note loan " there are *two* distinct promises made by the borrower (1) that he will pay the amount borrowed to the lender and (2) that he will pay the amount due on promissory note to the holder of the note " that each promise is a distinct cause of action and that S. 91 applies only to the 2nd promise, seems to me, with all respect, equally artificial, if the learned Judge meant to hold that even promise No. 1 was an *express* promise. If, on the other hand, it is only an *implied* promise, the question arises, whether the principle enunciated by Lord Cairns in *Shaw* v. *Foster*[4] and applied by the Judicial Committee in *Subramanian* v. *Lutchman*[5] would not preclude the lender from falling back on the implied promise when the contract between the parties had been reduced to writing.

It has been asked why a man should be put in a worse position when he takes a worthless document than when he does not take any. Lord Cairns said:

1. (1929) I.L.R. 51 All. 530.
2. (1916) 31 M.L.J. 401: I.L.R. 40 Mad. 585.
3. (1919) 54 I.C. 84 at '2 and 94 (F.B.).
4. (1872) L.R. 5 H.L. at 341.
(1922) 44 M.L.J. 602: L.R. 50 I.A. 77: I.L.R. 50 Cal. 338 (P.C.).

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"Any implication that might be raised, supposing there was no document is put out of the case and reduced to silence by the documents by which alone you must be governed."

This principle was applied by Sir Richard Couch to a claim for money due under an unstamped note. The learned Chief Justice observed:

"The plaintiff cannot . . . . . say that from the deposit there arose a contract on the part of the defendant to repay it, because here the parties have made an express contract which has been put in writing. The plaintiff cannot resort to any implied contract; if he recovers at all, it must be on the contract actually made and he must prove that, if it is denied, and he must do it by the production of the writing, which, not being stamped, cannot be seen in evidence." (*Ankur Chunder Roy Chowdhry* v. *Madhub Chunder Ghose*[1].)

This case has sometimes been explained away on the ground that the suit was there laid on the note and not on the consideration. (See *Golap Chand Marwaree* v. *T. Mohokoom Kooaree*[2] and *Krishnaji Narayan* v. *Rajmal Manichand*[3].) This distinction wholly ignores the principle on which the decision was avowedly based.

It has been suggested that this principle of the 'implied promise' being superseded by the 'express' promise in writing should be limited to cases where the writing can be proved and enforced but where it is not admissible in evidence, the paper may be treated as non-existent and the objection based on S. 91 will not arise (*see* Mulla and Pratt, Commentaries on the Stamp Act, 3rd Edition, p. 134). The decision in *Subramanian* v. *Lutchman*[4] furnishes the answer even to this suggestion. In the absence of a document embodying the terms of the security created by the deposit of title deeds, the lender could have proved the deposit by oral evidence and obtained the benefit of the security; but when the transaction was accompanied by an unregistered document their Lordships held that the creditor could not establish his security by oral evidence as to the deposit, even though the document was inadmissible by reason of non-registration (see also *Ram Bahadur* v. *Dusuri Ram*[5]). The same decision of the Judicial Committee answers the argument that though the *contract* between the lender and the borrower cannot be proved without the document, the *fact* of a loan could be proved. Under the law, the mere deposit of title deeds (with intent to create a

1. (1873) 21 W.R. 1.
2. (1878) I.L.R. 3 Cal. 314.
3. (1899) I.L.R. 24 Bom. 360.
4. (1922) 44 M.L.J. 602: L.R. 50 I.A. 77: I.L.R. 50 Cal. 338 (P.C.).
5. (1912) 17 C.L.J. 399.

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security) would suffice, but in the case referred to, their Lordships declined to allow even the fact of such deposit to be proved when the document turned out to be inadmissible. It is obvious that when the creditor is asking for permission to prove the *fact* of the loan, he is only seeking to invoke the theory of an *implied* promise to repay. In *Krishnaswami Pillai* v. *Rangasami Chetti*[1], the learned Judges held that:

> "the defendant's request and the payment by plaintiff which constitute the cause of action can be proved independently of the note."

With great respect, I cannot help thinking that this is merely the theory of 'implied' promise stated in other words.

The theory of 'failure of consideration' has sometimes been invoked as also the formula of 'money had and received' (cf. *Baij Nath Das* v. *Salig Ram*[2]). The appeal to the theory of failure of consideration in a case like the present seems to me, with all respect, to ignore the distinction between the 'contract' and the 'consideration' for the contract. We only fall back on the question whether the promissory note represents the *contract* or the *consideration* for some other contract. In view of the judgments delivered in *Sinclair* v. *Brougham*[1], it seems to me that neither the theory of failure of consideration nor the formula of money had and received is available in the case before us. Both these causes of action rest on a 'notional or imputed promise to repay' (see *Sinclair* v. *Brougham*[3]) and the consideration above adverted to in connection with the theory of 'implied promise' equally apply to this way of supporting the lender's claim. In the case of a *loan* transaction, the *principal* contract itself consists of the promise to repay and it cannot be said that 'the implied promise on which the action for money had and received depends' forms no part of but is merely collateral to the main contract (*per* Lord Parker in *Sinclair* v. *Brougham*[3]). The claim for 'failure of consideration' can arise only when the contract has been *proved* and the very question for decision is whether or not S. 91 of the Evidence Act prevents the contract being proved without the production of the note.

The observations of Bowen, L.J., in In re *Guardian Permanent Benefit Building Society*[4], quoted by Lord Sumner in *Sinclair* v. *Brougham*[3], seem equally to apply to the argument of 'failure of consideration' in the present case. The unstamped

1. (1883) I.L.R. 7 Mad. 112.
2. (1912) 16 I.C. 33.
3. (1914) A.C. 398 at 440 and 452.
4. (1883) 23 Ch.D. 440 at 470.

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promissory note has *all along* been unenforceable and inadmissible and both parties must be presumed to have known the law on the point. It is sometimes assumed that it is the debtor's duty to affix the proper stamp; but the statute, with a view to safeguard the interests of the revenue, expects the creditor also to make sure that the document is duly stamped —though, according to several decisions he may not incur the *penalty* prescribed by S. 62 of the Stamp Act by taking an unstamped document. It only remains to add that S. 70 of the Indian Contract Act, which has sometimes been appealed to, is scarcely appropriate to a case of money *lent* to the defendant. There is no possibility in such a case or even a contemplation of the 'thing delivered' *being restored*—which obviously means *in specie*; and lending money to the defendant cannot be described as something *done for* the defendant.

Lakshmana Rao, J.

*Lakshmana Rao, J.*—I agree with my Lord and have nothing to add.

Stodart, J.

*Stodart, J.*—S. 91 of the Indian Evidence Act so far as material is:

"When the terms of a contract have been reduced to the form of a document no evidence shall be given in proof of the terms of such contract except the document itself."

The document now in question is a promissory note which is inadmissible in evidence because it is improperly stamped. Assuming that the promissory note contains a recital of the consideration for which it was executed is the promisee debarred from proving the fact that consideration passed and must he therefore fail in a suit to recover the consideration? All the High Courts in India appear to be agreed that when the consideration passed prior to the execution of the note—as when the note is executed for money due on account—or when the consideration arises out of a transaction which can be separated from the execution of the promissory note—as when the note is executed for the price of goods sold—then a separate cause of action arises on the consideration and the consideration can be proved. But in cases where the note is executed for money or other consideration which passes at the time of the execution of the note, there is a conflict of decisions. For my part, I must confess that I see no difference in principle between the two cases. The promissory note may be in the form:

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"For money which I owe you on account I promise to pay you, etc.," *or* "For money received from you to-day I promise to pay you, etc."

Then, if the recital of consideration is a term of the contract it cannot on a strict interpretation of S. 91 be proved at all except by proof of the promissory note. *See* the similar opinions expressed by Phillips and Reilly, JJ., in *Venkatachalapathi* v. *Ramakrishnayya*[1].

The question for decision as formulated by my Lord is:

"Whether a person who has lent money on a promissory note can sue to recover the debt apart from the note when the note embodies the terms of the contract with the borrowers but is inadmissible in evidence owing to a defect in the stamping."

My answer to this question is first that the existence of the debt is not a term of the contract, and even if it is recited in the promissory note it can be proved by other evidence; and secondly that the terms of the contract between the promisor and the promisee can never be wholly embodied in the promissory note. One of the terms of the contract is that the promisee agrees to accept the promissory note in satisfaction of the debt due to him by the promisor. What he agrees to accept is a valuable security and not a worthless piece of paper—which is all that the note is if it is not properly stamped. If then the note is valueless the promisor has not done that which he contracted to do. The promisee has not got what he bargained for. The promisor therefore is bound to restore to the promisee the advantage which he the promisor has obtained from the transaction. To me it appears that when a man gives another a promissory note in satisfaction of a debt or for other consideration he gives at the same time a warranty that the note is a good and enforceable instrument. If the note is bad for want of a proper stamp it is difficult to see how it can operate as a discharge of the debt any more than the giving of a counterfeit currency note could so operate. This implied warranty is in my opinion a term of the contract and such a warranty is in my experience not generally embodied in a promissory note or other negotiable instrument.

Reverting to the first proposition which I have stated, namely, that the recital in a promissory note of the existence of the debt is not a term of the contract, it is permissible, I think, to refer to the opinion of the learned and distinguished authors of the Commentary on the Indian Stamp Act (Mulla

1. A.I.R. 1930 Mad. 168.

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and Pratt, 3rd Edition, 1935, at page 134):

'The fact of the loan is not a term of the contract and proof of that fact is outside the scope of S. 91 of the Indian Evidence Act." And again:

"If the loan was made at the debtor's request, the request implies a promise to repay. If the express provision in the promissory note could be proved it would exclude the implied promise. But as the express promise cannot be proved the lender may rely on the implied promise. If the loan was not made at the request of the debtor, there is a liability to make compensation under S. 70 of the Contract Act."

In spite of the conflict of decisions in Indian Courts on the question whether a separate cause of action arises on the consideration in the case where consideration passes at the same time as the promissory note, I think that it is possible to interpret the decision of the Judicial Committee in *Sadasuk Janki Das* v. *Maharajah Kishan Pershad*[1] as answering that question in the affirmative.

*Sadasuk Janki Das* v. *Maharajah Kishan Pershad*[1] was a case where the consideration passed at the same time as the execution of the hundis on which the suit was brought. It was sought to make the Maharajah liable on the hundis which were drawn and accepted by an officer of his Treasury on the ground that the money was borrowed on his behalf. The Judicial Committee held that the Maharajah could not be made liable on the hundis but that the plaintiffs could in the alternative have based their suit on the consideration:

"It would have been open to the plaintiffs had they thought fit to have framed their case in an alternative form and to have sued both on the hundis and alternatively upon the consideration."

In *Venkatachalapathi* v. *Ramakrishnayya*[2] already cited in another connection, the principle of this decision was applied to the case of a claim on a promissory note executed by one partner in a firm on which it was sought to make the other partners liable. It was held that the plaintiff's suit as framed must fail but that he might be allowed to amend his plaint so as to make it clear that he was alternatively suing all the defendants as members of a firm on loans made to that firm. Reilly, J., as he then was said:

"If the firm is to be made liable the lender must not only allege and prove that the loan was really taken for his firm by the partner who made the promissory note but must base the suit on the loan to the firm."

1. (1918) 36 M.L.J. 429: L.R. 46 I.A. 33: I.L.R. 46 Cal. 663 (P.C.).
2. A.I.R. 1930 Mad. 168.

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*Sadasuk Janki Das* makes it clear in my opinion that when money or other valuable consideration passes and a negotiable instrument is given in exchange for that consideration a cause of action arises on the consideration apart from the engagements evidenced by the instrument. I am not able to subscribe to the view that because the consideration is recited in the instrument no evidence can be given of it except the instrument itself. The consideration, that is to say, the loan for which the promissory note is given, is the subject-matter of the contract and not a term of the contract within the meaning of S. 91 of the Indian Evidence Act. In the matter of the loan the lender consents to it only on condition that the borrower gives him a negotiable instrument in the shape of a promissory note containing certain stipulations; and the borrower for his part consents to execute a promissory note. If in the promissory note the borrower embodies a recital that he has received the money that in my opinion is not a "term of the contract" but merely a statement of the actual circumstance which has given rise to the contract.

In this view, I hold that the decision of the learned District Munsif may be allowed to stand.

S. V. V. *Revision allowed and suit remanded.*

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## PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD WRIGHT, SIR SHADI LAL AND SIR GEORGE RANKIN.

Nawab Mirza Mohammad Kazim Ali Khan and another .. *Appellants**

*v.*

Nawab Mirza Mohammad Sadiq Ali Khan and others .. *Respondents.*

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*Contribution—Taluqdari property—Taluqa in hands of eldest son of deceased—Partible property in hands of other heirs—Recovery of dower by widow of deceased against all his property in hands of his heirs—Execution levied against partible property only—Right of heirs to claim contribution from taluqdar—Oudh Settled Estates Act (V of 1917), S. 15.*

A property-owner died leaving a senior and a junior widow, and children by each. His taluqa descended to his eldest son, while his other partible properties passed to his heirs according to the ordinary principles of Shia

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* P. C. Appeal No. 116 of 1936. 7th April, 1938.
Oudh Appeals Nos. 7 and 8 of 1934.

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Mahomedan law. The senior widow, having brought an action for her dower against her three children, her co-widow, and the latter's children, obtained a decree for the sum claimed against the whole of her deceased husband's property, but enforced that decree by execution proceedings against the non-taluqdari property only, an application to be allowed to enforce it against the taluqdari property having failed on account of want of sanction by the Local Government. On a claim by the junior widow and the rest of the deceased's children against his eldest son for contribution from the taluqdari property in his hands towards payment of the sum awarded against them in favour of the senior widow,

*Held*, (1) that the fact that the widow, as execution creditor, had in fact levied execution and recovered against the non-taluqdari property only did not entitle the taluqdari property to exemption from bearing its proportion of the debt, that the heirs' rights could not be concluded by the choice so made by the execution creditor and that the plaintiffs were entitled to invoke the equitable doctrine of contribution.

Observations of Lord Eldon in *Aldrich* v. *Cooper*, (1803) 8 Ves. Jun. 382: 32 E. R. 402, relied on.

(2) that the judgment obtained by the widow being one of the kind contemplated by S. 52 of the Code of Civil Procedure, and each of the defendants to her suit having thus become liable for the whole debt to the extent of assets of the deceased come into his or her hands, that decree was therefore merely a step towards the administration of the deceased's estate, and did not complete the administration as between persons whose rights were postponed to those of creditors. The Court, having granted the creditor-widow a decree which enabled her at her choice to levy execution upon the impartible and the partible properties, a proper administration of the deceased's estate required a proper allocation of the debts as between the properties to which the different rules of descent applied.

*Mussumat Mulleeka* v. *Mussumat Jumeela*, (1872) L.R. Sup. I.A. 135 and *Jafri Begam* v. *Amir Muhammad Khan*, (1885) I.L.R. 7 All. 822 (F.B.), referred to.

(3) that the value of the taluqa to be taken for the purpose of allocation of debts as between taluqdari and non-taluqdari property must be its value at the death of the deceased, and not its value treating the portion settled under the Oudh Settled Estates Act of 1917 as having that of a life interest only. The words " to be or to have vested " in S. 15 of the Act should not be interpreted as operating retrospectively upon rights accrued to third parties in the administration of the property of the deceased.

Decision of the Chief Court of Oudh reversed.

Consolidated appeals from a decree of the Chief Court of Oudh (Wazir Hasan, C. J. and Smith, J.) dated 14th March, 1934, reversing a decree of the Subordinate Judge, Lucknow, dated 1st September, 1932.

*Wallach* and *Abdul Majid* for Appellants.—There is no reported case in which the Board have dealt with this matter. *Jotindra Mohun Lahiri* v. *Guru Prosunno Lahiri*[1] is a case somewhat similar to this. This is a case where there has been a decree

1. (1904) L.R. 31 I.A. 94 at 100: I.L.R. 31 Cal. 597 (P.C.).

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against the heirs of a deceased taluqdar which is to be satisfied out of the estate. If one of the heirs has paid more than his share, the other heirs are liable to contribute in proportion to the share of the estate which they have received. Refers to Pollock and Mulla on the Indian Contract Act, 6th Edition, p. 301. It is submitted that, on the facts of the case, the Subordinate Judge came to the right conclusion on the question of maintainability of the suit. If the Board takes that view, the result will be that the case will have to go back for determination of the proportion which is to be calculated. The estate must be valued in allocating the respective responsibilities as at the date of the taluqdar's death. Reference was also made to *Ram Saran Pande* v. *Janki Pande*.[1]

*C.S. Rewcastle, K.C.* and *Subba Row* for Respondents.—Taluqdari property has the curious feature that there are restrictions in law on the right to levy execution against the property. Here the widow in the execution proceedings after the dower suit attempted to levy execution on the taluqdari property. Before, however, execution can in any circumstances be levied against taluqdari property, the matter must be referred to the Government whose refusal to allow the execution proceedings to proceed would be fatal to them. It is accordingly possible to have a decree which against any other property would give a good right but which in the case of taluqdari property would be defeated in the absence of government consent.

Once the taluqdari estate has been released by the Court, no process, it is submitted, can thereafter be taken against it. There is no right here to seek contribution from the taluqdari estate, for it is essential to a suit for contribution that the plaintiff in that suit should have paid in one way or another the debt of the defendant. When the money in question was taken in execution, it was not taken from the plaintiffs in this action at all, but was taken under the Mahomedan law from the deceased himself. In other words, had the deceased chosen, just before his death, to realise some part of his property governed by Shia law and to pay the dower debt with it, the position would have been the same as in the present, and clearly no question of contribution could have arisen in such a case. The effect of the Mahomedan Law is such that this payment was in fact made, and must be regarded under Shia law as having been made, by the deceased himself. Counsel referred to *Abdul Majeeth Khan Sahib* v. *Krishnamachariar*.[2] Further on the facts of this case unlike the ordinary case of a judgment-debtor there was nothing which could be implied as a request for contribution. A request for contribution is an inherent

1. (1895) I.L.R. 18 All. 106.
2. (1916) 32 M.L.J. 195: I.L.R. 40 Mad. 243 at 253 (F. B.).

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part of the obligation to pay. Counsel referred to S. 69 of the Indian Contract Act.

7th April, 1938. Their Lordships' judgment was delivered by

SIR GEORGE RANKIN.—In this case two appeals by separate sets of plaintiffs have been brought from a decree of the Chief Court of Oudh dated the 14th March, 1934, setting aside the decree of the Subordinate Judge, Lucknow, dated the 1st September, 1932, and dismissing with costs a suit for contribution. In both appeals the sole contesting respondent is the defendant in the suit, Nawab Mirza Mohammad Sadiq Ali Khan (herein called Sadiq Ali) who is the taluqdar of Makanpur Rahimabad in the district of Sitapur. The parties are Shia Mahomedans and the questions in dispute have reference to the administration of the estate of Nawab Mohammad Baqar Ali Khan (herein called the late Nawab) who died on the 17th January, 1921. The relationship of the parties to him and to each other is shown by the pedigree hereunder:—

Sharaf Jahan Begam (Plaintiff No. 4) = NAWAB MOHAMMAD BAQAR ALI KHAN = Fakhr Jahan Begam (Plaintiff No. 1).

| By Sharaf Jahan Begam | | | By Fakhr Jahan Begam | |
|---|---|---|---|---|
| Nawab Mirza Mohammad Sadiq Ali Khan (Defendant No. 1). | Nawab Mirza Mohammad Kazim Ali Khan (Plaintiff No. 5). | Nawab Mirza Mohammad Naqi Ali Khan (Died before the institution of the suit. His legal representatives are on the record as Plaintiffs Nos. 4, 6 and 7). | Nawab Abid Jahan Begam (Plaintiff No. 2). | Nawab Mirza Mohammad Taqi Ali Khan (Died 19-11-35. His heirs are on the record as Plaintiffs-Appellants party 3, in P.C. Appeal No. 8 of 1934). |

The late Nawab left two widows, and a family by each. The property of which he was possessed at his death comprised the taluqa of Makanpar Rahimabad, an estate which had been entered under S. 8 of the Oudh Estates Act (I of 1869) in List II as an estate which according to the custom of the family ordinarily devolved upon a single heir. In addition thereto, however, he was possessed at his death of other properties. Litigation to determine whether any or all of his properties were partible or were impartible took place from 1921 to 1931 between his heirs. In 1931 it was decided by this Board that the taluqa descended to Sadiq Ali alone but

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that the other properties were not governed by any special family custom, and that they descended according to the ordinary principles of the Shia school of Mahomedan law: *Mohammad Sadiq Ali Khan* v. *Fakr Jahan Begam*[1]. The value of the taluqdari property at the date of the death is estimated by the plaintiffs at Rs. 25,62,800 and the value of the partible estate at Rs. 8,90,314.

On the 31st October, 1921, the late Nawab's senior widow, Sharaf Jahan Begum, brought a suit for her dower against her own three sons, her co-widow Fakhr Jahan Begum, and the latter's son and daughter. These six defendants were impleaded as being, with the plaintiff herself, the heirs of her husband in possession of his property. The claim was for five lakhs of rupees as dower, and on the 3rd January, 1923, the Subordinate Judge "ordered that the plaintiff's claim be and is hereby decreed for three lakhs of rupees with proportionate costs against the entire estate of Nawab Baqar Ali Khan deceased." An appeal by Sadiq Ali to the Court of the Judicial Commissioner was on the 4th March, 1924, dismissed.

Thereafter by various execution proceedings the senior widow Sharaf Jahan Begum as decree-holder realised out of the partible or non-taluqdari property of her late husband sums sufficient to satisfy her dower decree, amounting to Rs. 3,06,855. It is not necessary to detail these proceedings, which took place at different dates between 1924 and 1930. It may, however, be noted that in May, 1924, the first application made by her was against her son, the taluqdar, and asked for attachment and sale of certain taluqdari villages. Such property is protected by the provisions of the Oudh Laws Act, 1876, and by rules made under S. 68, Civil Procedure Code. The sales officer, having submitted the case to the Local Government for sanction of an execution sale, was informed that as the taluqdar had non-taluqdari property from which the decree could be fully realised the proceedings to sell in the first instance the ancestral taluqdari villages did not seem proper. This execution application came accordingly to nothing.

On the 29th April, 1931, the suit out of which the present appeals arise was brought by the junior widow, her son and daughter against Sadiq Ali. Originally the senior widow,

1. (1931) 62 M.L.J. 320: L.R. 59 I.A. 1: I.L.R. 6 Luck. 556 (P.C.).

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her two sons, and the representatives of her third son, Naqi Ali (who had died), were impleaded as defendants in this suit, but they were afterwards made plaintiffs, leaving Sadiq Ali, the taluqdar, as sole defendant. The main contentions of the plaintiffs were to the effect that both taluqdari and non-taluqdari properties were liable for the dower debt; that, as the dower decree was satisfied from the non-taluqdari property alone, the taluqdari estate should be made to contribute according to its value. The defendant, among other pleas, denied that any right to claim contribution arose to the plaintiffs upon the facts alleged. The Subordinate Judge thought it right to deal with certain of the issues before taking evidence upon disputed questions of fact. He found in favour of the plaintiffs that they had a right to contribution in respect that the taluqdari property was liable for the debts of the deceased taluqdar along with the partible property: and that the values of taluqdari and partible properties should be estimated as at the date of the death. His findings on other points need not here be mentioned.

The Chief Court reversed this decision and dismissed the suit. On the main question of the plaintiffs' right to contribution, the view of the learned Judges (Wazir Hasan, C. J. and Smith, J.) was that, as the heirs of a Mahomedan were only entitled to the residue of his partible estate left after the payment of funeral expenses, debts and legacies, the plaintiffs' claim involved the assertion of a right to share in the impartible estate. In their opinion, even had the entire partible estate been exhausted in satisfaction of debts due by the deceased, no right would have arisen to any of the heirs to rehabilitate their shares by means of contributions from the impartible estate. As their Lordships read the joint judgment of the Chief Court, the learned Judges did not doubt that the taluqdari property of the late Nawab was liable for his debts just as much as the partible property. They regarded it as the plaintiffs' misfortune that execution proceedings were taken against the latter. But they held that "the fact that the result of that action was a benefit to the defendant, inasmuch as it saved the impartible estate intact, does not create, in equity or otherwise, in favour of the plaintiffs, a right to share in that benefit." Their Lordships postpone mention of certain other findings of the Chief Court and proceed to consider the

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correctness of the view that the suit for contribution was not maintainable.

The claim of the senior widow, Sharaf Jahan Begum, for dower was that of an ordinary unsecured creditor against the estate of her late husband. She was not in possession of any property of his in lieu of her dower, still less had she any charge upon any part of his estate. On the other hand, the fact that the debt was for dower did not make it different from any other simple contract debt so far as the taluqdari property was concerned. Sharaf Jahan Begum impleaded all the heirs of her late husband in her suit for dower, and obtained a decree against all. It is not necessary now to consider whether the decree which she obtained was in a form to which she was entitled. It was apparently contended in the suit that the proper form of decree would have been against each heir of her late husband to the extent only of a part of the debt proportionate to that heir's share in the estate. There is some difference of opinion among the High Courts of India upon the proper form of decree in a suit by the creditor of a deceased Mahomedan against one or more of his heirs. In the present case the matter was complicated by the facts that the line or lines of succession to the late Nawab's property were uncertain and in all probability governed only in part by the Mahomedan law; and that the lady was minded to contend that the taluqdari property was liable to answer her claim. The reference in the decree to "the entire estate" shows that Sadiq Ali was not being sued merely as a person entitled to share in the partible estate: otherwise their Lordships attribute no importance to it. Being heiress as well as creditor, the senior widow might doubtless have sued for a declaration that, as between partible and impartible estates, the latter should bear its proportionate share of the debts, but she did not ask for or get relief in that form. She brought her suit as a creditor in the manner provided by the Code impleading all the heirs as legal representatives, [S. 2 (11), Civil Procedure Code] and she obtained, as the Chief Court has noticed, a judgment of the character contemplated by S. 52 of the Code. In *Mussumat Mulleeka* v. *Mussumat Jumeela*[1] this was held by the Board

1. (1872) L.R. Sup. I.A. 135.

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in a suit for dower to be the right form of decree; and in the present case that form of decree was granted, and no appeal was taken therefrom. Each of the defendants to that suit became liable, as explained by Sir Barnes Peacock in the case just cited (p. 142), for the whole debt to the extent of assets received by him; and the decree could be executed by the attachment and sale of as much as necessary of the property of the deceased in the hands of any or all of the defendants. If any defendant was shown to have been in possession of property of the deceased, but to have parted with it, his own assets could be made liable to a like extent unless he proved that he had "duly applied" the property of the deceased. Such a decree is only a step towards the administration of the deceased's estate, and does not complete the administration as between persons whose rights are postponed to creditors. In the ordinary case of a Muslim whose whole property descended according to his personal law, it would be impossible to suggest that an heir was without remedy against his co-heirs if, by the action of the judgment creditor under such a decree, he was left with less than his proper share of the nett estate of the deceased. His right to contribution would be plain. As a beneficiary, he would have the right that the deceased's estate should be duly administered, that it should be cleared of debts and valid legacies, and that he should be given possession of his share therein. For this purpose his suit could take various forms according to the circumstances of the case. It might be denominated an administration suit or a suit for partition or a suit for contribution, but the basis of his claim would be the same in each case, namely, the right to have due administration of the deceased's estate. This right might also be enforced in a proper case by an application for the appointment of an administrator under S. 218 of the Indian Succession Act, 1925.

The question raised by the present case is whether the plaintiffs, as heirs having an interest in a portion of the property left by the deceased and entitled to a due administration of his estate, cannot claim to have the debts of the deceased provided for rateably out of the partible and impartible properties which are equally liable for such debts. The estate of the late Nawab was between 1921 and 1931 in a difficult position, since it was doubtful whether any substantial portion of it was

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divisible or indivisible, and the claim of the senior widow was a heavy claim. That such an estate should be administered by the crude method of leaving it exposed to execution sales at the creditor's choice, is, it may be hoped, unusual. Had there been an executor or administrator in charge, or a receiver appointed by the Court, it would have been his duty to take proper measures to pay off the dower debt, and he could not possibly have claimed to saddle either the taluqdari or the non-taluqdari property with the whole of the dower. It would have been the plain right of the plaintiffs to object to any more than a proportionate part of the debt being taken from the partible estate. The view of the Chief Court is that, the creditor having levied on partible assets, the loss must lie where it has fallen. This, in their Lordships' judgment, is contrary to the rights of the parties; it would, moreover, open wide the door to chicanery and fraud. A proper administration of the deceased's estate involves and requires a proper allocation of the debts as between properties to which different rules of descent apply. The plaintiffs are not claiming to share in the taluqdari property, because they ask for a proper allocation of the debts as between the partible and the taluqdari properties.

That the right of an heir under the Mahomedan law is a share in the estate after debts and valid legacies have been provided for is undeniable. It is laid down no less than three times in the fourth Sura of the Koran. The principle is not disputed by the plaintiffs or by anyone. Indeed it lies at the root of the plaintiffs' case: *because* an heir is only entitled beneficially to a share in the residue after payment of debts, he is bound to contribute towards debts properly paid by his co-heirs to the extent of his interest. If the Mahomedan law governed the whole matter, the plaintiffs' difficulties would be at an end. The Mahomedan law as to legacies is highly special and need not now be considered; but, in providing that the heir takes a share in the nett estate after deduction of the debts of the deceased, the Mahomedan law is in line with other laws including the Hindu law and the second chapter of the Indian Succession Act, 1925. The single heir under Act I of 1869 also takes subject to debts. So far as their Lordships are aware, the particular problem presented by the circumstance that part of the deceased's property does not descend according to Koranic principles at all, is not dealt with by any of the

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classical authorities such as the Hedaya, Fatawa Alamgiri or Shuraya. From the standpoint of orthodoxy, such a contingency might well appear not as one to be provided for but as one to be rejected. In any case neither the dicta nor the authorities referred to by the Chief Court are addressed to any such matter. In the cases envisaged by these authorities there is no need to ask what debts shall be discharged out of the property before division into shares as prescribed by Mahomedan law. As all the property would descend by that law, all the debts must be first provided for. But here some property, though liable for debts, is not divisible at all and descends upon different principles unknown to the Mahomedan law; hence the need to ask how much of the debts should be satisfied out of each class of property. Had the authorities cited been relevant to this question and conclusive to the effect that Mahomedan law provided no remedy in such a case as the present, it by no means follows that a British Indian Court would not afford a remedy.

In the case cited by the Chief Court, *Jafri Begam* v. *Amir Muhammad*[1], it was pointed out by Mahmood, J., that "the *lex fori* regulates all matters going to the remedy, *ad litis ordinationem.*" In his view "upon the death of a Mahomedan owner, his property . . . immediately devolves upon his heirs in specific shares; and if there are any claims against the estate, and they are litigated, the matter passes into the region of procedure, and must be regulated according to the law which governs the action of the Court" (p. 882). In that case, as is well known, the Full Bench of the High Court at Allahabad, while holding that a decree passed against some only of the heirs did not bind other heirs so as to convey their interest to the auction purchaser in execution, agreed that in such a case the heirs who were not parties to the decree could not recover their shares from the auction purchaser without paying their proportionate share of the ancestor's debt for which the decree was passed. This is a particular application of the right to contribution as between co-heirs in respect of the debts of the deceased. It was treated as not depending upon any rule peculiar to the Mahomedan law, but on the general principles of equity.

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1. (1885) I.L.R. 7 All. 822 at 841 (F.B.).

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In the present case, the Court, having granted to the creditor a decree which enabled her to levy at her choice upon the partible and the impartible estates, cannot as between the defendants refuse to carry the administration beyond that point.

The principle or method of which S. 52 of the Code is an expression has always been so operated as not to prejudice the rights *inter se* of beneficiaries or legatees over whom the creditor has priority. Indeed, by its doctrine of marshalling, equity, in days when debts were of different priority and assets were of different classes, ensured that the order in which the assets of a deceased person were answerable for his debts was ultimately enforced as between persons beneficially interested in the estate [*cf.*, Williams on Executors, 12th ed. 1930, Vol. II, pp. 1119-20]. Creditors may generally resort to any portion of the estate, but the judgment of Lord Eldon in *Aldrich* v. *Cooper*[1] may be pointed to as showing how this principle has of old been limited and controlled to avert injustice:—

" The simple contract creditor therefore has no more in law any claim against the freehold estate. . . . But . . . . the Court has said, the caprice or election of a bond creditor shall not operate to the prejudice of the simple contract creditor . . . ." at (p. 394). "In the cases of legatees against assets descended a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling: that, if those creditors, having a right to go to the real estate descended will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not . . . . Both are in law liable to the creditors, and therefore by making the option to go against the one they shall not disappoint another person, who the testator intended should be satisfied" at (p. 395).

The rights of the plaintiffs cannot be concluded by the choice of the execution creditor. Their claim to their proper share in the partible estate of the late Nawab makes them co-beneficiaries with Sadiq Ali in respect of assets all of which are answerable for the debts of the deceased, and the fact that different portions of the assets devolve on different principles in no way defeats the plaintiffs' right to contribution.

It is not necessary that the plaintiffs should found upon an actual or implied promise in seeking contribution from the defendant in the events which have happened. Whether or not Ss. 69 and 70 of the Indian Contract Act are wide enough

1. (1803) 8 Ves. Jun. 382: 32 E.R. 402.

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to cover the case, the root of the plaintiffs' claim is their right to a due administration of the estate of the deceased. "The reason given in the books is, that *in aequali jure* the law requires equality: one shall not bear the burthen in ease of the rest" *Dering* v. *Earl of Winchelsea*[1]. "The principle established in the case of *Dering* v. *Earl of Winchelsea*[1] is universal, that the right and duty of contribution is founded on doctrines of equity; it does not depend upon contract": *Ramskill* v. *Edwards*[2]. This has been settled law in India since *Rambux Chittangeo* v. *Modoosoodhun Paul Chowdhry*[3] a Full Bench decision of the High Court at Calcutta in Sir Barnes Peacock's time, which contains a careful exposition of the matter from an Indian standpoint.

A further decision of the Chief Court remains to be considered. Sadiq Ali made an application under S. 3 of the Oudh Settled Estates Act, 1917, and on the 21st December, 1923, having obtained the necessary permission, he duly declared by deed that a certain portion of the taluqa was in future to be held subject to the provisions of the Act. S. 15 of the Act is as follows:—

" Except as otherwise provided by this Act, no person entitled to a settled estate shall have power to transfer, dispose of, alienate, convey, charge, encumber or lease the same or any part thereof, or the profits thereof, for any greater or larger interest or time than during his life, nor shall a settled estate, or any part thereof, or the profits thereof, be held by any Court to be or to have vested in such person for any larger or greater interest or time than for his life."

The Subordinate Judge has held that, for the purpose of a rateable allocation of the debts of the late Nawab as between taluqdari and non-taluqdari property, the value of his interest in the taluqa is to be taken as it stood at the date of his death in 1921. The Chief Court have held that the portion comprised in the declaration of 1923 is to be valued as a life interest only. In their Lordships' view it would be contrary to a sound construction that the words "to be or to have vested" in S. 15 should be interpreted as operating retrospectively upon rights accrued to third parties in the administration of the property of the deceased. On this point their Lordships agree with the view of the Subordinate Judge that the respective values of partible and impartible properties should be

1. (1787) 2 Bos. & Pul. 270 and 1 Cox. 318 at 321: 29 E.R. 1184.
2. (1885) 31 Ch. D. 100 at 109. 3. (1867) 7 W.R. 377 (F.B.).

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ascertained as at the date of the death. They express no opinion upon the *quantum* of the interest which would be saleable in execution under any decree passed in the present suit.

No question arises now upon any of the other matters dealt with by the Courts in India. It may be noted, however, that on the 24th July, 1934, Sharaf Jahan Begum petitioned the Chief Court to the effect that she had parted with her interest in the subject-matter of this consolidated appeal to her son Nawab Kasim Ali Khan. This allegation was disputed, and the Chief Court did not act upon it as the learned Judges considered that they were *functi officio*. The lady has not been represented before their Lordships. When His Majesty's order is received in India the Chief Court will deal with her application before sending the case back to the Subordinate Judge's Court.

Their Lordships will humbly advise His Majesty that these two appeals be allowed, that the decree of the Chief Court be set aside, that the decree of the Subordinate Judge be restored, and that the case be remanded to the trial Court for final disposal. The respondent, Nawab Mirza Mahammad Sadiq Ali Khan, must pay the appellants' costs in the Chief Court and one set of costs as between the appellants in the two appeals which have been consolidated in the present case.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Nehra & Co.*

R.C.C. —— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Komma Harichandra Reddy and others .. *Petitioners* (Accused in Calendar Case No. 275 of 1936, on the file of the Stationary Sub-Magistrate of Pulivendla).*

Harichandra Reddy, *In re.*

*Criminal Procedure Code (V of 1898), S. 350—Further enquiry ordered by Sessions Judge—Magistrate resummoning prosecution witnesses—Failure to examine them—Charge framed on the evidence already recorded—Legality of—Right of accused to a fresh enquiry.*

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* Crl. R. C. No. 880 of 1937.
Crl. R. P. No. 824 of 1937.

24th March, 1938.

An order of discharge by a Sub-Magistrate was set aside by the Sessions Judge who ordered further enquiry. At the time of further enquiry, the Magistrate decided to summon the prosecution witnesses already examined; but he failed to examine them. He considered the evidence sufficient and framed a charge and convicted the accused.

*Held*, that the Magistrate was not bound to begin the enquiry afresh and was justified in framing the charge upon the evidence.

The resummoning of witnesses is not tantamount to recommencing the enquiry. Even if the Magistrate contemplated recommencing the enquiry when he re-summoned the witnesses, he could change his mind before he recommenced the enquiry.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the First Class Sub-Divisional Magistrate of Jammalamadugu dated 22nd October, 1937 and passed in Criminal Appeal No. 41 of 1937 preferred against the judgment of the Court of the Stationary Second Class Magistrate of Pulivendla in Calendar Case No. 275 of 1936.

*A. Narasimha Aiyar, P. Chandra Reddi* and *R. Ramalinga Reddy* for Petitioners.

*The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioners were convicted by the Stationary Sub-Magistrate of Pulivendla under Ss. 147, 341 and 342, Indian Penal Code, and the sixth petitioner under S. 323, Indian Penal Code, also; and they were fined Rs. 10 each on each count. The convictions and sentences were confirmed by the appellate Court.

There was first an enquiry by the Stationary Sub-Magistrate of Pulivendla and the accused were discharged. The matter was then taken in revision to the Sessions Judge, who thought that the order of discharge was improperly passed and ordered a further inquiry into the matter under S. 436, Criminal Procedure Code. The Stationary Sub-Magistrate decided to summon the prosecution witnesses already examined; and upon being told by the Sub-Inspector conducting the prosecution that it was not necessary to examine the prosecution witnesses, the Magistrate did not do so. He presumably considered the evidence already on record and then framed a charge. The trial ended in a conviction.

It is now argued that the Magistrate was bound to begin the enquiry afresh. I find nothing in any section of the Criminal Procedure Code which justifies this argument. When

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an order of discharge is set aside and further enquiry ordered, the enquiry recommences where it was left off at the time when the improper order of discharge was passed. Further enquiry, as pointed out in *Queen-Empress* v. *Balasinnathambi*[1], does not mean merely an examination of witnesses, but a further consideration of the evidence; and the Magistrate was therefore justified upon perusing the evidence in framing the charge.

Prior to the framing of the charge an accused is not entitled under S. 350, Criminal Procedure Code, to have a *de novo* enquiry. S. 350 gives the accused a right to have a *de novo* trial. It has been held by this Court that the trial begins only after the framing of a charge. I can therefore see nothing wrong in the proceedings of the Sub-Magistrate. It is however argued from *Queen-Empress* v. *Hasnu*[2], *Ram Dial* v. *Emperor*[3] and *Sahib Din* v. *The Crown*[4], that the principle of natural justice requires that every Magistrate should begin his enquiry afresh and see the witnesses for himself before he convicts the accused. I do not think that the Criminal Procedure Code recognises or suggests that there is such a principle of natural justice. On the contrary, it negatives the existence of such a principle; for it leaves the resummoning of witnesses entirely to the discretion of the Magistrate. He may feel that he would like to see a witness or question him further; and S. 350 (1) gives him authority to do so. If he does not feel it necessary to examine any witnesses afresh it is not incumbent on him to do so. After the framing of the charge, he had in any event an opportunity of seeing the witnesses for himself during the further cross-examination. This matter has come before this Court on many occasions, and was considered by Jackson, J., in *Lakshmi Reddy* v. *Muni Reddy*[5], where he held that there was no obligation laid on the Magistrate to begin the enquiry afresh.

A further argument advanced is that even though the Magistrate is given a discretion to continue the enquiry from the place where it was left by his predecessor he exercised the choice in favour of commencing the enquiry *de novo* by summoning the witnesses. I cannot agree that the resum-

1. (1891) 1 M.L.J. 343: I.L.R. 14 Mad. 334 (F.B.).
2. (1884) I.L.R. 6 All. 367.
3. (1912) 14 I.C. 607.
4. (1922) I.L.R. 3 Lah. 115.
5. (1930) 60 M.L.J. 524: I.L.R. 54 Mad. 512.

moning of the witnesses is tantamount to recommencing the inquiry; and even if it is true that the Magistrate, when he re-summoned the witnesses, contemplated recommencing the enquiry, he was not precluded from changing his mind before he recommenced the enquiry.

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The evidence before the Courts below was considered sufficient by them to sustain a conviction; and I am not prepared to interfere in revision with that finding.

The petition is therefore dismissed.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

The Public Prosecutor ... *Appellant**

*v.*

Panchaksharam *alias* Mannangatti .. *Respondent (Accused).*

Public Prosecutor *v.* Panchaksharam.

*Penal Code (XLV of 1860), Ss. 304 and 335—Injuries caused with knife on abdomen—Death caused—Nature of offence—Criminal Procedure Code (V of 1898), S. 439 (1)—Appeal against acquittal—Power of High Court to set aside conviction.*

The accused was charged under S. 304, Indian Penal Code, with cutting the deceased with a toddy drawer's knife on the head, back and abdomen. The Sessions Judge found on the evidence that the accused did strike the deceased on the head, back and abdomen, and caused the injuries alleged but he held that the accused had neither the intention nor the knowledge which would bring the accused within the mischief of S. 304. He found however that the accused voluntarily caused grievous hurt under grave and sudden provocation and convicted him under S. 335, Indian Penal Code. The Crown preferred an appeal against the acquittal under S. 304.

*Held,* that as the accused voluntarily caused an injury that endangered life and the deceased died as the result of that injury the offence committed was culpable homicide and the accused was liable to be convicted under S. 304, Indian Penal Code.

In an appeal against acquittal the accused is entitled to ask the Court to consider all the evidence before it and all the possible grounds which may be raised against the conviction, and if the High Court is satisfied that no offence was committed, it would undoubtedly exercise *suo motu* its powers under S. 439 (1), Criminal Procedure Code, and set aside the conviction for the smaller offence.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) for an offence under S. 304 of the Indian Penal Code by the Court of Session of the South Arcot Division at Cuddalore in S. C. No. 18 of 1937.

*N. Somasundaram* for Appellant.

*J. Subbuswami* for Respondent.

*Crl. Appeal No. 378 of 1937. 30th March, 1938.

Public Prosecutor v. Panchaksharam.

The Court delivered the following

JUDGMENT:—The accused Panchaksharam was charged by the Sessions Judge of South Arcot under S. 304, Indian Penal Code, with cutting the deceased Munuswami with a toddy drawer's knife on the head, back and abdomen. The learned Sessions Judge found on the evidence that the accused did strike the deceased Munuswami on the head, back and abdomen and caused the injuries alleged; but he held that the accused had neither the intention nor the knowledge which would bring the offence within the mischief of S. 304, Indian Penal Code. He found however that the accused voluntarily caused grievous hurt under grave and sudden provocation and so convicted him under S. 335, Indian Penal Code and sentenced him to two years' rigorous imprisonment. The Crown has appealed against the acquittal under S. 304, Indian Penal Code.

It was contended on behalf of the Crown that the findings of fact of the learned Sessions Judge must be accepted and that the arguments of the learned Counsel for the accused must be confined to combating the arguments with regard to the nature of the offence committed. The learned Counsel for the accused relied on S. 439 (6), Criminal Procedure Code, which is to the effect that any convicted person to whom an opportunity has been given of showing cause why his sentence should not be enhanced shall be entitled to show cause against his conviction. That sub-section does not apply because this is an appeal, not against the sentence, but against the acquittal. It is however clear that in an appeal against acquittal the accused is entitled to ask the Court to consider all the evidence before it and all the possible grounds which may be raised against the conviction. If therefore the learned Counsel for the accused is entitled to argue on the facts of the case to show that the accused has not committed an offence under S. 304, Indian Penal Code, then although the acceptance of those arguments may not automatically set aside the conviction under S. 335, Indian Penal Code, yet if this Court were satisfied that no offence was committed, it would undoubtedly exercise *suo motu* its powers under S. 439 (1), Criminal Procedure Code and set aside the conviction.

However, after hearing the learned counsel for the accused, I am satisfied that the facts found by the learned

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Sessions Judge are correct. P. W. 5 is equally related to both parties and her evidence therefore is very valuable. Moreover, the accused himself has made several statements which to a great extent meet the prosecution case. The learned Sessions Judge has accepted the accused's case to the extent that while in the tope he heard that his mother had been attacked by the deceased and was lying senseless, that he came to where the deceased and his mother were, that the deceased asked him what he was doing there with the knife and struck him on the hand with his stick, that the accused then stabbed him, that the deceased then gave further blows with his stick and that the accused delivered several more blows with his knife on the person of the deceased.

I agree with the learned Sessions Judge that the accused cannot be said to have acted in self-defence. His mother was in no further danger from the deceased. He came there with the intention of attacking the deceased and the deceased, when he saw that the accused had a knife and was prepared to use it, was justified in striking his hand to prevent him from using it. A free fight between the accused and the deceased followed; and the accused must accept responsibility for the acts done by him.

That the accused acted under grave provocation there can be no doubt; but whether it was also sudden provocation is open to doubt; but I am prepared to accept the finding of the learned Sessions Judge that there was grave and sudden provocation. I cannot however agree with him that the offence committed did not amount to one punishable under S. 304, Indian Penal Code. The accused certainly knew that a blow with a knife on any vital part of the body was likely to cause death; and there are few parts of the body where a severe blow with a knife would not cause death unless expert medical attention was immediately available. In a sense, the learned Sessions Judge concedes that, for he says "it was an injury which endangered human life, and so it amounts to grievous hurt as defined in S. 320, Indian Penal Code". The learned Sessions Judge has found the accused guilty of causing grievous hurt under grave and sudden provocation and he has said that it was grievous hurt because it was hurt that endangered human life. The finding of the learned Sessions Judge therefore amounts to this, namely, that the accused voluntarily

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caused an injury which endangered human life and the deceased died as the immediate result of that injury. If the accused voluntarily caused an injury that endangered life and the deceased died as the result of that injury, the offence committed is certainly culpable homicide. Moreover, the injury caused was a very grievous one; and I have never known of an injury of that kind from which a wounded man has survived. It was not merely a cut across the abdominal wall; but the intestine itself was severely injured. Although theoretically death was not the necessary result, yet in the ordinary course of nature one would expect that death would result. In very few cases of murder can it be said that the injury caused necessarily resulted in death; but if it is caused with the necessary intention or knowledge and death results from the injury caused, then the offence committed is murder or culpable homicide as the case may be. Had there not in this case been grave and sudden provocation, the accused would have been guilty of murder.

The conviction under S. 335, Indian Penal Code, is therefore set aside and the accused convicted under S. 304, Indian Penal Code. In view of the fact that the accused acted under grave provocation and that the deceased was a bully, I do not think any very great enhancement of sentence is necessary. I sentence the accused to three years' rigorous imprisonment.

B.V.V. *Appeal allowed.*

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## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD WRIGHT, LORD ROMER, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN.

P.C.

Pandit Parma Nand *v.* Nihal Chand

Pandit Parma Nand .. *Appellant**

*v.*

Nihal Chand and another .. *Respondents.*

*Religious endowments—Public trust—Proof of dedication—Onus—User for purposes of reciting Holy Books—Inference—Charitable and Religious Trusts Act (XIV of 1920), S. 3—Udasi order—Rules of succession.*

Where it is alleged against a person in possession of property that the property is the subject of a trust for a public purpose of a charitable or religious

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*P.C. Appeal No. 12 of 1937. 3rd May, 1938.

nature it is for the persons pleading the existence of the trust to establish affirmatively that a trust of a public character was imposed on the property. To constitute a trust "created or existing for a public purpose of a charitable or religious nature" within the meaning of S. 3 of the Charitable and Religious Trusts Act of 1920 the author or authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover, the purpose of the trust, the trust property and the beneficiaries must be indicated so as to enable the Court to administer the trust if required. The recitations of the holy book on a property are in no way inconsistent with the hypothesis that the trust, if any, existing in respect of the property is of a private nature.

*Chhotabhai* v. *Jnan Chandra Basak,* (1935) 69 M.L.J. 1: L.R. 62 I. A. 146: I.L.R. 57 All. 330 (P.C.), relied on.

When a person enters the Udasi order he severs his connection with the members of his natural family. It follows that neither he nor his natural relative can succeed to the property held by the other. There is, however, no reason for holding that an Udasi cannot acquire private property with his own money or by his own exertions. If he does acquire private property, it cannot be inherited by his natural relatives but passes on his death to his spiritual heir including his chela who is recognised as his spiritual son. But the descent of the property from a guru to his chela does not warrant the presumption that it is religious property.

Decision of the Lahore High Court reversed.

Appeal from a decree of the High Court, Lahore (Coldstream and Hilton, JJ.) dated 11th June, 1934, reversing a decree, dated 26th May, 1926, of the senior Subordinate Judge of Gujranwala.

*D. N. Pritt* and *C. Sidney Smith* for Appellant.

*A. M. Dunne* and *W. Wallach* for Respondents,

3rd May, 1938. Their Lordships' judgment was delivered by

Sir Shadi Lal

SIR SHADI LAL.—In the town of Gujranwala there is a building variously described as Baghichi Thakaran or Gurdwara Baghichi, and the main issue, which their Lordships have to determine in this appeal, is whether that building, together with the shops and other property attached to it, is the subject-matter of a trust for a public purpose of a charitable or religious nature. The issue was raised by the defendants who, claiming to be the representatives of the Hindu public, made an application to the District Judge under S. 3 of the Charitable and Religious Trusts Act (No. XIV of 1920), alleging that the Baghichi Thakaran was a public endowment for religious and charitable purposes, and called upon Mahant Narain Das,

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who was described by them as the trustee of the endowment, to furnish details of the nature and purposes of the trust, and of the value of the property belonging to the trust, and also to render an account of the income and expenditure of the trust property. Their allegations were contested by Narain Das, and the controversy between the parties led to the present action, brought by Narain Das for the purpose of obtaining an authoritative pronouncement upon the nature of the trust and of the property attached to it.

The Trial Judge found against the public character of the alleged trust; but his judgment has been reversed by the High Court of Judicature at Lahore. From the judgment pronounced by the High Court and the decree which followed upon it, this appeal has been brought to His Majesty in Council by Pandit Parma Nand who, on the death of Narain Das, was impleaded as his legal representative.

The learned Judges of the High Court, after a careful consideration of the question of onus, have endorsed the conclusion of the Trial Judge that it was for the defendants to prove that the plaintiff, who was admittedly in possession of the property, held it on a trust created for public purposes of charitable and religious nature.

The history of the Baghichi Thakaran or Gurdwara Baghichi may be briefly stated. The Baghichi was founded by one Baba Kulla or Kuljas who died about 1800 A.D. He was a Khatri by caste, and migrated from a place called Saidnagar to Gujranwala, where he took up a plot of land and built a house thereon. He also planted a garden, which was the origin of the name Baghichi (orchard) usually applied to this institution. Baba Kulla was succeeded by his chela, Thakar Ram Das who was an Arora by caste. It is stated that Ram Das practised as a physician, and that while he was in charge of the Baghichi Thakaran he made improvements to the building. It was, however, Ram Das's successor, Sant Das, who made considerable extensions and also acquired house and shop property at Gujranwala. The prosperity of the institution was mainly due to Narain Das who succeeded Sant Das on his death in 1879. Narain Das acquired properties at Nankana Sahib, and also built shops at Gujranwala. The annual income of the various properties during the time of Narain Das rose from Rs. 1,394 in 1905 to Rs. 7,664 in 1923. It was probably

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this abnormal rise in the income which attracted the attention of the respondents who made the application under the Charitable and Religious Trusts Act, which led to this litigation.

It appears that the person, who happened to be in charge of the Baghichi, was called Mahant; and that the Baghichi itself was known as Gurdwara. But the main property, which is the subject-matter of the dispute, was acquired by the person or persons who occupied the office of Mahant.

The principal ground, upon which the judgment of the High Court proceeds, is that the Baghichi and other properties have descended from guru (religious preceptor) to chela (religious disciple); but this circumstance does not necessarily lead to the conclusion that a property, when acquired by a Mahant, loses its secular character and partakes of religious character. It is common ground that the Mahants of this institution belonged to an ascetic order called Udasi. The Udasis rarely marry; and, if they do so, generally lose all influence; for the dharmsala or Gurdwara soon becomes a private residence closed to strangers: Maclagan's Census Report for the Punjab, Part I, Chapter IV, page 152. When a person enters the Udasi Order, he severs his connection with the members of his natural family. It follows that neither he nor his natural relative can succeed to the property held by the other. There is, however, no reason for holding that an Udasi cannot acquire private property with his own money or by his own exertions. If he does acquire private property, it cannot be inherited by his natural relatives, but passes on his death to his spiritual heir including his chela who is recognised as his spiritual son. The descent of the property from a guru to his chela does not warrant the presumption that it is religious property.

Assuming, however, that the property acquired by a Mahant is to be treated as a religious property, the question arises whether it was dedicated for the use or benefit of the public. In the case of a public trust, the beneficiaries are either the public at large or a considerable portion of it answering a particular description. Now, there is no documentary or oral evidence to show that the property was expressly dedicated for the use or the benefit of the public. Are there any circumstances from which the dedication of the property to a public trust can be implied?

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It appears that in 1869 four persons applied to the Municipal Committee, Gujranwala, that a plot of land lying in front of the building of the Baghichi Thakaran might be included in the courtyard of the building, and that, though they were themselves interested in the land as muafidars, they would not demand any compensation for surrendering their rights to the property. The Municipal Committee recommended the grant of land, and the Deputy Commissioner considered the land to be an unsightly plot adjoining the public road, and was induced to remit the share of the price of the land which was due to the Government "in the interest of the city." It is true that the building was then described as a holy place and the Mahant occupying it was stated to be a "very good man"; but as pointed out by the High Court—"The transaction itself seems to have had a town planning motive rather than to have been prompted by a desire to endow the Gurdwara." This assignment of land does not prove that the building was dedicated to a public trust.

It is, however, argued that income-tax was sought to be imposed upon Narain Das for the year 1905-06 in respect of the income derived by him from the property of the Gurdwara, and that the income-tax was then remitted on the ground that the property constituted a public trust. There is no document to show the nature of the objection on which the order of remission was based. The oral evidence is to the effect that the tax was remitted because the property was stated to be waqf; but the expression "waqf" is vague and may include a private trust. It cannot, therefore, be said that the Mahant at that time declared the property to be dedicated to a religious trust of a public nature. It is, however, significant that, as deposed by him, Narain Das did not succeed in securing an exemption from income-tax on a subsequent occasion, and had to pay Rs. 250 or Rs. 300 per annum as income-tax.

Their Lordships' attention has been invited to a will made by Mahant Sant Das on the 14th October, 1875. In this will the testator describes the property in dispute as his private property, and states that he is entitled to alienate it. There can be no doubt that Sant Das regarded the property to be his property, but the respondents contend that he himself declared the property to be a public trust to take effect after his death, and appointed a managing committee to administer the alleged

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trust. The original will is not available, but it is common ground that the will was not acted upon after the death of the testator. There is some evidence to show that the testator revoked it by destroying it. The revocation would make the declaration of trust infructuous. Be that as it may, there can be no doubt that neither Narain Das, who succeeded Sant Das, nor any managing committee administered the property as trust property. The will, whether revoked or not, cannot be relied upon to prove that a public trust came into operation after Sant Das's death. It, however, shows that he regarded himself to be the owner of the property and claimed the right to alienate it. This claim negatives the suggestion that it came into his hands as property dedicated to public trust. Indeed, there is ample documentary evidence to show that alienations of several properties were made by various Mahants in exercise of their right of ownership.

The plaintiff Narain Das himself made a will on the 9th July, 1922, and gifted the property to the appellant, Parma Nand, as his successor; and described himself to be the absolute owner of the Baghichi and all other property. But this declaration cannot be used for determining the point in controversy between the parties.

It appears that holy scriptures were recited in the Gurdwara on various occasions, and that presents were made by the audience to the person or persons who made the recitations. But it is clear that recitations were suspended for several months. The recitations of holy books are, in no way, incompatible with the hypothesis that the trust, if any, was of a private nature. There can be no doubt that even in a private shrine, the public may worship, but the question is whether they do so without any permission, leave or license and as of right. This test has not been satisfied in the present case.

Their Lordships do not think that any user or treatment of the property has been proved, such as would justify the conclusion that it was a public, and not a private, trust. It cannot be disputed that the plaintiff can be defeated only if the defendants establish affirmatively that a trust of a public character was imposed upon the property.

To constitute a trust "created or existing for a public purpose of a charitable or religious nature" within the mean-

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ing of Act XIV of 1920, the author or authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover, the purpose of the trust, the trust property, and the beneficiaries must be indicated so as to enable the Court to administer the trust if required; *Chhotabhai* v. *Jnan Chandra Basak*[1]. These conditions have not been fulfilled.

Their Lordships are of the opinion that the onus, which rested upon the defendants, has not been discharged. They will, therefore, humbly advise His Majesty that the appeal be allowed, that the decree of the High Court be discharged, and that the decree of the Court of first instance be restored. The appellant must have his costs here, as well as in the Courts below.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *T. L. Wilson & Co.*

R.C.C. ——— *Appeal allowed.*

## PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD WRIGHT, SIR SHADI LAL AND SIR GEORGE RANKIN.

Malik Harkishan Singh .. *Appellant**

*v.*

Malik Partap Singh deceased and others .. *Respondents.*

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*Hindu Law—Joint family—Partition—Severance in status—Agreement to divide property—Legal effect—Partition by metes and bounds not necessary—Document defining shares of members—Evidence of subsequent conduct—Admissibility.*

It is by no means a rare thing that a person makes a statement that he is a member of a joint family with his relative, but has reasons of his own for making that statement. It is not his statement, but his actings and dealings with the estate, which furnish a true guide to the determination of the question of jointness or otherwise.

According to the Mitakshara law partition consists in defining shares of the coparceners in the joint property, and a physical division of the property is not necessary. Once the shares are defined there is a severance of the joint status. The parties may then make a physical division of the property or they may decide to live together

1. (1935) 69 M.L.J. 1: L.R. 62 I.A. 146: I.L.R. 57 All. 330 (P.C.).

* P. C. Appeal No. 8 of 1935. 2nd May, 1938.

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and enjoy the property in common. The defining of shares may be expressed by an agreement between them containing a declaration of their shares in the estate. Even an agreement between the members of a joint family whereby they appoint arbitrators for dividing the joint family property among them, amounts to a severance of the joint status of the family from the date of the agreement. The fact that no award has been made is not evidence of the renunciation of the intention to separate. Nor can the legal construction or legal effect of an unambiguous document defining shares of the members of the family be controlled or altered by evidence of the subsequent conduct of the parties.

*Balkishen Das* v. *Ram Narain Sahu,* (1903) L.R. 30 I.A. 139: I.L.R. 30 Cal. 738(P.C.); *Syed Kasam* v. *Jorawar Singh,* (1922) 43 M.L.J. 676: L.R. 49 I.A. 358: I.L.R. 50 Cal. 84 (P.C.) and *Balmakund Lal* v. *Musammat Sohano Kueri,* (1928) I.L.R. 8 Pat. 153, referred to.

Decision of the Court of the Judicial Commissioner, North-Western Frontier Province affirmed.

Appeal from the decision of the Judicial Commissioner in the North-Western Frontier Province in Appeal No. 19/4 of 1933 decided on 11th July, 1933.

*L. P. E. Pugh* and *L. M. D. De Silva* for Appellant.

*A. M. Dunne* and *W. Wallach* for Respondents.

2nd May, 1938. Their Lordships' judgment was delivered by

Sir Shadi Lal.

SIR SHADI LAL.—Hira Singh, the father of the plaintiff-respondent Partab Singh, resided originally in Dera Khalsa, a village situated in the Rawalpindi District. He admittedly constituted a joint Hindu family with his two sons, Narain Singh and Partap Singh. The family owned ancestral property consisting of a house and agricultural land. In 1872, when Narain Singh was about eight years old and Partap Singh about six years, Hira Singh migrated with his sons from his ancestral village to Abbottabad. He acquired some property at Abbottabad and also carried on business there. Partap Singh was educated by his father, first, at Abbottabad, and then at Lahore. He completed his education in 1888, when he went with the Black Mountain Expeditionary Force as a contractor for supplying articles of food and other necessaries to the troops. He earned money in his business of contract, and on his return to Abbottabad, he handed it over to his father. He subsequently went to Rawalpindi and supervised the ancestral property in Dera Khalsa, while his elder brother lived with his father at Abbottabad and helped him in the management of the business there.

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It appears that Hira Singh and his two sons continued to live as a joint family until January, 1918, when Hira Singh died. After the expiry of about nine years Hira Singh's elder son, Narain Singh, died in 1927, leaving his son Harkishan Singh, who is the appellant before their Lordships.

The action, which, has led to the present appeal, was brought by Partap Singh against his nephew, Harkishan Singh for partition of the property situated a Abbottabad and Dera Khalsa on the allegation that the entire estate belonged to the joint Hindu family consisting of the plaintiff and the defendant, Harkishan Singh, and that the plaintiff is entitled to a moiety thereof. The claim was resisted by Harkishan Singh, who denied the plaintiff's status as a member of the joint family, and pleaded that the property at Abbottabad belonged originally to Hira Singh and Narain Singh as members of a joint family, and that it passed, by survivorship, on the death of Hira Singh to Narain Singh, and on the latter's death to his son, Harkishan Singh. As regards Partap Singh, the defendant did not adopt a consistent attitude. While stating that Partap Singh had separated from the other members of the family, he was not quite clear as to whether Partap Singh was allotted any property on separation. At one stage of the case he said that all the property in the Rawalpindi District was awarded to Partap Singh, but he subsequently claimed a share even in that property. Indeed, neither party has given a consistent version of the position of the sons of Hira Singh *inter se*, and no reliance can be placed on their statements.

It is by no means a rare thing that a person makes a statement that he is a member of a joint family with his relative, but has reasons of his own for making that statement. It is not his statement, but his actings and dealings with the estate, which furnish a true guide to the determination of the question of the jointness or otherwise.

The Trial Judge, upon a consideration of the evidence before him, found that the plaintiff had ceased to be a member of the joint family, but his view was not accepted on appeal by the Court of the Judicial Commissioner at Peshawar, who held the family to be joint, and granted a preliminary decree for partition in favour of the plaintiff.

From that decree the defendant has brought this appeal to His Majesty in Council, and the main questions, which their

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Lordships have to determine, are whether the plaintiff and the defendant constituted a joint Hindu family at the date of the institution of the suit, and whether the property at Abbottabad belonged to that family. There is no proof of actual partition of the joint estate at any time, but there is no doubt that there can be a partition of the joint property without an actual division of the property by metes and bounds. According to the Mitakshara law, by which the parties are governed, partition consists in defining shares of the coparceners in the joint property, and a physical division of the property is not necessary. Once the shares are defined, there is a severance of the joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined, and thenceforth the parties hold it as tenants in common.

The defining of shares may be expressed by an agreement between them containing a declaration of their shares in the estate. Even an agreement between the members of a joint family, whereby they appoint arbitrators for dividing the joint family property among them, amounts to a severance of the joint status of the family from the date of the agreement, *Syed Kasam* v. *Jorawar Singh*[1] and *Balmakund Lal* v. *Musammat Sohano Kueri*[2]. The fact that no award has been made is not evidence of the renunciation of the intention to separate. Nor can the legal construction or legal effect of an unambiguous document defining shares of the members of the family be controlled or altered by evidence of the subsequent conduct of the parties, *Balkishen Das* v. *Ram Narain Sahu*[3].

Their Lordships do not find any such agreement defining the shares among the members of Hira Singh's family. The oral evidence adduced by the parties is of a partisan character; but the documentary evidence, though meagre, furnishes a clue to the relations between Hira Singh and his son Partap Singh until 1918 when the former died. It appears that the father used to write letters from Abbottabad to his son at Rawalpindi, which were couched in affectionate terms. He made enquiries about the ancestral property in which he took a personal

1. (1922) 43 M.L.J. 676: L.R. 49 I.A. 358: I.L.R. 50 Cal. 84 (P.C.).
2. (1928) I.L.R. 8 Pat. 153.
3. (1903) L.R. 30 I.A. 139: I.L.R. 30 Cal. 738 (P.C.).

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interest. There is no indication in the correspondence that the son had been separated from the father and was treated by him as the sole proprietor of the property at Dera Khalsa.

It is common ground that the father and his two sons were joint when they migrated to Abbottabad, and the learned counsel for the appellant is unable to suggest any time during the lifetime of the father when the plaintiff separated from the other members of the joint family and thereby ceased to have any interest in the coparcenary property.

It is contended that a cinema was built by Narain Singh after the death of his father, and that the plaintiff did not contribute to the expenses of the building and has therefore no right to a share in it. But the site, upon which the cinema was built, was acquired by the father in 1886 on a lease of ninety-nine years on a rental of five rupees a year. The cost of the building came out of the profits of the business at Abbottabad which was started by the father. There is no reason for holding that Narain Singh alone was joint with his father in the business, and that on the latter's death it devolved upon the former by survivorship. Whether it was a part of the joint property of all the members of the joint family, or separate property of the father, both the sons were, on his death, equally interested in the business and its assets. The defendant cannot, therefore, sustain his claim to be the exclusive owner of the cinema.

Their Lordships have examined the arguments advanced by the learned counsel for the parties, and are not prepared to dissent from the conclusion reached by the Court of the Judicial Commissioner. They will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *T. L. Wilson & Co.*

R. C. C. / B. V. V. —— *Appeal dismissed.*

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD THANKERTON, LORD WRIGHT AND SIR SHADI LAL.

Sain Maule Shah .. *Appellant**

*v.*

Ghane Shah, deceased (now represented by Fateh Mohammed) and others .. *Respondents.*

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Sain Maule Shah *v.* Ghane Shah.

*Mahomedan Law—Sajjadanashin of takia—Nature and devolution of office—Usage of institution—Election by bhek or religious fraternity—Procedure—Meaning of takia.*

A *takia* is a place where a fakir or dervish, a person who abjures the world and becomes an humble servitor of God, resides before his pious life and teachings attract public notice, and before disciples gather round him, and a place is constructed for their lodgement. A *takia* is recognised by law as a religious institution and a grant or endowment to it is a valid wakf or public trust for a religious purpose. The sajjadanashin, literally meaning a person who sits on the sajjada or prayer mat, is the spiritual preceptor of a religious institution. He has the privilege of imparting to his disciples spiritual knowledge. He has charge of the spiritual affairs of a religious institution, while the mutawalli has charge over its temporal affairs. In some cases the office of sajjadanashin and the office of mutawalli may be combined in one and the same person. The succession to the office of sajjadanashin depends on the rules, if any, made by the founder. Where there are no such rules applicable to a particular shrine the succession is regulated by the usage which governs the institution. Where election by the bhek or religious fraternity is the rule followed for appointing the sajjadanashin of a takia, what is contemplated by the usage is that the view of the fraternity should be ascertained as to who would be regarded by them as a suitable person to discharge the functions of the sajjadanashin.

*Mohiuddin* v. *Sayiduddin*, (1893) I.L.R. 20 Cal. 810, referred to.

Decision of the Lahore High Court reversed.

Appeal from the High Court of Judicature at Lahore.

*J. P. Eddy* and *V. Krishna Menon* for Appellant.

*A. M. Dunne* and *J. M. Parikh* for Respondents.

3rd May, 1938. Their Lordships' judgment was delivered by

SIR SHADI LAL.—The question raised by this appeal relates to the appointment of a sajjadanashin of a Moslem shrine situate at Ludhiana in the Province of the Punjab. The shrine is known as takia Shah Shuhada, and belongs to a sect — Sir Shadi Lal.

* P. C. Appeal No. 14 of 1932. 3rd May, 1938.

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of ascetics called Madari fakirs. The sajjadanashin of the shrine was one Sain Jhandu Shah, who died on the 25th October, 1922. The matter in controversy between the parties is whether the appellant Maule Shah was validly appointed to succeed Sain Jhandu Shah in the office of the sajjadanashin of this institution.

A takia is a place where a fakir or dervish (a person who abjures the world and becomes an humble servitor of God) resides before his pious life and teachings attract public notice, and before disciples gather round him, and a place is constructed for their lodgement (*Mohiuddin* v. *Sayiduddin*[1]).

A takia is recognised by law as a religious institution, and a grant or endowment to it is a valid wakf or public trust for a religious purpose.

The sajjadanashin (literally meaning a person who sits on the sajjada or prayer mat) is the spiritual preceptor of a religious institution. He has the privilege of imparting to his disciples spiritual knowledge. He has charge of the spiritual affairs of a religious institution, while the mutwalli has charge of its temporal affairs. In some cases the office of sajjadanashin and the office of the mutwalli are combined in one and the same person.

The succession to the office of the sajjadanashin depends on the rules, if any, made by the founder. But there are no such rules applicable to the shrine in question, and the succession is regulated by the usage which governs the institution. Now, there is ample evidence, and, indeed, the parties are agreed, that election by the bhek or religious fraternity is the rule followed for appointing the sajjadanashin of the takia in question. Whether, in addition to election, there should be a nomination, or confirmation, by the head of a superior shrine, is a matter upon which the parties are not unanimous.

The shrine in question belongs, as already stated, to Madari fakirs, an order of fakirs which was founded by Zinda Shah Madhaar of Syria, whose shrine is situate at Mukrampur or Makanpur, about 30 miles from Cawnpore in India. It appears that, on the 8th April, 1925, the appellant Maule Shah, accompanied by two other fakirs, approached

1. (1893) I.L.R. 20 Cal. 810 at 822.

Sayad Nazir Ahmad, the head of the shrine at Makanpur, and asked him to attend an assembly of Madari fakirs and other persons at Ludhiana. Sayad Nazir Ahmad acceded to his request, and arrived at Ludhiana on, or before, the 18th July, 1925. On that day a document or agreement in writing was submitted to him by the fakirs assembled at Ludhiana, requesting him to appoint a successor to Jhandu Shah. It is to be observed that this document was signed, not only by a large number of fakirs and the heads of Madari shrines of the neighbourhood, but also by the respondent Sardar Ali Shah. The signatories declared that the office of the Gaddi Nashin (sajjadanashin) had been vacant since the demise of Jhandu Shah, and unanimously requested Sayad Nazir Ahmad to confer the office on "anyone who is fit and whom he deems fit" for the office of the sajjadanashin of the takia. In compliance with this request, Sayad Nazir Ahmad granted, on that day, a sanad selecting Maule Shah, a "disciple of Jhandu Shah" for the office of the sajjadanashin of the shrine. This sanad also was signed by the representatives of various shrines and other Madari fakirs.

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There is evidence to show that Sayad Nazir Ahmad himself tied a turban on the head of Maule Shah in the presence of the assemblage, and other persons, who attended the gathering, offered turbans and presents in cash to him in token of accepting him to be the head of the shrine. Their names are mentioned in a list, with the presents made by them. Maule Shah, on his part, entertained all of them at a feast which cost him about Rs. 3,000.

The trial Judge holds that the evidence, both oral and documentary, produced by the plaintiff in support of his claim, proves that he had complied with the usage regulating the succession to the office of the sajjadanashin, and the learned Judge has accordingly granted a decree to him.

From this decree Ghane Shah, who claimed to be the mutwalli of the shrine appointed by Sardar Ali Shah, brought an appeal to the High Court. The appeal was accepted by that Court on the ground that the proceedings taken by Maule Shah for his election cannot be regarded as an election "in which the electors exercised a free and independent choice of a successor to the deceased sajjada." The learned Judges of

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the High Court criticised the method employed by Maule Shah in first "obtaining the good will and support of Sayad Nazir Ahmad," and "the unauthorised delegation to him of their powers by a certain section of the fraternity." They expressed the view that the result was, in the circumstances, a foregone conclusion.

Their Lordships are unable to concur in the conclusion reached by the learned Judges. Sayad Nazir Ahmad was admittedly the head of the shrine of the founder of the Order of Madari fakirs, and he was held in high esteem by the members of the bhek or the religious fraternity of the takia. The plaintiff was, therefore, justified in finding out whether his election would meet with the approval of the head of the parent shrine, whose consent is regarded by some witnesses to be essential to a proper election. Be that as it may, it is clear that when he arrived at Ludhiana, he adopted the proper attitude and did not take action until he was requested by all the persons interested in the matter. It cannot be said that the members of the bhek were coerced or unduly influenced in making their choice. Indeed, it is not suggested that the usage governing the election of a sajjadanashin provides a special procedure for conducting the election. There is no such thing as secret voting in the community consisting of these fakirs, and there can be little doubt that what is contemplated by the usage is that the view of the fraternity should be ascertained as to who would be regarded by them as a suitable person to discharge the functions of the sajjadanashin. It is obvious that a proposal should be made by a member of the Madari fraternity, and it was only natural that the members of the bhek should make a request to the head of the most important Madari shrine to give them a lead in the matter. Their Lordships think that the validity of the election in this case cannot be impugned on any reasonable ground. It must, therefore, be held that Maule Shah was duly elected by the bhek to the office of the sajjadanashin.

It is, however, argued that he was not a disciple of Jhandu Shah; but there is sufficient evidence to refute this contention. It is significant that he is described as a disciple of the late sajjadanashin in the sanad granted to him by Sayad Nazir Ahmad, and this document is signed by a large

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number of fakirs. Moreover, Sayad Nazir Ahmad deposes that he himself made enquiries as to the status of Maule Shah, and was satisfied that he was a disciple of the deceased sajjadanashin.

The respondent Sardar Ali Shah, however, claims that he was selected sajjadanashin by the bhek on the 28th October, 1922, the third day after the death of Jhandu Shah. There can be no doubt that, if he was validly elected in October, 1922, there was no vacancy in the office of the sajjadanashin which could be filled by the subsequent election of Maule Shah in July, 1925. The question is whether there was a previous election of Sardar Ali Shah, which rendered the subsequent election of the appellant inoperative. It is said that a document was executed in favour of Sardar Ali Shah on the date of the alleged election, but that document has not been produced. It is not disputed that the contents of the document cannot be proved by oral evidence. There is, therefore, no proof that the election, if any, was held by the bhek in accordance with the usage of the institution. Indeed, the agreement, executed on the 18th July, 1925, by the heads of the various shrines and other Madari fakirs requesting Sayad Nazir Ahmad to confer the office of the sajjadanashin on a fit person, states in clear terms that the office of the sajjadanashin of the takia in question has been vacant since the death of Jhandu Shah, and contains a request that the office should be conferred upon a suitable person. The agreement bears the signature of Sardar Ali Shah himself, and it is idle to suggest that he was induced by fraud to sign the document. This plea runs counter to the evidence of Sayad Nazir Ahmad in whose presence the document was signed by Sardar Ali Shah and other Madari fakirs. The objection on the ground of a prior election of Sardar Ali Shah cannot, therefore, be sustained.

It is not clear whether the usage followed by the institution prescribes that the sajjadanashin-elect should be approved by the head of a superior shrine, but their Lordships do not consider it necessary to discuss the matter, because it is common ground that the appellant's succession to the deceased sajjadanashin received the approval of the head of the shrine, which is recognised by the Madari fakirs as superior to all other Madari shrines in the country.

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Upon an examination of all the relevant circumstances their Lordships are of opinion that the appellant Maule Shah has established that he was duly elected to the office of the sajjadanashin of the takia Shah Shuhada. The result is that the appeal preferred by him should be allowed, the decree of the High Court be discharged, and that pronounced by the trial Judge be restored. The respondents 1 and 2 must pay the costs incurred by the appellant here and also in the High Court. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Nehra & Co.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

R.C.C.
B.V.V. *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

The Secretary of State for India in Council, represented by the Collector of Tinnevelly .. *Appellant* in both (1st Defendant in both)*

*v.*

Mary Ponnammal and others .. *Respondents in both (Plaintiffs 2 to 5 and 2nd Defendant and Nil) in both.*

Secretary of State for India in Council v. Mary Ponnammal.

*Madras Irrigation Cess Act (VII of 1865), S. 1, proviso—Inamdar's lands irrigated by water from a Government channel—Rights of.*

The extent of an Inamdar's right under the first proviso to S. 1 of the Madras Irrigation Cess Act is governed by the physical dimensions of the supply channel and not by the actual quantity of water that might pass along the channel. Even if it had been shown that greater supply of water passed along the channel, nevertheless under the proviso the quantity would obviously be variable according to the conditions of the season from year to year.

*Prasadha Row* v. *Secretary of State for India,* (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P.C.), followed.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin in A. S. No. 47 of 1927 preferred against the decree of the Court of the District Munsiff of Tuticorin in O. S. No. 120 of 1924, etc.

* S. As. Nos. 951 and 952 of 1928. 24th March, 1938.

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*The Government Pleader (K. S. Krishnaswamy Aiyangar)* for Appellant.

*R. Krishnaswami* and *R. Srinivasan* for Respondents.

The Court delivered the following

JUDGMENT.—These appeals have arisen out of two suits filed against the Secretary of State for India in Council for the refund of money collected in the shape of irrigation cess under the provisions of the Madras Irrigation Cess Act. There were five plaintiffs but they all belong to one family and they represent the Inamdar of Rajapudukudi. It will therefore be convenient to speak of "the plaintiff" in the singular. The plaintiff's inam village Rajapudukudi is irrigated by a tank which receives its supply from a jungle stream called Uppar. There is a supply channel from the Uppar to the tank which for three quarters of its length runs through the Government land and for the other quarter through the inam land; in order to divert the water along the channel a stone anicut has been in existence across the Uppar from time immemorial. In 1888 the Inamdar took the permission of the Government to replace the then existing anicut which is described in the documents as an anicut built of rubble stones by a permanent masonry structure. Permission was given, and the anicut was completed sometime in 1888. In faslis 1332-33 it was reported that the plaintiff had newly brought under wet cultivation about 32 acres of dry land and the Revenue officials imposed a water cess at the rate of one rupee per acre on these 32 acres of punjah. The suits were filed to recover these amounts (approximately Rs. 32 per fasli) and for an injunction against the representatives of the Secretary of State forbidding them to make any such levies in the future.

The case on behalf of the Collector was that the Irrigation Cess had been properly levied. He alleged that by the construction of the new anicut in 1888 the supply to the plaintiffs' tank had been increased. His case was that the new wet cultivation was made with the aid of the additional water supplied by means of the improved anicut. He contended also that at the time the anicut was constructed there was not indeed an express agreement, but an implied agreement between the Government and the plaintiff, that if the plaintiff should thereafter bring under wet cultivation any additional extent

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(over and above the immediately wet anicut under the tank) he would be liable to pay water rate. It was conceded that since the Government did not pay any contribution towards the cost of the anicut, the plaintiff would not be liable to pay the full water rate but a reduced water rate of one rupee per acre.

The issues framed by the learned District Munsiff were as follows:—

I. "Whether the plaintiff has been getting an appreciably larger supply of water for his inam lands from the Uppar river because of the anicut he was allowed to build across the river in the year 1888 and if so whether he cultivated the lands assessed for water rate with such increased supply?

II. Has plaintiff agreed to the levy of water cess now objected to by him and if so was the agreement made under mutual mistake of the parties and without consideration and is it void?

III. Is plaintiff estopped from contending that the levy of the water cess by defendant is illegal?

IV. Is the levy of water cess complained of by the plaintiff legal?

V. Is plaintiff entitled to the injunction asked for?

VI. What relief is plaintiff entitled to if any?"

On the first issue the learned District Munsiff found that the plaintiff has not been getting an appreciably larger supply of water from his inam lands from Uppar river because of the anicut that he was allowed to build across the river in the year 1888. This finding is confirmed by the learned Subordinate Judge. It can only be attacked in this Court by contending, as the learned Government Pleader has contended, that the onus of proof was wrongly thrown in the Courts below. Quoting the case of *The Secretary of State for India in Council* v. *Sri Mahant Prayag Dossjee Varu*[1], the learned Government Pleader argues that the onus should have been thrown upon the plaintiff to show that he was not getting any more water supplied to him than he was entitled to by virtue of the engagement implied in the inam title deed granted to him at the time of the inam settlement in 1867. We do not think that the case of *The Secretary of State for India in Council* v. *Sri Mahant Prayag Dossjee Varu*[1] has any bearing upon this case. That was a case of irrigation from a tank belonging to the Government and when it was found that the Inamdar who was entitled to irrigate certain inam lands from the tank had greatly increased the area of the lands which he irrigated from the

1. (1936) 71 M.L.J. 574.

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tank, it was held that the burden lay upon him to show that he was irrigating this increased extent of land without using more water. This is an entirely different case from the one with which we now have to deal. Here all the water for irrigation purposes is taken from the tank of the plaintiff. We think that this is a case in which, as was observed in *The Secretary of State for India in Council* v. *Ambalavana Pandara Sannadhi*[1], in the circumstances the burden was on the Government to show that the Inamdar had been storing in his tank more water than he was entitled to under the engagement. In our case there was no allegation on the side of the Government that the level of the anicut constructed across Uppar in 1888 by the plaintiff was any higher than the level of the rubble stone anicut which it replaced. There was also no allegation that the dimensions of the supply channel from the anicut to the tank had been in any way increased. Unless the anicut level were raised or the dimensions of the channel increased, it would be impossible for the change to make any difference in the quantity of water conveyed along the channel to the tank. The only possible improvement in the supply that could be occasioned by such a change would be the prevention of leakage, assuming that the old rubble stone dam was porous; but there is no proof in this case and no statement by anybody that the old rubble stone dam did in fact leak. In these circumstances we think it is clear that the case is governed by the principle of the Urlam case *Prasadha Row* v. *Secretary of State for India*[2]. The anicut and the supply channel having remained virtually unaltered the Inamdar is entitled to the water which runs down the channel into his tank and is entitled to use that in any way he pleases. He is not limited to the extent of wet cultivation which he was making at the time of the Inam settlement (1867).

The extent of the Inamdar's right under the first proviso to S. 1 of the Madras Irrigation Cess Act is governed by the physical dimensions of the supply channel and not by the actual quantity of water that might pass along the channel. Even if it had been shown that greater supply of water passed along the channel, nevertheless under the proviso the quantity would

1. (1917) 33 M.L.J. 415 at 429.
2. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P. C.).

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obviously be variable according to the conditions of the season from year to year.

With regard to issue 2, it was found by the learned District Munsiff and confirmed by the learned Subordinate Judge that there was no agreement between the plaintiff and the Government to the levy of water cess now objected to. This also is really a question of fact. The learned Government Pleader referred us to the correspondence which passed between the plaintiff and the Government in 1888 and subsequently and has asked us to say that it does imply an agreement. But we think it is equally possible to explain this correspondence on the assumption that both the Government and the plaintiff were under a misapprehension regarding the extent of the plaintiff's rights. It is quite clear from the correspondence that the Government thought they would be entitled to levy water rate for any increased area brought under wet cultivation after the improvement of the anicut. It is also quite clear that the plaintiff acquiesced in that view and thought that he would be liable to pay water rate for any such increased area. But this is not the same thing as saying that both the plaintiff and the Government *agreed* to the payment and the imposition of water cess. The learned Government Pleader was able to show that in 1891 the plaintiff paid an amount of one rupee per acre by way of water rate without protest and without taking any steps for its recovery. This however, as both the lower Courts have held, cannot estop the plaintiff from denying his liability. We may quote here the judgment of the Privy Council in *The Secretary of State for India in Council* v. *Subramania Aiyar*[1]. Dealing with a somewhat similar case, their Lordships made the following observations:—

> "The action was brought, as has been said, by the trustee of the temple for a declaration that the temple was not bound to pay cess. They had been paying cess for some ten or fifteen years, but they said they had paid it under a mistake as to their rights and they claimed repayment of the amount that they had paid. It is obvious that the amount which they were entitled to claim would be affected by the Limitation Act but as to that no question arises in this particular suit, the question being whether they ought to have paid it at all."

We think the case is really concluded by the findings of fact of both the lower Courts, namely, that the plaintiff was

1. (1933) 64 M.L.J. 715 (P.C.).

not getting an appreciably larger supply after the construction of the anicut in 1888 and that there was no agreement by the plaintiff to pay water cess to which he now objects. The appeals must therefore fail and are dismissed with costs.

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K. C. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

G. M. Rajulu .. *Petitioner**

*v.*

Rao Bahadur M. Govindan Nair .. *Respondent.*

Rajulu *v.* Govindan Nair.

*Madras City Civil Court Act (VII of 1892), Ss. 3 and 5 (1)—Scope—Suit on the file of Small Cause Court—Transfer to City Civil Court—Power of City Civil Judge to try—Civil Procedure Code (1908), S. 24.*

S. 3 of the Madras City Civil Court Act merely sets forth the purpose for which the Madras City Civil Court was established, and cannot be read to mean that the Madras City Civil Court after its establishment would not be competent to try and dispose of suits that were transferred to it. On the other hand S. 5 (1) of the same Act gives to the Judge of the City Civil Court all the powers of a Judge of the Small Cause Court in respect of cases cognisable by that Court. The City Civil Judge is therefore competent to try and dispose of a small cause suit transferred to his court.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing the transfer of suit No. 1831 of 1938 on the file of the Court of Small Causes, Madras, to the file of the Court of the City Civil Judge, Madras, to be tried and determined along with O.S. No. 238 of 1938 on the file of the latter Court or in the alternative to issue an order directing stay of trial of Small Cause Suit No. 1831 of 1938 pending the said O.S. No. 238 of 1938 on the file of the Court of the City Civil Judge, Madras.

*V. Thyagarajan* for Petitioner.

*O. T. G. Nambiar* for Respondent.

The Court made the following

ORDER.—This is an application under S. 24, Civil Procedure Code, to transfer a suit from the Presidency Small Cause Court to the Madras City Civil Court. Two suits relate to the same matter and arise out of a contract between the parties. The suit filed in the City Civil Court is by the contractor alleging breach of contract by the person who entrusted the work to him. The suit in the Small Cause Court is by the

*C. M. P. No. 1684 of 1938. 30th March, 1938.

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person who entrusted the work, alleging breach of contract by the contractor. Each claims damages. It is clearly in the best interest of the parties to have these cases tried together and it would cause very great inconvenience if the two Courts were to give different findings on the same question, especially as an appeal would lie from one decision but not from the other.

The transfer is however objected to on the ground that the City Civil Court is not competent to try or dispose of the suit within the meaning of S. 24 (*a*), Civil Procedure Code. That argument is based on the wording of S. 3 of the Madras City Civil Court Act which empowered the Local Government to establish the Madras City Civil Court with jurisdiction to receive, try and dispose of all suits, etc., arising within the City of Madras of the value not exceeding Rs. 2,500 and excepting suits cognisable by the Small Cause Court and other Courts. This section merely sets forth the purpose for which the Madras City Civil Court was to be established, and cannot be read to mean that the Madras City Civil Court after its establishment would not be competent to try and dispose of suits that were transferred to it. A District Munsiff, for example, cannot receive, try and dispose of suits that lie within the jurisdiction of another District Munsiff's Court; but that does not prevent the District Court or the High Court from transferring the suit from the one Court to the other. In the same way, a District Court and a District Munsiff's Court may have concurrent jurisdiction to try the suits of a value not exceeding Rs. 3,000; but a District Court cannot receive a suit of the value of less than Rs. 3,000 although it can try and dispose of it. I do not therefore think that S. 3 of the Madras City Civil Court Act prevents the City Civil Court from trying suit No. 1831 of 1938 if it is transferred to it.

S. 5 (1) of the same Act gives to the Judge of the City Civil Court all the powers of a Judge of the Small Cause Court in respect of cases cognisable by that Court. "By that Court" must mean Judge of the Small Cause Court. S. 5 (1) therefore gives the Judge of the City Civil Court power to try and dispose of any suit cognisable by the Small Cause Court. The various duties that have to be performed by the Judges of the Small Cause Court and the Judge of the City Civil Court is determined by the Chief Justice of the High Court under S. 5 (2). I therefore feel no doubt that the City Civil Judge

is competent to try and dispose of the small cause suit if it is transferred to it. Another objection is that the petitioner has not made his application promptly. An application was made before the Judge of the Small Cause Court to stay the suit before him pending the disposal of the suit in the City Civil Court. That application was dismissed on 15th March, 1938. The present application was filed on 28th March, 1938; and it is argued that on account of this delay this Court ought not to grant any indulgence to the petitioner. The petitioner states that this delay is due to the fact that he proposed to file a revision petition against the order of the Chief Judge of the Small Cause Court refusing to stay the suit. Whether that excuse is valid or not I cannot say; but I do not consider that this delay of 12 days is sufficient to warrant my refusing a remedy which should ultimately be as convenient to the respondent as to the petitioner.

This petition is therefore allowed with costs. As the suit transferred is of a small cause nature, it is desirable that it and the City Civil Court Suit No. 238 of 1938 should be disposed of early, before the vacation if possible.

B.V.V. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Puthiya Veettil Moideen's son Ahammu .. *Appellant* (1st Defendant)*

*v.*

Patiyath Ayidross Haji's son Kunhu Muhammad Haji and others .. *Respondents (Plaintiff and Defendants 4 to 14).*



*Limitation Act (IX of 1908), Art. 132—Mortgage bond providing for payment in instalments—Default in payment—Subsequent waiver of the default clause by the conduct of the mortgagee in accepting and giving credit to payment of arrears—Limitation—Suit whether barred.*

In a mortgage bond the principal sum was repayable in 15 annual instalments of a certain specified figure. The first of the instalments fell due in the year 1913 and the last in 1927. The mortgagor died soon after the mortgage bond had been executed, but the instalments for the years 1913, 1914, 1915 and 1916 were paid regularly on behalf of his heirs. In 1927 owing to a partition of properties among the heirs of the mortgagor the appellant herein was made responsible for discharging the debt under the

* Appeal No. 182 of 1932. 12th November, 1937.

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mortgage bond. The instalment due for 1917 was unpaid and for two more years 1918 and 1919 the instalments remained unpaid. By some arrangement the dues were set off against moneys payable by the mortgagees in another transaction leaving a small balance as the amount due to the mortgagees in respect of instalments for the said three years. The mortgagees accepted payment of the amount but in 1920 they purported to assign the mortgage to another on the basis that a default occurred in 1917 and that the amount due on the mortgage was the mortgage debt less only the instalments paid up to 1917. In the assignment the mortgagees gave credit for the sum of balance received by them in 1919 and regarded the instalments for the three subsequent years from 1917 as having been paid. The present suit was filed in 1929 by the assignee mortgagee who gave credit for the amounts mentioned above as having been received by the predecessors-in-title. The defence was that the mortgage debt was time barred.

*Held*, that by their conduct of giving credit to the amounts for three years as well as receiving the balance remaining in cash the mortgagees had waived their right of enforcing the default clause in the hypothecation bond. That right having been waived limitation did not run. The suit having been filed within the period allowed by law under Art. 132 of the Limitation Act it was maintainable.

(2) That the interest would have to be calculated from the dates on which the instalments fell due up to the date fixed for payment in the preliminary decree and the interest would be at the contract rate.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in O. S. No. 41 of 1929.

*The Advocate-General* (*Sir A. Krishnaswami Aiyar*) and *K. Subramanyam* for Appellant.

*B. Pocker* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

*The Chief Justice.*—The appellant was the first defendant in the trial Court. The suit was to enforce a hypothecation bond dated the 5th June, 1912, which was executed by the father of the appellant, a Sunni Mohammadan, in favour of respondents 2 to 9. The bond was assigned to the first respondent who was the plaintiff in the suit, on the 19th July, 1928. The principle sum due under the mortgage was Rs. 5,000 which was repayable in 15 annual instalments of Rs. 375. The first of the instalments fell due in the year 1913 and the last in 1927. The appellant's father died soon after the mortgage bond had been executed, but the instalments for the years 1913, 1914, 1915 and 1916 were paid regularly on behalf of his heirs. On the 17th September, 1917, the estate of the appellant's father was partitioned amongst his heirs and the first appellant was made responsible for discharging the debt under the hypothecation bond. No question arises as to the validity of the partition or of the liability of the appellant

under the bond. The instalment due for the year 1917 was not paid. It was not paid for the year 1918 and default was made also in respect of the year 1919. On the 8th May, 1919, the uncle of the appellant, purporting to act as the guardian of the appellant, made up an account of what was due under the hypothecation bond for these three years and set off against the amount a sum of Rs. 900, which was due to the appellant by the mortgagees on another transaction. This left Rs. 136-7-0 as the amount due to the mortgagees in respect of the instalments for these three years. This sum of Rs. 136-7-0 was sent to the representatives of the mortgagees by letter and was received by them on the 24th May, 1919. The mortgagees accepted payment of this money, but on the 2nd July, 1920, they purported to assign the mortgage to one Krishnan Nambudripad on the basis that a default had occurred in 1917 and that the amount due was the mortgage debt, less the instalments paid in respect of the years 1913, 1914, 1915 and 1916. There appears to have been some question as to the validity of this assignment, and on the 19th September, 1928, a fresh assignment was executed by the mortgagees, the assignee in this instance being the first respondent. To this deed Krishnan Nambudripad was a party. In the assignment to the first respondent the mortgagees gave credit for the sum of Rs. 136-7-0 received by them on the 24th May, 1919 and regarded the instalments for the years 1917, 1918 and 1919 as having also been paid. The present suit was filed on the 7th October, 1929, by the first respondent, who gave credit for the Rs. 900, which was due to the appellant in 1919 and shown in the accounts submitted to the mortgagees in that year and also gave him credit for the sum of Rs. 136-7-0, which was received by the mortgagees on the 24th May, 1919. The appellant defended the suit on the ground that the mortgage debt was time barred. The learned trial Judge, however, held that it was in time. He based his finding on the fact that there had been a written acknowledgment of the debt in 1919 by the *de facto* guardian of the appellant. This written acknowledgment was the letter written by the appellant's uncle forwarding the sum of Rs. 136-7-0. It is clear that the learned Judge here erred. Under Mohammadan Law a *de facto* guardian has no right to bind his ward and this was frankly conceded by the learned Advocate for the first respondent.

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The learned Advocate-General supported the appeal on another ground. He said that under the terms of the deed the whole of the mortgage debt became due on default in payment of the first instalment. The first default here took place on the 12th May, 1917, and as the suit was not filed until 1929 it was, he said, out of time. In support of this argument he referred us to the wording of Arts. 75 and 132 of the Limitation Act. Art. 75 refers to a promissory note or a bond payable by instalments. The limitation here is three years from the date of the default, unless the payee or pledgee waives the benefit of the provision. Under Art. 132 the period of limitation in respect of a mortgage bond is twelve years from the time the money becomes due. No mention is made here of waiver. The question whether the omission to include in Art. 132 a provision similar to the one in Art. 75 operates to prevent a plea of waiver being set up has been the subject of considerable discussion in the High Courts in India, but the matter has now been set at rest by the decisions of the Privy Council in *Pancham* v. *Ansar Husain*[1] and *Lasa Din* v. *Gulab Kunwar*[2]. In the first of these cases their Lordships discussed the question whether the default in the payment of an instalment set the law of limitation in motion for the benefit of the mortgagee, but as a decision was not necessary in that case the matter was left open for the time being. The question arose again in the case of *Lasa Din* v. *Gulab Kunwar*[2] and was there decided. At page 384 Sir George Lowndes who delivered the judgment of their Lordships observed :—

"There can be no doubt that, as pointed out by Lord Blanesburgh in *Pancham* v. *Ansar Husain*[1], a proviso of this nature is inserted in a mortgage deed 'exclusively for the benefit of the mortgagees,' and that it purports to give them an option either to enforce their security at once, or if the security is ample, to stand by their investment for the full term of the mortgage. If on the default of the mortgagor—in other words, by the breach of his contract—the mortgage money becomes immediately 'due', it is clear that the intention of the parties is defeated, and that what was agreed to by them as an option in the mortgagees is, in effect, converted into an option in the mortgagor. For if the latter, after the deed has been duly executed and registered, finds that he can make a better bargain elsewhere, he has only to break his contract by refusing to pay the interest, and '*eo instanti*', as Lord Blanesburgh says, he is entitled to redeem. If the principal money is 'due', and the stipulated term has gone out of the contract, it

1. (1926) L.R. 53 I.A. 187: I.L.R. 48 All. 457 (P.C.).
2. (1932) 63 M.L.J. 187: L.R. 59 I.A. 376: I.L.R. 7 Luck. 442 (P.C.).

follows, in their Lordships' opinion, that the mortgagor can claim to repay it, as was recognised by Wazir Hasan, J., in his judgment in the Chief Court. Their Lordships think that this is an impossible result. They are not prepared to hold that the mortgagor could in this way take advantage of his own default: they do not think that upon such default he would have the right to redeem, and in their opinion the mortgage money does not 'become due' within the meaning of Art. 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. This would, of course, also be the position if the mortgagee exercised the option reserved to him."

In the present case, the mortgagees accepted the payment of the Rs. 136-7-0 tendered to them in 1919 and gave credit for the Rs. 900 due by them to the appellant on another account. It is obvious that in so doing they had waived their right of enforcing the default clause in the hypothecation bond. That right having been waived limitation did not run, and this being so the suit was filed within the period allowed by law. The judgment of the learned trial Judge will, therefore, stand.

The learned Advocate-General has pointed out that the plaint does not give credit for the amount paid in respect of the 1919 instalment and that the sum claimed as being due under the hypothecation bond is worked out on the basis that the whole amount became due in 1929. The mortgagees did not exercise their right under the bond of calling in the amount and consequently are not entitled to calculate interest on the basis that the amount of the principal sum became due in 1919. They are, however, entitled to charge interest on each instalment which was not paid. The learned Advocate for the respondent accepts this as being correct. The interest on the instalments will, therefore, be calculated from the dates on which the instalments fell due up to the date fixed for payment in the preliminary decree and the interest will be at the contract rate. The period allowed for redemption will be six months from to-day. After the date for redemption has passed the decretal amount will carry interest at six per cent. The learned Advocates say that they will submit an agreed statement of what is due under the mortgage on this basis.

The first respondent is entitled to his costs in the appeal.

This appeal came on for final hearing after the filing of the statement by the advocate for the first respondent in pursuance of the order contained in the above judgment and the Court delivered the following

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Leach, C.J.

JUDGMENT.—The learned Advocate for the respondent has filed a statement of what is due under the mortgage on the basis of our judgment of the 7th October 1937. The learned Advocate for the appellant accepts the statement as being correct except that he challenged the first two items, namely, Rs. 88-9-0 and Rs. 200-14-2 respectively. The learned Advocate for the respondent accepts the objection, and it is agreed that the total amount due under the mortgage including interest and costs is Rs. 9, 532-7-10. The decree will be drawn up accordingly.

K.C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

T. Nannu Shankar Tawker .. *Appellant** (*3rd Defendant*)

*v.*

P. S. Bashyam Aiyangar and others .. *Respondents* (*1st and 2nd Plaintiffs and 1st Defendant*).

Nannu Shankar Tawker *v.* Bashyam Aiyangar.

*Hindu Law—Debts—Manager of trading family—Loan advanced for business—What creditor has to prove—Father—Debts contracted by—Suit by son to avoid on ground of immorality—Proof of connection between debt and father's immorality.*

Where debts are contracted by the father in a Hindu joint family and the son sues to avoid the debts as not binding on him on the ground that the loans were raised for immoral purposes, it is not sufficient for him to prove that the father had been immoral. It must further be shown that there was some connection between the debt and the father's immorality.

*Sri Narain* v. *Lala Raghubans Rai,* (1912) 25 M.L.J. 27: 17 C.W.N. 124 (P.C.), relied on.

*Tulshi Ram* v. *Bishnath Prasad,* (1927) I.L.R. 50 All. 1, referred to.

The obligation resting upon the creditor in cases where the principle of *Hunoomanpersaud's case,* (1856) 6 M.I.A. 393, applies to all cases including the case of a loan advanced to the manager of a trading family, and the lender in all such cases must satisfy himself that he made a reasonable enquiry as to the necessity for the loan and that he *bona fide* believed in the representations made to him. Thus in the case of a loan advanced to the manager of a trading family the creditor besides showing that the family is a trading family has further to prove that he made enquiries with regard to the necessities of the loan and *bona fide* believed in the representations made to him that the loan was required for the family business.

*Thakur Ramkrishna Muraji* v. *Ratan Chand,* (1931) 61 M.L.J. 665: L. R. 58 I.A. 173: I.L.R. 53 All. 190 (P.C.), relied on.

* Appeal No. 82 of 1932. 12th October, 1937.

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Observations in *Raghunathji Tarachand* v. *The Bank of Bombay*, (1909) I.L.R. 34 Bom. 72, not followed.

*Vithal Yeshwant* v. *Shivappa Mallappa*, (1923) I.L.R. 47 Bom. 637, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput in O. S. No. 39 of 1928.

*K. Bashyam* and *V. C. Veeraraghavan* for Appellant.

*T. R. Venkatarama Sastri* and *C. Narasimhachari* for Respondents.

The Court delivered the following

Leach, C. J.

JUDGMENTS. *The Chief Justice.*—This appeal concerns a mortgage executed on the 12th March, 1919, in favour of the father of the first and second respondents by the third respondent, who is the father of the appellant. In executing the mortgage the third respondent signed for himself and also purported to be acting (*a*) as the guardian of the appellant and of his nephew, Krishnaji, and (*b*) as the manager of a joint family which he alleged consisted of himself, the appellant, his nephew, and his brother Balakrishna. The mortgagee having died, the first and second respondents, on whom his estate devolved, instituted the suit out of which this appeal arises in the Court of the Subordinate Judge of Chingleput to recover the sum of Rs. 9,213-12-0 claimed to be due as principal and interest under the mortgage. The defendants were the appellant, the third respondent, and Balakrishna who died during the pendency of the suit. Balakrishna's estate having devolved by will on the appellant the suit was continued against the appellant as the legal representative of Balakrishna as well as against him as a member of the joint family. The suit was defended by the appellant who averred that the property in suit constituted trust property and as such could not be mortgaged by the third respondent; that even if it were not trust property no necessity existed for mortgaging it; that the loan was in fact obtained by his father for immoral purposes; and that, in any event, the estate of Balakrishna was not bound by the deed as he had already separated from the family. The learned trial Judge rightly refused to go into the question whether there was a paramount title, as all that could be sold was the right, title and interest of the defendants in the property. He rejected the plea that the loan had been obtained by the third respondent for immoral purposes, but held that the appellant was bound by the deed as the mortgagee had made reasonable

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inquiries with regard to the need for the loan and had satisfied himself that it was necessary. He was, however, of the opinion that liability did not extend to Balakrishna's estate. On these findings he passed a decree for the amount claimed and directed that in default of payment within the time allowed for redemption the interests of the third respondent, of Krishnaji, who had died before the suit, and of the appellant as the son of the third respondent should be sold. The appellant contends that on the evidence the learned trial Judge should have accepted the plea that the money was raised by the third respondent for immoral purposes and failing this should have dismissed the suit so far as the appellant was concerned on the ground that the loan was not required for family purposes and it had not been shown that the mortgagee made inquiries before lending the money. The first and the second respondents have filed cross-objections as they challenge the finding that the estate of Balakrishna is not bound by the mortgage.

In order to understand the position it is necessary to refer to certain events which happened before the mortgage deed was executed. Up to the year 1905 the family was joint. It then consisted of the appellant's great uncle (Gopinath) his father, his father's brothers (Rajaram and Balakrishna), Rajaram's son (Krishnaji) and himself. In January of that year Gopinath separated from the other members of the family, and on the thirty-first of that month a deed of partition was executed. The properties belonging to the family were a house in Tanjore, a house in Madras, and certain property on the outskirts of Madras known as "Teeds Garden". Under the terms of the partition deed Gopinath received the Tanjore house and Rs. 3,000 and the third respondent and his brothers the Madras house. Teeds Garden was not partitioned, but the effect of the deed was to make Gopinath a tenant-in-common with his nephews, who as between themselves remained joint. On the 28th April, 1905, Balakrishna separated from his brothers and executed a deed relinquishing his interest in the Madras house in consideration of a sum of Rs. 2,000. On the 24th July, 1910, Rajaram and the third respondent sold the Madras house. Shortly afterwards Rajaram died. The joint family then consisted of the third respondent, the appellant and Rajaram's son Krishnaji.

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According to the recitals in the mortgage deed the money was required for the marriage of the appellant and for capital in the family business in precious stones. It will be necessary to consider whether these recitals were true, but I will first of all deal with the plea that the loan was raised by the third respondent for immoral purposes. It is the appellant's case that his father became addicted to drink many years ago and that drink led him to associate with woman of immoral character. He is supported by a number of relatives, some of whom hold good positions in life. It is said on behalf of the first and the second respondents that it is no uncommon thing in this country for members of a family, ostensibly respectable, to instigate and to assist a son in maintaining a plea that his father has lived an immoral life, when it is a matter of preventing a mortgagee from enforcing his rights. It is a regrettable fact that false pleas of this nature are not unknown. But each case must be considered on its merits, and the fact that other people have not hesitated to raise false pleas cannot be taken into account here. The learned trial Judge, having heard the appellant's witnesses, refused to believe their testimony on this point, and the learned Advocate for the first and the second respondents has shown that in another respect the defence evidence is not true. An attempt was made to prove that the third respondent had not lived with his wife and son for many years, but the falsity of this story is to be gathered from the evidence of Nana Tawker, the uncle of the appellant's mother and one of the defence witnesses. In these circumstances we are not prepared to hold that the learned trial Judge has failed to weigh the evidence on this point properly. But even if it were true that the third respondent did drink and associate with women of bad character this would not entitle the appellant to succeed, because there is nothing to show that the loan was raised for the purpose of enabling the third respondent to lead an immoral life or to discharge debts which had been incurred as the result of such conduct. To prove that the father has been immoral will not relieve the family from liability. It must be shown that there is some connection between the debt and the father's immorality, as the Privy Council pointed out in the case of *Sri Narain* v. *Lala Raghubans Rai*[1]. In their judgment in *Tulshi Ram* v. *Bishnath Prasad*[2], Lindsay and Sulaiman, JJ.,

1. (1912) 25 M.L.J. 27; 17 C.W.N. 124 (P.C.). 2. (1927) I.L.R. 50 All. 1.

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remarked that if this were not the correct law the position of the mortgagees would become wholly insecure and intolerable, and that even the payment of antecedent debts would be nullified by proof that the father was an immoral person. This disposes of the appellant's plea based on the alleged immorality of his father.

The more important question is whether the first and the second respondents have discharged the burden imposed upon them of showing that their father did make inquiries before lending the money and was satisfied that there was necessity for the loan. The learned Advocate for these respondents would have it that it is not necessary for his clients to go so far and that it is sufficient if they prove that he had a business, the argument being that this in itself would shift the burden. This contention, however, is opposed to settled principle and it is, therefore, necessary to state the law. It is set out in language which leaves no room for argument in the following passage from the judgment of their Lordships of the Privy Council in the case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[1]:

"Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

These remarks were emphasised by their Lordships in *Sri Thakur Ramkrishna Muraji* v. *Ratan Chand*[2], where they quoted the passage which I have just set out from their former judgment. We are asked to disregard these pronouncements, because their Lordships were not dealing with a loan required for the purposes of a business and the Bombay High Court

1. (1856) 6 M.I.A. 393 at 424.
2. (1931) 61 M.L.J. 665: L.R. 58 I.A. 173: I.L.R. 53 All. 190 (P.C.).

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placed a business loan in a different category in the case of *Raghunathji Tarachand* v. *The Bank of Bombay*[1]. The answer is twofold. The remarks of their Lordships apply equally to the case of a loan sought for the purposes of a family business and a loan sought for any other family necessity and the opinion expressed in *Raghunathji Tarachand* v. *The Bank of Bombay*[1] did not find acceptance by the Bombay High Court in the later case, *Vithal Yeshwant* v. *Shivappa Mallappa*[2] and has not found acceptance in other High Courts. It is therefore clear that while a lender has not got to see to the application of the money he is put on inquiry and he must satisfy himself that the loan is necessary. It is not sufficient to accept the mere word of the manager of the family that a loan is required. The nature of the inquiries must depend of course on the particular facts of the case, but there must be inquiries which a reasonable man would make in the circumstances. A person who lends money to the manager of a Hindu family knows full well the risks he runs and he has only got himself to blame if he lends it without proper inquiry. And the fact that the lender is dead and, therefore, cannot state what inquiries he made does not relieve his heirs from the necessity of showing that there were proper inquiries. The death of the mortgagee increases the difficulty of deciding the question, but there must be on the record sufficient to justify the Court in forming the conclusion that the lender did what was reasonably incumbent upon him to do in the circumstances of the case.

I will now consider whether the evidence justifies the finding of the trial Court that the mortgagee did what was incumbent upon him to do to safeguard his position. The evidence on which the first and the second respondents rely is that of their father's clerk, S. Parthasarathy Aiyangar, but it is obvious that he is a witness on whom no reliance can be placed. In the first place he states that the mortgagee made inquiries and ascertained that the appellant was a minor. This is obviously false, because if he had made inquiries he would have found that the appellant was then in his twentieth year. It has been suggested on behalf of the appellant that the third respondent knew that he could not get his son to consent to join in the mortgage, and, therefore, told the mortgagee that

1. (1909) I.L.R. 34 Bom. 72. 2. (1923) I.L.R. 47 Bom. 637.

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his son was a minor. It is certainly very remarkable that the third respondent should describe the appellant as a minor in the mortgage-deed, because it cannot be denied that he knew his son's age. In the deed under which the Madras house was sold, Ex. XIII-*c*, dated 24th July, 1910, he described his son as being about 11 years of age and the mortgage-deed was not executed until more than 10 years later. In these circumstances there is foundation for the suggestion that the father did not wish the son to know what he was doing with the property. But be this as it may, the important point is that the mortgagee could not have made the alleged inquiries. Parthasarathy Aiyangar has been shown to be an untruthful witness in another respect. He said in the course of his evidence that he and the mortgagee received an invitation to the appellant's wedding in the year the mortgage was created. The marriage, however, did not take place until 1921, nearly two and a half years after the date of the mortgage and then only after the appellant had secured employment. It is not suggested that any other marriage was ever contemplated. The only reasonable conclusion to be drawn from the evidence is that the marriage of the appellant was not a reason for the loan, which means that here again the mortgagee could not have made proper inquiries.

The next question is whether the mortgagee made any inquiries about the need of a loan for the family business? The evidence does not prove that he did. On the other hand the indications are that he did not. The family had dealt in precious stones, but the business was at such a low ebb when the appellant's great grandfather died in 1903 that the stock-in-trade had to be sold to pay off debts. The appellant states that at the time of the mortgage the business had ceased to exist. Even if this is not true it is obvious that the business was a very poor one. There were no business premises and the family income was very small. That the mortgagee was reluctant to lend the money is shown by the fact that the negotiations for the loan continued for two or three months. The security offered consisted of nearly 42 acres of garden land lying on the outskirts of the city of Madras, and only Rs. 5,000 was wanted. If the money had been required for the purposes alleged it is very strange that the mortgagee should have taken so long to make up his mind. It would appear

that he was persuaded to lend against his better judgment, and then tried to secure his position by the recitals in the deed. The recitals do not prove the statements contained therein and in one respect—the need of money in 1919 for the marriage of the appellant—there is obviously a false statement. In these circumstances it appears to me that the finding of the trial Court cannot be supported and the appellant is entitled to succeed on the ground that the first and second respondents have failed to show that there was any necessity for the loan or that the mortgagee made proper inquiries before lending the money.

With regard to the cross-objections of the first and the second respondents, I am of opinion that the learned trial Judge is correct in holding that Balakrishna had left the family in 1903. The deed of relinquishment of the 28th April, 1905, states:

> " I have executed the following deed of relinquishment of share as I am unwilling to live with you and as I wish to discharge the debts contracted without your permission. So in future I shall have no claim against you in connection with your properties . . . . . . . As I have received this day from you the said sum (Rs. 2,000) in cash, I shall have no kind of interest in future in the family properties, movable and immovable."

It is true that this deed has reference only to the Madras house, but its terms show that Balakrishna had separated from his brothers and his interest in Teeds Garden was no longer that of a member of the joint family. Therefore the third respondent had no power as manager of his own branch of the family to charge Balakrishna's interest in the property.

The result is that the first and the second respondents are entitled to a mortgage decree as against the third respondent, but if a sale has to take place it will be confined to the third respondent's interest in the property, whatever that is. The appellant having succeeded will be entitled to his costs in this Court and the Court below, including costs on the cross-objections.

Madhavan Nair, J.

*Madhavan Nair, J.*—I entirely agree both on the question of fact and on the question of law; but having regard to the nature of the argument advanced, I would say a few words on the question of law. The contesting respondents seek to make the share in the joint family properties of the appellant, who was a minor at the time of the transaction, liable for the money borrowed by their father on a mortgage on the repre-

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sentation made by the appellant's father, the manager of a joint Hindu family, that the amount was required for family business. It has been proved that the business of the joint family was trade. The creditor has not been able to prove the existence of any actual necessity. But his learned counsel contends that, once he proves the existence of a family trade or business, the burden of making the enquiry into the necessities of the loan placed on him by the Privy Council in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[1] is discharged and a decree will have to be granted in his favour binding the minor's estate. The case in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[1] has laid down the principle that if the lender makes a reasonable enquiry as to the necessity for the loan, and the facts represented to him were such as, if true, would justify the loan, then he is protected even if he is not able to prove that actual necessity existed for the loan. This principle has been accepted and applied in all cases where its application is relevant without any modification. If the contention of the respondents' learned counsel is accepted, it would mean that in the case of a trading family, that is, a family whose business is trade, all that is required of the lender in law to get a decree against the minor's estate, is to prove by evidence that by enquiries he found out that the family was a trading family, and it is not necessary for him to prove that he satisfied himself that there was necessity for the loan; or, in other words, the creditor is not bound to enquire into the purpose of the debt, nor prove that he believed that such purpose existed. This argument if accepted would involve the grafting of an exception upon the rule laid down by the Privy Council. Except the single decision of the Bombay High Court in *Raghunathji Tarachand* v. *The Bank of Bombay*[2], the counsel has not been able to put before us any other decision or any special texts of Hindu Law in support of his proposition. No doubt the observations of Chandavarkar, J., in that decision support him, but, as pointed out by my Lord, those observations have been dissented from in *Vithal Yeshwant* v. *Shivappa Mallappa*[3]. In that case, after referring to *Raghunathji Tara-*

1. (1856) 6 M.I.A. 393.
2. (1909) I.L.R. 34 Bom. 72.
3. (1923) I.L.R. 47 Bom. 637.

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*chand* v. *The Bank of Bombay*[1] and the arguments based upon it, Macleod, C. J., pointed out:

"But I do not think that the argument holds good that an exception can be grafted to the rule laid down by the Privy Council. When the manager of a joint Hindu family mortgages joint estate, it must still be incumbent on the parties supporting the mortgage to prove that the money raised on the mortgage was required for family purposes. No doubt if the family is carrying on a trading business, it would be very much easier to prove that the money was required for the purposes of that trade, and so for family purposes, than if the family were mere agriculturists. But it is not a necessary inference that, because Krishnaji (the borrowing party) was carrying on two shops dealing in iron and groceries, and because he raised moneys by mortgaging family property, the money was necessarily required for the purposes of the joint family business."

These observations make it clear that the creditor, besides showing that the family is a trading family, has further to prove that he made enquiries with regard to the necessities of the loan and *bona fide* believed in the representations made to him that the loan was required for family business. The obligation resting upon the creditor in cases where the principle of *Hunoomanpersaud's case*[2] applies is the same in all cases and the lender in all such cases must satisfy himself that he made a reasonable enquiry as to the necessity for the loan and that he *bona fide* believed in the representations made to him. Of course, the nature of the enquiry to be made would depend upon the particular circumstances of each case. The Privy Council in *Sri Thakur Ramkrishna Muraji* v. *Ratan Chand*[3] has, without any modification, restated the principle of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[2]. I have ventured to add these words because of the insistence with which the argument was pressed before us by the learned counsel.

B.V.V. —— *Appeal allowed.*

1. (1909) I.L.R. 34 Bom. 72.
2. (1856) 6 M.I.A. 393.
3. (1931) 61 M.L.J. 665: L.R. 58 I.A. 173: I.L.R. 53 All. 190 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

K. M. T. T. Kulandaivelu Chettiar and others .. *Petitioners* (Accused 1, 3 to 5 and 7 to 13).*

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*Gaming Act (III of 1930), Ss. 3, 6, 8 and 9—Persons found with gambling articles in a house—Presumption as to a 'common gaming house'—Proof of actual profit not necessary for conviction under the Act—Presumption under S. 114 (e)—Evidence Act.*

Where the petitioners were found in a small room of a building described as a club with all the paraphernalia of gambling such as cards, coloured chips and cash, and accused 1 to 12 were convicted under S. 9 of the Gaming Act of gaming in a 'common gaming house' and the 13th accused convicted under S. 8 which punishes the opening, keeping, using or permitting to be used any common gaming house or conducting or assisting in conducting such, etc., and the contention was that the prosecution was not able to prove that any person had received any money or profit for the keeping of the room for the purpose of gaming,

*Held*, that under S. 6 although there may not be any independent proof that any person makes a profit from this gambling or from the use of the room for gambling, yet the mere finding of cards and instruments of gambling in a house searched on a search warrant is evidence that the room was used for gambling and that some person was deriving a profit; even though there is no presumption of guilt, there is nothing in the Act which prevents a Magistrate convicting upon the evidence of finding the articles mentioned in S. 6.

The presumption under S. 114, Illustration *(e)* of the Evidence Act regarding performance of judicial and official acts can be applied to the proper information sufficient to lead the Magistrate to believe that the room in question was used as a common gaming house.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Devakottai in Criminal Appeal No. 36 of 1937 preferred against the judgment of the Court of the Taluk Magistrate of Sivaganga in C. C. No. 181 of 1937.

*V. T. Rangaswami Aiyangar* and *G. N. Chari* for Petitioners.

*The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioners were found in a small room of a building in Devakottai described as the 'Jubilee Club' with all the paraphernalia of gambling such as cards, coloured chips,

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*Cr. R. C. No. 636 of 1937.
Cr. R. P. No. 599 of 1937.

10th February, 1938.

Kulandaivelu Chettiar, *In re.*

beans, and cash and it has been found by both the Courts below that these persons were engaged in gaming in a 'common gaming house' within the meaning of S. 3 of the Madras Gaming Act, 1930. Accused 1 to 12 were convicted under S. 9 of the Act of gaming in a 'common gaming house' and the 13th accused was convicted under S. 8, which punishes the opening, keeping, using or permitting to be used any common gaming house or conducting or assisting in conducting such, etc. The 13th accused contends that the building in which the gaming took place was not a common gaming house and that in any event the 13th accused was not the keeper of that gaming house.

Most of the arguments have turned on the legal effect of S. 6 of the Gaming Act which is that

"Any cards, dice, gaming table or cloth, board or other instruments of gaming found in any place entered or searched under the provisions of the last preceding section, or on any person found therein shall be evidence that such place is used as a common gaming house and that the persons found therein were there present for the purpose of gaming."

S. 5 empowers a salaried Magistrate, not below the rank of a Second Class Magistrate, and certain police officers to issue a warrant to a police officer upon the belief that a certain place was used as a common gaming house, to search such a place and seize any property therein which are instruments of gaming, moneys, securities connected therewith and to arrest all persons found there. The words 'common gaming house' are defined in S. 3 as any room, etc., in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using, etc., that room. It is said that the prosecution have not been able to prove that any person has received any money or profit for the keeping of this room for the purpose of gaming; but I cannot altogether agree that this is so. The club appears to have been a bogus one; the 13th accused's participation in the gaming is proof that he knew the purpose for which he was letting the building. In accepting rent for the use of a building for gambling, he was making a profit from the gaming.

Apart from this common sense deduction from the facts, I should still be of opinion that the room in which the gambling took place was a 'common gaming house'. S. 6 clearly makes the finding of cards or instruments of gaming not merely evidence that cards or instruments of gaming

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were found; but that the building in which they were found was a 'common gaming house', provided that these articles were found there in a search conducted upon a warrant issued under S. 5. That means that although there may not be any independent proof that any person makes a profit from this gambling or from the use of the room for gambling; yet the mere finding of cards and instruments of gambling in a house searched on such a warrant is evidence that the room was used for gambling and that some person was deriving a profit from it.

It is however contended that the section does not raise a a presumption that a room in which these articles were found was a common gaming house. That contention may be right, although in the majority of cases quoted before me by the learned Advocates for the petitioner as well as for the Crown, the effect of finding the articles mentioned in S. 6 is referred to as raising a presumption. Even though there is no such presumption of guilt, there is nothing in the Act which prevents a Magistrate convicting upon that evidence also. I do not propose to decide the abstract question whether such evidence alone would be sufficient or not to sustain a conviction; for, in almost every case, there must be some other evidence lessening the effect of the evidence operated on by S. 6 or increasing it. In the present case, there is evidence to the effect that this room in which the gambling took place was not part of a club at all; and it would appear that the name "Jubilee Club" was intended merely to screen from the public the nature of the building and the purpose for which the building was used. The Circle Inspector deposes that when the police party entered, the petitioner signalled to the other accused and they tried to extinguish the petromax light which was burning and to conceal the articles of gambling by standing round them. This is further evidence upon which the Magistrate was entitled to act; and I cannot say that on the evidence before the Magistrate he was not justified in convicting the accused of gambling in a common gaming house.

It is further argued that before the presumption under S. 6 can be availed of, there must be some evidence for the prosecution that the warrant was issued under S. 5 upon proper information, sufficient to lead a Magistrate to believe that the room in question was used as a common gaming house. This

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contention has some support from some observations found in *Walvekar* v. *Emperor*[1], *Emperor* v. *Dattatraya Shankar Paranjpe*[2] and *Kesanna Chetty* v. *Emperor*[3]; but I see no reason why the presumption raised under S. 114, Illustration (*e*) of the Evidence Act that judicial and official acts have been regularly performed should not be here applied. It would be against public policy in most cases if the prosecution were compelled to let in evidence in regard to the material on which a Magistrate acted. If the nature and the source of such information were not concealed, the police might be unable in future to obtain information at all.

Another contention is that a common gaming house cannot include any gaming house in which there was any restriction on its use by any section of the public. The definition of a common gaming house in S. 3 warrants no such limitations. Any room is a common gaming house if instruments of gaming are kept or used there for the profit of a person owning, occupying, etc., that house. If a common gaming house had the limited meaning ascribed to it, it would be possible for any person to avoid the application of the Gaming Act by introducing some petty restrictions on certain classes of persons. Members of a particular caste might be excluded or even more fanciful restrictions might be applied, such as by excluding persons above or below a certain height or weight. I cannot accept this contention.

Clearly, the 13th accused, who was gambling in that house, could have been convicted under S. 9 of the Gaming Act as the other accused were. He has, however, been convicted under S. 8 simply because the Magistrate thought that S. 8 was a more serious offence and that the greater offence included the lesser. It has been argued that it has not been satisfactorily proved that he derived any benefit from this gaming house. If, by the application of S. 6, the Court is satisfied that the room in question was a common gaming house, then it would follow that gaming was conducted there for some person's profit. The person mentioned in the warrant as using the gaming house is the Secretary of the Club; but as the police were given to understand that he had not been present in the

1. (1926) I.L.R. 53 Cal. 718. 2. (1923) 25 Cr. L. J. 531.
3. (1937) M.W.N. 1068.

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room for 10 or 15 days, he was not charged. The petitioner, who was found participating in the gaming, was charged as the owner of the room and one who had derived a profit from the gaming that was going on there. The petitioner has produced a document under which the house in question purports to have been sold to his daughter; but whether the sale is a genuine one or not matters little; for it is clear that it was the petitioner who was acting as the owner of the place—whether on behalf of himself or his daughter—and as presumably rent was being paid for that building, the owner of the house was receiving profit from it. Even otherwise, the petitioner had the control of the house and knew that gaming was going on there. He would therefore be guilty under S. 8 because he was permitting his property to be used as a common gaming house. He was therefore rightly convicted under S. 8.

The punishments awarded are not excessive. S. 8 prescribes a maximum fine not exceeding Rs. 500 or imprisonment not exceeding three months; and the 13th accused has been sentenced only to a fine of Rs. 75. This cannot be said to be heavy. 'he other petitioners were sentenced only to a fine of Rs. 50.

The petition is therefore dismissed.

K. C. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Sree Rajah Venkatadri Apparao Bahadur Zamindar Garu and others .. *Appellants** *(Defendants)*

*v.*

Morivineni Seetharamayya and others .. *Respondents (Plaintiffs and Defendants).*

Sree Rajah Venkatadri Apparao *v.* Seetharamayya.

*Riparian rights—What constitutes riparian tenement—Limitation on user of right to take water—Unlawful user of water by riparian owner—Remedy of aggrieved party—Permanently settled estate—Zamindar as owner of land.*

What is a riparian tenement does not depend upon any arbitrary rule but must in each case be a question depending upon circumstances. The expression connotes, in addition to contact with a river, a reasonable proximity to the river bank. Each riparian proprietor has a right to the water flowing past his land, but it is a right only to the flow of the water and the enjoyment of it

* Appeal No. 563 of 1931. 16th February, 1938.

subject to similar rights of all the proprietors on the banks on each side to the reasonable enjoyment of it. When only part of a stream is taken for purposes of irrigation, the only limitation is that the amount taken shall not be so much as to injure the right of the inferior owner to have the stream passed on to him practically undiminished. But when a riparian owner taking advantage of his position uses the water for purposes unconnected with his riparian tenement, he will be prevented by an injunction from doing so, although no actual injury has been sustained by the other party.

*Coulson and Forbes on Waters*, 5th Edn., p. 111; *Attwood* v. *Llay Main Collieries*, (1926) 1 Ch. 444 at 459; *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*, (1875) L.R. 7 H.L. 697; *McCartney* v. *Londonderry and Lough Swilly Railway*, (1904) A.C. 301 at 306; *Secretary of State for India* v. *Subbarayudu*, (1931) 62 M.L.J. 213: L.R. 59 I.A. 56: I.L.R. 55 Mad. 268 (P.C.) and *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*, (1917) 33 M.L.J. 415 at 424 relied on.

The Madras Permanent Settlement Regulation of 1802 declares that the British Government has resolved to grant to Zamindars and other land-holders a permanent property in their land and the sanad granted to them is styled a deed of permanent property and they are called proprietors of land. For the purpose of deciding a question of riparian right arising from the right of access to a stream passing along a riparian tenement the Zamindar and not the ryot should be considered to be the owner of the land.

*Narayanaswami* v. *Venkanna*, (1914) M.W.N. 481, considered.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Ellore dated 17th November, 1930, in O. S. No. 20 of 1928.

*Y. Govindarajulu* and *B. Lakshminarayana* for Appellants.

*P. V. Rajamannar* and *K. Subba Rao* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

*Venkatasubba Rao, J.*—Once the facts of this somewhat difficult case are found, the principles governing it seem well settled by authority. After having heard the matter fully argued on both sides, we have come to the conclusion that the findings of the Court below are right and should be accepted.

We are concerned here with two villages, Nadupalli and Velupucherla. The first defendant, the Zamindar owning the Medur estate, is the overlord in respect of both the villages. The plaintiffs are the mokhasadars of Velupucherla and defendants 2 to 5 of Nadupalli. It may be mentioned that the Zamindar has made common cause with the Mokhasadars of Nadupalli and as the real contest is by the latter, defendants 1 to 5 will be referred to as the defendants.

The dispute relates to the waters of a natural stream known as Tammileru. As the lower Court points out excepting in rainy season when the current is swift,. there is scanty

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flow; during period of scarcity a witness deposes there is a general scramble, each man being anxious to abstract as much water as he can. Nadupalli is bounded on the west by this river Tammileru and lower down the stream is Velupucherla, but the plaintiffs' lands in it do not abut on the stream, so that the position is shortly this: whereas the defendants are upper riparian proprietors, the plaintiffs for the purpose of this case do not answer the description of lower heritors. But the plaintiffs have long been using the water of a channel (Balive Velupucherla Irrigation Channel) taking off from Tammileru, for irrigating Velupucherla lands, admittedly not in contact, as stated above, with the flow of the stream. The lower Court has, however, found that this is an ancient channel and that the plaintiffs' rights must be "referred to a lawful origin".

To make the point at issue clear, we must here state that there is in Nadupalli a tank shown in the map (the Commissioner's plan Ex. III) as "Ura Tank", which has been receiving water through a "supply channel" (so called in the map) from various sources with which we are not concerned. What gave occasion to the present suit was the excavation by the defendants of a new channel 1650 feet long (called the "suit channel" in the map) which was made to connect Tammileru with the "supply channel" already referred to. It will be manifest from what has been stated that the defendants dug the new channel with the object of drawing off water from Tammileru into the Ura tank. That they have succeeded in producing the desired result has not been denied. There was a good deal of contest in the case whether the channel was newly dug or was, as alleged by the defence, an ancient one. The lower Court has found, and quite rightly, that this is a new excavation. It is with a view to get this new channel closed up, that this suit has been brought, and the Court below has decided in favour of the plaintiffs. The defendants who are the appellants here question the correctness of its decision.

The plaintiffs' "immemorial user" (to quote the words of the lower Court) of the water in the manner alleged by them has been admitted by the defendants. The learned Judge, as already observed, says that their user must be referred to a "lawful origin". That statement seems sufficient for the present purpose, as it is unnecessary to enquire how this

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undisputed right originated. But to clarify the position, it may be stated that the plaintiffs do not claim as against Nadupalli owners, that is, those higher up the stream that they acquired a right by prescription. At any rate, that position has been made clear by Mr. Rajamannar, their learned Counsel, in his lucid argument. Prescription involves the idea that the right acquired is in derogation of another person's right. But the plaintiffs do not suggest here that the right they acquired in any way impaired the fulness of the defendants' legal right. The simple question then is, did the defendants by making the new excavation and drawing off water into their Ura tank, infringe the plaintiffs' admitted rights? The lower Court has in effect decided (and we think correctly) that while the plaintiffs are entitled to relief, their acquired right has, however, no operation as against the natural rights of the Nadupalli Mokhasadars.

This raises the question, is the abstracting of the water by the new excavation in excess of the defendants' natural riparian rights? The channel having been found to be a new excavation, the Subordinate Judge, it may be mentioned, has negatived the prescriptive right set up by the defendants to divert the water into the Ura tank. Then the question, as already stated is, what is the user justified by the defendants' natural rights?

This question must be answered with reference to the following considerations:—

1. A riparian right arises from the right of access to the stream which landowners on its banks have by the law of nature. In other words, it is necessary for the existence of a riparian right that the land should be in contact with the flow of the stream (*Coulson and Forbes on Waters*, 5th Edition, page 81). Even if the portion on the bank be a narrow strip, the backlands enjoy riparian rights if they be in the same ownership as the bank (*ibid.*, p. 111).

2. In the case of zamindars and similar proprietors, are they to be considered the owners or the ryots for deciding the question of the contact with the stream? The contention in this respect of Mr. P. Satyanarayana Rao, the appellant's learned Counsel, must prevail. It seems consonant to reason to hold that a zamindar should be treated as a proprietor for this purpose. The rights possessed by the tenants may be very

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valuable, such as permanent occupancy rights, but that does not justify the view that zamindars are not the proprietors of the soil. The Permanent Settlement Regulation (Madras Act XXV of 1802) declares that the British Government has resolved to grant to zamindars and other landholders a permanent property in their land and the sanad granted to them is styled a deed of permanent property and they are called proprietors of land. If *Narayanaswami* v. *Venkanna*[1] is to be understood as laying down a different rule, we must, with all respect, express our dissent from it.

3. The ownership of the zamindar as distinguished from that of the ryot being then the decisive factor, is the whole of the land a riparian estate on the ground that it belongs to a single owner? The proposition that every piece of land in the same occupation which includes a portion of the river bank and therefore affords access to the river, is a riparian tenement, is as Lawrence, J., observes far too wide:

"Nobody in their senses would seriously suggest that the site of Paddington Station and Hotel is a riparian tenement, although it is connected with the river Thames by a strip of land many miles long." (*Attwood* v. *Llay Main Collieries*[2]; see also *Coulson and Forbes on Waters*, 5th Ed., p. 111.)

A riparian tenement, as the learned Judge points out, connotes, in addition to *contact* with the river, a reasonable proximity to the river bank (*vide* the observations of Abdur Rahim, J., in *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*[3] and of Sadasiva Aiyar, J., in *Lakshminarasu Avadhanulu* v. *Secretary of State for India*[4]). What is a riparian tenement does not depend upon any arbitrary rule (the depth of *half a furlong* suggested by Sadasiva Aiyar, J., was not intended to be absolute), but must in each case be a question depending upon circumstances.

4. Each riparian proprietor has a right to the water flowing past his land; but it is a right only to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors on the banks on each side to the reasonable enjoyment of it (*Embrey* v. *Owen*[5]). As observed by Lord Macnaghten (citing Lord Cairns) in *Swindon Waterworks*

1. (1914) M.W.N. 481.
2. (1926) 1 Ch. 444 at 459.
3. (1917) 33 M.L.J. 415 at 424.
4. (1917) 34 M.L.J. 223 at 226.
5. (1851) 6 Ex. 353: 155 E.R. 579 at 586.

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*Company* v. *Wilts and Berks Canal Navigation Company*[1], a riparian proprietor may use the water (*a*) for ordinary or primary purposes, (*b*) for extraordinary or secondary purposes, and (*c*) for purposes foreign to or unconnected with his riparian tenement. The first two purposes are legitimate, whereas the third is not (*McCartney* v. *Londonderry and Lough Swilly Railway*[2]).

5. Irrigation is a secondary purpose and the English Law seems to be that the water should be restored after the object of the irrigation is answered, in a volume substantially equal to that in which it passed before (*see* Lord Cairns in *Swindon Waterworks case*[1] and Lord Macnaghten in *McCartney's case*[2]). The rule has been somewhat modified in its application to India. The Judicial Committee observed:

" Now in speaking of the returning of the water it must be remembered that both Lord Cairns and Lord Macnaghten were speaking of a diversion of the whole stream. When only a part of the stream is taken, and that for the purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished." (*Secretary of State for India* v. *Subbarayudu*[3].)

6. The right of a riparian owner to take the water is a natural right and not in the strict sense of the word an easement and is not capable of being lost by non-user. (*Ibid.*)

7. When a riparian owner taking advantage of his position uses the water (as here) for purposes *unconnected* with his riparian *tenement*, he will be prevented by an injunction from doing so, although no actual injury has been sustained by the other party. This is put upon the ground that the wrongdoer, if not prevented, will at the end of the statutory period, gain a prescriptive right to continue the unlawful use for ever (*per* Lord Macnaghten at 309 and Lord Lindley at 313 in *McCartney's case* above cited).

These are the principles touching riparian rights which become applicable to the facts as found by the lower Court. Its findings are (*a*) that the channel is a new excavation recently dug, (*b*) that a large quantity of water is impounded in the Ura Tank, (*c*) that the water is used not only for irrigating some distant lands stretching far away from the river bank, in Nàdupàlli, but also other lands *totally*

1. (1875) L.R. 7 H.L. 697 at 704. 2. (1904) A.C. 301 at 306.
3. (1931) 62 M.L.J. 213; L.R. 59 I.A. 56; I.L.R. 55 Mad. 268 (P.C.).

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*unconnected with* the riparian tenement, and (*d*) that the plaintiffs have not succeeded in proving that they sustained any actual injury.

On these findings the question is, to what reliefs will the plaintiffs be entitled? The lower Court has granted an injunction restraining the defendants "from taking the water of Tammileru through the suit channel (the new excavation) to Nadupalli Ura tank." To this extent the lower Court's decree is right, but the learned Judge has, unnecessarily in our opinion, added two further directions and that in the defendants' favour: *firstly*, that they may store water in a *separate tank* "to be used for irrigating lands within a distance of half a furlong from the river bund"; *secondly*, that they are entitled to use the new excavation for taking Tammileru water into the tank to be *newly dug*. The making of these declarations does not fall within the purview of the suit, which was brought simply with a view to get the new channel filled up. The Judge has attempted to define the limit of the defendants' riparian right, although there was no material before him which could enable him to do so. The only question before him was, whether or not the defendants' alleged act was wrongful and he was not called upon to define the extent of their natural rights. That the lower Court's decree is apt to lead to confusion and complications is obvious enough. At what distance from the river bank is the new tank to be built and what are its dimensions to be? Is the water to be permanently impounded in the proposed tank? As regards the impounding of the water, some argument has been addressed to us, but we do not think that is a question that arises here. We may in this connection refer usefully to the observations of Lord Watson in *Debi Pershad Singh* v. *Joynath Singh*[1]. His Lordship points out that the pleadings in that case were silent in regard to the size and character of the dam in question or, as to the quantity of water which it had the effect of diverting, and goes on to say that "without an investigation into facts which have neither been averred nor made the subject of proof", it would be most unsatisfactory to proceed to give a decision. These observations apply here with very great force.

There is one other matter to which we may refer. The learned Subordinate Judge observes that the defendants may

1. (1897) L.R. 24 I.A. 60 at 69: I.L.R. 24 Cal. 865 (P.C.).

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go higher up the stream for the purpose of putting up Kongara-kutta (sand bunds). This obviously affects interests of parties not before us and in view of what we have said that the extent of the defendants' riparian rights does not fall to be determined here, it is unnecessary to enquire how far the learned Subordinate Judge's view on this matter is right.

It seems to us that the decree to be passed here may be modelled on the decree passed in the case of the *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*[1]. It is declared that the plaintiffs are entitled to use Tammileru and its waters as the same have been accustomed (before the interference therewith complained of) to flow down to and into their channel (the Balive Velu-pucherla Irrigation channel), so far as the said stream and waters are required for the supply of their said channel, but subject to such reasonable use by the defendants as riparian owners higher up the stream, and it is ordered that an injunction be awarded restraining the defendants from diverting into their Ura tank, the said stream and waters. To this must be added, having regard to the circumstances here, a mandatory injunction directing the defendants to fill up the newly excavated channel.

The appeal fails and is dismissed with costs. It is unnecessary, in view of the decree we have made, to make any special order upon the Memorandum of Objections. There will be no order as to costs in the Memorandum of Objections.

B. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Minor Ragunathan by his mother and next friend Andalammal .. *Appellant** (*1st Defendant*)

*v.*

P. N. Ravuthakanni (died) and others .. *Respondents* [*Plaintiff* (*died*) *and his L. Rs.*].

Ragunathan *v.* Ravutha-kanni.

*Minor—Contract for sale of land entered into by guardian—Breach—Suit for specific performance and return of earnest money—Maintainability—Advance paid for discharging debts binding on minor—Hindu Law doctrine of benefit to minor—Contract Act (1872), S. 68—Applicability.*

1. (1875) L.R. 7 H.L. 697.

* Appeal No. 347 of 1933. 16th March, 1938.

Ragunathan v. Ravuthakanni.

Where the mother and guardian of a Hindu minor entered into a contract for the sale of certain property belonging to the minor for the purpose of paying off certain pressing creditors of the minor's estate, and the sale having fallen through, the intending purchaser filed a suit for specific performance of the contract and for return of the earnest money paid by him,

*Held*, that as an infant cannot contract in India a covenant by his guardian for the sale of the immovable property could not be enforced as against the minor.

*Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*, (1911) 21 M.L.J. 1156: L.R. 39 I.A. 1: I.L.R. 39 Cal. 232 (P.C.) and *Batchu Ramajogayya* v. *Vajjula Jagannadham*, (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.), followed.

*Held, further*, that there could be no decree for the return of the earnest money which under the circumstances had been paid under a void contract. The earnest money is in such a case paid as a guarantee that the contract will be performed and the payment to the guardian cannot be treated as falling within S. 68 of the Contract Act or as being repayable under the Hindu Law on the ground that it was paid for the purpose of discharging debts and was therefore for the minor's benefit.

*Pathak Kali Charan Ram* v. *Ram Deni Ram*, (1917) 2 Pat.L.J. 627, not followed.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in O. S. No. 69 of 1931.

*T. M. Ramaswami Aiyar* for Appellant.

*V. N. Venkatavaradachari* and *P. Rajagopalan* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

*The Chief Justice.*—This appeal raises the question of the liability of a minor to return a sum of money paid to his guardian as earnest money in respect of a contract of sale of immovable property entered into by the guardian on his behalf. On the 20th August, 1931, Andalammal, the mother and guardian of the appellant, agreed to sell to the respondent the minor's shares in a village. The price agreed upon was Rs. 7,125 of which Rs. 500 was paid in advance. It is common ground that certain creditors of the estate were pressing for the payment of their debts and the intention was to sell the minor's interests in the village to discharge these liabilities. The sale was not completed, and the property was sold by the mother to a third party, the second defendant in the suit out of which this appeal arises. The suit was for a decree for specific performance of the contract, but before the case came on for hearing it was realised that the Court could not grant this relief. An infant cannot contract in this country and a

covenant by his guardian for the sale of immovable property cannot be enforced against him: *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri*[1] and *Batchu Ramajogayya* v. *Vajjula Jagannadham*[2]. An application was then made for leave to amend the plaint by adding a prayer for the return of the earnest money. This application was granted, and at the trial the only question which was raised was whether the respondent was entitled to the return of the Rs. 500. The learned trial Judge held that he was on the ground that the minor was liable, unless it could be shown that he had not received the benefit of the Rs. 500. On this basis he granted a decree for the return of the amount with interest. The appellant challenges the correctness of the decision. The second defendant is not concerned with this question, and has, therefore, not been made a party to the appeal.

It may be taken that it was necessary to sell this property of the minor for the purpose of paying off pressing creditors. This was alleged in the plaint and it was acknowledged in the appellant's written statement that he had to sell the property to the second defendant "owing to the pressing necessities of the creditors". It would appear that it was out of the money which the mother received from the second defendant that the debts were in fact discharged. What has become of the Rs. 500 paid to the appellant's mother by the respondent has not been disclosed. The learned Advocate for the appellant contends that there can be no decree for the return of earnest money paid under a void contract. On the other hand the learned Advocate for the respondent says that as the contract was entered into in order to raise money to pay off creditors the Rs. 500 must be treated as having been paid to the guardian for necessaries or for his benefit.

In our opinion, the appellant is entitled to succeed. It is true, that the guardian was compelled to sell the property of the minor to pay off debts for which the minor's estate was liable, and if a conveyance had been executed no doubt the respondent would have obtained a valid title to the property, but the Rs. 500 can only be treated as being security for the performance of a contract which in law was no contract at all. Earnest money is paid as a guarantee that the contract will be

1. (1911) 21 M.L.J. 1156: L.R. 39 I.A. 1: I.L.R. 39 Cal. 232 (P.C.).
2. (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.).

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performed. James, L. J., so held that in Ex parte *Barrell*: In re *Parnell*[1], where there was a contract for the sale of immovable property with a stipulation that a portion of the purchase money should be paid immediately, and his definition was accepted by the Court of Appeal in *Howe* v. *Smith*[2] and by the House of Lords in *Soper* v. *Arnold*[3]. In the last mentioned case, Lord Macnaghten observed:

"The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business."

The price to be paid for the land in the present case was Rs. 7,125 and the Rs. 500 was paid as a guarantee that the respondent would pay the balance. It cannot be regarded as a payment to the appellant or to the appellant's guardian for any other purpose. The respondent says that the contract was not carried out because of the default of the appellant's guardian, on the other hand, the appellant puts the blame on to the respondent. It matters not on whose shoulders the blame must be placed. All that we have to consider is the purpose for which this money was paid. The respondent's advocate does not contend that a minor can be made liable for the return of earnest money paid under a void contract. He says that the payment must be treated as falling within S. 68 of the Contract Act or as being for the benefit of a Hindu minor and therefore repayable under his personal law. We are unable to regard the payment as falling within S. 68 or as being repayable under Hindu law on the ground that it was paid for the minor's benefit. We can only regard it as being paid by the respondent as a guarantee that he would fulfill his part of the contract and as far as we know it remained with the guardian for this purpose.

The learned Advocate for the respondent has referred us to *Pathak Kali Charan Ram* v. *Ram Deni Ram*[4] which was a case in which a minor member of a joint Hindu family had executed an agreement of sale of immovable property and had received an advance of Rs. 125 as earnest money. The object in selling the property was to defray the marriage expenses of the minor's brother. The Court treated the expenses as being necessary expenses and granted a decree for the return of

1. (1875) 10 Ch. App. Cases 512.
2. (1884) 27 Ch. D. 89.
3. (1889) 14 A.C. 429.
4. (1917) 2 Pat.L.J. 627.

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the earnest money as the contract was not fulfilled. The learned Judges regarded the case as falling under S. 68 of the Contract Act. They did not consider the question whether the earnest money should be treated as security for the performance of a void contract. We are unable to accept this decision as embodying a correct statement of the law applying to a case like the one before us.

For these reasons the appeal will be allowed and the suit dismissed with costs in favour of the appellant in both the Courts. The costs of the appellant will include the fee paid to the Court guardian and also the cost of the printed papers supplied to him.

B. V. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

A. S. Pandian .. *Petitioner**

Pandian, *In re.*

*Criminal trial—Different offences arising out of single act—Separate sentences—Propriety—Possession of wireless receiving set without licence—Accused acting in* bona fide *manner—Licence subsequently obtained—Nature of offence—Wireless Telegraphy Act (XVII of 1933), Ss. 3 and 6—Indian Telegraphs Act (XIII of 1885), S. 20—Offence under.*

The accused was convicted of being in possession of a wireless receiving set without a licence under Ss. 3 and 6 of the Wireless Telegraphy Act, 1933, and also of working the same without a licence under S. 20 of the Indian Telegraphs Act, 1885, and sentenced to pay a fine in respect of each of the offences. It appeared that the accused had been taking out licences for some years before the offence and that actually a licence had been issued by the Postmaster to take effect from a date earlier than the date on which the accused was said to have been in possession without a licence.

*Held*, that the accused was guilty of an offence under Ss. 3 and 6 of the Wireless Telegraphy Act. It is not possible to say that the licence issued subsequently by the Postmaster had the effect of converting what was possession without a licence into possession with licence, or in other words, give a sort of pardon in respect of an offence already committed.

*Held, however*, that on the facts there was no justification for a separate conviction and sentence under S. 20 of the Indian Telegraphs Act.

*Semble*: It is extremely doubtful whether the use of a wireless receiving set without a licence would amount to an offence under S. 20 of the Indian Telegraphs Act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the West Tanjore Division at Tanjore in C. A. No. 28 of 1937 preferred against the judg-

* Crl. R. C. No. 972 of 1937. 6th May, 1938.
(Crl. R. P. No. 911 of 1937).

Pandian, *In re.*

ment of the Court of the Sub-Divisional Magistrate of Tanjore in C. C. No. 57 of 1937.

*K. S. Jayarama Aiyar* and *K. Venkataramani* for Petitioner.

*K. Venkataraghavachari* for *The Public Prosecutor* (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner was convicted of being in possession of a wireless receiving set without a licence under Ss. 3 and 6 of Act XVII of 1933 and also of working the same without a licence under S. 20 of Act XIII of 1885 and sentenced to pay a fine of Rs. 60 under the Wireless Telegraphy Act and a fine of Rs. 75 under the Indian Telegraphs Act in respect of the same wireless receiving set. These fines were reduced on appeal by the Sessions Judge to Rs. 20 and Rs. 25 respectively; it will thus be seen that even in the appellate Court the separate sentences were retained. It is, to say the least, extremely doubtful whether the use of a wireless receiving set without a licence would amount to an offence under S. 20 of the Indian Telegraphs Act which in view of S. 4 of that Act could not have been intended to include wireless receiving sets used ordinarily to receive broadcast programmes. In my opinion there is no justification for a separate conviction under S. 20 of the Indian Telegraphs Act or for a separate sentence under that section. The conviction and sentence under S. 20 of the Indian Telegraphs Act are therefore set aside.

It is argued that even the conviction under Ss. 3 and 6 of the Wireless Telegraphy Act cannot stand because actually a licence had been issued by the Postmaster to take effect from a date earlier than the date on which the petitioner is said to have been in possession without a licence. It is not however possible to say that the licence issued subsequently by the Postmaster has the effect of converting what was possession without a licence into possession with licence, or in other words gives a sort of a pardon in respect of an offence already committed. It is not in accordance with the spirit of the law that any official should have the power to convert what is an offence into what is not an offence by the mere issue of a licence subsequent to the event. I am therefore of opinion that this conviction cannot be objected to successfully. At the same time there is justification for the complaint that even the

reduced fine of Rs. 20 is excessive in the circumstances of the case. The offence was trivial and technical. The petitioner is apparently a respectable man who has been taking out licence for some years before the offence and it would appear that the delay in paying the licence fee was due to the fact that he was not quite satisfied with the wireless set which he had purchased and wanted either to get it put right or to exchange it for another set. It was in these circumstances, namely, because he had not made up his mind which set he should have permanently that he did not pay the licence fee in time. The learned Judge also says that there could have been no intention in this case to evade payment of the fee or defraud the revenue. In these circumstances it would have been quite sufficient to impose only a nominal fine. I therefore reduce the fine from Rs. 20 to Re. 1. The excess fine, if paid, must be refunded.

B. V. V. —— *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Adepalli Venkata Gurunadha Rama-seshayya .. *Appellant**

*v.*

Vissamsetti Venkatarathnam being minor by mother and guardian Sesharathamma and others .. *Respondents.*



*Limitation Act (IX of 1908), S. 12 (3)—Appeal—Limitation—Day on which copy of judgment was notified to be ready to be excluded.*

Under S. 12 of the Limitation Act it is consonant to reason that the day on which the copy of judgment is notified to be ready should be excluded in computing the period of limitation prescribed for an appeal.

*Raman Chetti* v. *Kadirvelu,* (1898) 8 M.L.J. 148 and *Ramaswami Chetty* v. *Ramanathan Chetty,* (1913) 25 M.L.J. 354, followed.

*Bani Madhub Mitter* v. *Matungini Dassi,* (1886) I.L.R. 13 Cal. 104 (F.B.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 166 of 1932 presented against the decree of the Court of the District Munsiff of Bezwada in O. S. No. 337 of 1929.

*Vedantam Satyanarayana* for Appellant.

*K. Kameswara Rao* and *P. Satyanarayana Rao* for Respondents.

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* S. A. No. 223 of 1934. 5th April, 1938.

Venkata Gurunadha Rama-seshayya *v.* Venkata-rathnam.

The Court delivered the following

JUDGMENT.—I am surprised that the lower Court has been able to persuade itself that the appeal was out of time. The following statement of facts brings out the point to be decided.

In the present case application for copy was made on 26th August, 1932. Copy was ready on 12th October, 1932. The interval between 26th August, 1932, and 12th October, 1932, is 47 days. He is entitled to deduct that. Balance is 31 days. Appeal was therefore filed one day too late. Learned Counsel for appellant contends that both days, the 26th August, 1932, when copy applied for and the 12th October when the copy was ready should be excluded, as time requisite for obtaining the copy.

S. 12 of the Limitation Act says that in competing the period of limitation prescribed for an appeal, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree appealed therefrom shall be excluded. The simple question is, what is meant by "the time requisite for obtaining a copy of the decree"? Is the day on which the copy was notified to be ready, to be excluded or not. There is a rule promulgated by the High Court to which my attention has been drawn, which says in terms that not only the day on which the copy is applied for but also that on which it is ready for delivery, should be excluded in the appellant's favour. (H. O. C. No. 2740, dated 9th October, 1885). It is unnecessary to enquire whether this rule is *ultra vires* or not, as I do not propose to rest my judgment upon it, for, I am satisfied that this is a rule which accords with the reason of the thing. In the absence of such a rule, the Court would have to embark upon an enquiry, at what hour of the day that the fact that the copy was ready notified? What is "the time requisite" would depend upon what in the circumstances is reasonably requisite. Although the word "requisite" is a strong word and may be regarded as meaning something more than the word "required", the idea of reasonableness is inherent in the words. It means nothing more than "properly required" as has been held by the Judicial Committee in *J. N. Surty* v. *T. S. Chettiar, a firm*[1]. It

1. (1928) 54 M.L.J. 696: L.R. 55 I.A. 161: I.L.R. 6 Rang. 302 at 313 (P. C.).

therefore follows that it is consonant to reason that the day on which the copy is notified to be ready, should be excluded. There are two cases of our Court directly in point, which supports the view I have taken—*Raman Chetti* v. *Kadirvelu*[1] and *Ramaswami Chetty* v. *Ramanathan Chetty*[2]. I fail to see how *Bani Madhub Mitter* v. *Matungini Dassi*[3] on which the lower Court professes to act is in the least applicable. In the first place what was decided there is entirely different from the one that now arises; secondly, a close perusal of the judgment will show that it mattered little whether the period excluded was reckoned as eight days or nine days—in either event the appeal would have been in time. If the appeal were in time, it is common ground that the lower Court was bound, to hear the memorandum of objection also.

Venkata Gurunadha Ramaseshayya *v.* Venkatarathnam.

In the result, the decision appealed against is set aside and the lower Court is directed to hear both the appeals and the memorandum of objection on their merits. In my opinion the Court was to blame and not either of the parties; I therefore make no order as to costs. The Court-fee on the memorandum of appeal will be refunded.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Kotakonda Venkatesulu Naidu .. *Petitioner* (1st Accused)*

*v.*

Golla Chittappa .. *Complainant (Respondent).*

Venkatesulu Naidu *v.* Chittappa.

*Cattle Trespass Act (I of 1871), S. 22—Compensation whether includes fees paid to Pleader.*

It is a misconception that a Magistrate is at liberty to include in the compensation payable under S. 22 of the Cattle Trespass Act, the fees paid by the complainant to the pleader employed by him for the purpose of the prosecution of his case.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Gooty, dated the 4th day of September and made in Criminal Appeal No. 47 of 1937 (C.C. No. 10 of 1937 on the file of the Taluq Magistrate of Kalyandrug).

*K. S. Jayarama Aiyar* and *G. Gopalaswami* for Petitioner.

1. (1898) 8 M.L.J. 148. 2. (1913) 25 M.L.J. 354.
3. (1886) I.L.R. 13 Cal. 104 (F.B.).

* Crl. R.C. No. 970 of 1937. (Crl. R. P. No. 909 of 1937). 6th May, 1938.

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*K. Venkataraghavachari* for *The Public Prosecutor* on behalf of the Crown.

*C. Vasudevan* for Complainant.

The Court made the following

ORDER.—I see no sufficient reason to think that the order of compensation made by the Taluk Magistrate in this case under S. 22 of the Cattle Trespass Act is not just. In view of the concurrent finding of the Courts below, it must be held that the seizure and detention of the sheep and goats belonging to the complainant and his party were wrongful and illegal and I do not think it makes much difference to the jurisdiction of the Magistrate if the person who is responsible for the wrongful or illegal detention happens to be a Forest Officer who claims to act under colour of the Forest Act, if as a matter of fact, the seizure and detention had nothing to do with any forest. It is however contended that the amount of compensation awarded, namely, Rs. 75 is excessive and that this excessive amount was arrived at as a result of a misconception of the Magistrate that he was at liberty to include in the compensation payable under S. 22 of the Act the fees paid by the complainant to the pleader employed by him for the purpose of the prosecution of this case. This certainly is a misconception and there is little doubt that the Magistrate must have allowed this to weigh in his mind in assessing the amount of compensation, because just before making the order of compensation, he observes that the complainant engaged a vakil and must have incurred a good deal of expenditure for the prosecution of the case against the accused. It is impossible now to ascertain exactly what the amount of the fee was and it is impossible to say that the Magistrate himself had any clear idea of the amount of the fee. He must have made some addition to the amount of compensation on this account and all that can be done in a case like this is to make some substantial reduction so that the compensation may be fixed on a legal basis. It is suggested by the learned Public Prosecutor that Rs. 25 may be regarded as the fee of the lawyer and that the amount of compensation fixed by the Taluk Magistrate may be reduced by Rs. 25. This suggestion appears to be reasonable and I therefore vary the order of the Taluk Magistrate by reducing the amount of compensation, namely, Rs. 75 to Rs. 50. In other respects, the petition is dismissed.

K.C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW (on a difference of opinion between MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE STONE).

Chockalingam Chettiar .. *Appellant* (1st Plaintiff)*

*v.*

Meyappa Chettiar and others .. *Respondents (Defendants 1 and 2, Legal Representative of 3rd Defendant and Defendants 4 and 5 and 2nd Plaintiff).*

Chockalingam Chettiar *v.* Meyappa Chettiar.

*Contribution—Equitable right as between co-judgment-debtors—Parties tracing rights to dissolved partnership—Disability to claim contribution whether attaches—Hindu Law—Doctrine of pious obligation—Father's partnership liability—Discharge by one member of firm—Right to be reimbursed—Contract Act (IX of 1872), S. 43.*

The right to contribution as between partners is not essentially different from the right to contribution as between persons who are jointly liable in respect of a debt. The partner's action for contribution is conditioned, however, by the special law of partnership. So long as the partnership continues or subsists no separate action for contribution will lie, the reason being that the right of contribution is subject to the special rights and obligations created by the contract of partnership and the right to contribution can be enforced only as a part of the general suit for accounts of the partnership. But where the partnership relation no longer exists and where there is no likelihood of any restitution being necessary there is no reason to apply the rule prohibiting actions for contribution as between persons who were once partners but have ceased to be such.

*Gopala Chetty* v. *Vijayaraghavachariar*, (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.) and *Arunachalam Chettiar* v. *Commissioner of Income-tax, Madras*, (1936) 71 M.L.J. 772: L.R. 63 I.A. 233: I.L.R. 59 Mad. 716 (P.C.), considered.

The right to sue for contribution as between co-judgment-debtors arises out of equity, an equity all the more stringent in view of the provisions of S. 43 of the Contract Act. That is part of the general equity which requires that one shall not bear the whole burden in case of the rest and it comes into existence only when the common burden is discharged and not before. Consequently there is no reason why the right to sue for contribution which accrues to a co-judgment-debtor as such should be deemed or made subject to any equities arising out of a contract of partnership many years after the partnership became dissolved and a suit for general account became barred.

One *A*, the father of the 1st plaintiff and the grandfather of the 2nd plaintiff, was a partner in a certain firm which was dissolved by the retirement of one of the partners *J* in November, 1908. In February, 1908, *J* who was also the agent of another firm lent a certain sum of money of that firm to the firm in which he and *A* were partners. One *M* a partner of the lending firm and his son instituted a suit in 1912 against all the partners including *A* as well as the plaintiffs and obtained a decree in 1919 against all the partners

* Appeal No. 139 of 1929. 28th January, 1938.

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and also against the plaintiffs to the extent of their shares in the joint family estate of themselves and their father who was one of the partners. In execution of that decree the plaintiff's family house was attached and *A* having died in the interval the plaintiffs were compelled to pay the whole decree amount in 1923. Thereupon the plaintiffs sued to recover contribution from the defendants of their share of the decree debt,

*Held* (on a difference of opinion between Madhavan Nair and Stone, JJ.), that the plaintiffs were entitled to invoke the equitable rule as to contribution between co-judgment-debtors, that they were entitled to recover from the defendant their share of the decree debt, and that the rule in *Gopala Chetty* v. *Vijayaraghavachariar*, (1922) 43 M.L.J. 305: L.R 49 I.A. 181: I. L.R. 45 Mad. 378 (P.C.), did not apply as the partnership had been dissolved earlier.

*Held, further,* that the Hindu law doctrine of pious obligation did not stand in the way of the plaintiff's claim for contribution.

Case-law discussed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Devakotta in O. S. No. 76 of 1926.

The appeal came up in the first instance before their Lordships Madhavan Nair and Stone, JJ.

*B. Sitarama Rao* and *K. S. Venkatarama Aiyar* for Appellant.

*The Advocate-General* (*Sir A. Krishnaswami Aiyar*), *E. Vinayaka Rao, K. Subramania Aiyar, K. Gopalaswami, R. Swaminatha Aiyar* and *A. Swaminatha Aiyar* for Respondents.

The Court delivered the following

Madhavan Nair, J.

JUDGMENTS. *Madhavan Nair, J.*—The 1st plaintiff is the appellant. This appeal arises out of a suit instituted by the plaintiffs to recover from the 3rd defendant personally and from defendants 1 and 2 out of the family properties Rs. 17,358 with subsequent interest at 12 per cent. per annum or in the alternative to recover from all the defendants 14/20th of the said amount with interest by way of contribution in respect of a decree debt discharged by the plaintiffs in execution of the decree in Appeal No. 296 of 1917 on the file of the High Court (*see* Ex. F). In the plaint the share of the debt claimed by way of contribution is 17/20, but in the argument the claim was altered to 14/20 accepting the contention of the defendants.

S. A. Subrahmanya Chetty and S. N. Subrahmanya Chetty, the 3rd defendant in the suit, sons of two brothers, started a money-lending firm at Singapore under the name and style of S. N. A. with a capital of more than six lakhs of dollars. The agents of the firm from 1901 to 1908 were successively

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Avadiappa Chetty and Jayangondan. They, as well as S. A. Subrahmanya Chetty, one of the partners, are now dead. Plaintiffs 1 and 2 in the present suit are the son and the grandson by a predeceased son of Avadiappa Chetty. Defendants 1 and 2 are the sons of Jayangondan. On the death of S. A. Subrahmanya Chetty, his mother adopted the 4th defendant as son to her husband Subrahmanya Chetty's father, and his widow adopted the 5th defendant as son to Subrahmanya Chetty himself. For the purpose of benefiting their agents it was the custom with these partners to start smaller firms in which their firm as well as the agents became partners. During the time of Avadiappa Chetty, S. N. A. firm and himself carried on such a partnership under the style of V. R. M. A. firm. We are not directly concerned with that firm in the present case. Avadiappa Chetty was agent till about the end of May, 1903. He was succeeded by Jayangondan. After the latter became the agent of the S. N. A. firm, a smaller firm, V. R. M. A. S. was started. It had a capital of 20,000 dollars. This is the firm with the dealings of which we are concerned in this appeal. The partners of this firm were S. N. A. firm, Avadiappa Chetty and Jayangondan. The plaintiffs stated that the shares of the partners in this firm were S. N. A.'s share 7 and 7, Avadiappa Chetty and Jayangondan's share 3 and 3. The defendants contended that the shares were in the proportion of 5, 5, 6 and 4. At the trial the plaintiffs admitted that the shares were in the proportion stated by the defendants. On the 11th November, 1904, S. A. Subrahmanya Chetty of the S. N. A. firm, died leaving a will. Afterwards the 3rd defendant for all practical purposes continued to manage the S. N. A. firm through the agent Jayangondan, who, it will be observed, was a partner of the firm of V. R. M. A. S. along with Avadiappa Chetty and S. N. A. firm and was also the manager of V. R. M.A.S. firm.

After a litigation which lasted from 1907 to 1912, Ramaswami Chetty, the executor of S. A. Subrahmanya Chetty, obtained probate of his will which was confirmed by the Privy Council on 21st February, 1916. In the meanwhile Subrahmanya Chetty's widow's attorney sued the 3rd defendant for a declaration that the S. N. A. firm had become dissolved by reason of Subrahmaniya Chetty's death and for accounts of the partnership. The present 3rd defendant contended that

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the suit was barred by limitation and got it ultimately dismissed by the Privy Council on 2nd March, 1916, on that point.

After Jayangondan became the agent of S. N. A. firm he was also the *adathi* agent of M. S. A. M. firm of Meyappa Chetty. As such agent he lent 3,000 dollars of M. S. A. M. firm's money to V.R.M.A.S. firm on the 29th February, 1908. At about this time both the S.N.A. firm and the V.R.M.A.S. firm had suffered heavy losses. In November, 1908, Jayangondan retired and his liabilities were taken over by the 3rd defendant on behalf of the S.N.A. firm. On Jayangondan's retirement the 3rd defendant appointed Ramanathan Chetty, 4th defendant's father-in-law as the agent of the S.N.A. firm. This agent paid on the 3rd September, 1909, 56¼ dollars to Narayanan Chetty, the *adathi* agent who succeeded Jayangondan in the M.S.A.M. firm.

In 1912 Meyappa Chetty of the M.S.A.M. firm and his son Palaniyappa Chetty instituted O.S. No. 177 of 1912 on the file of the Sub-Court, Ramnad, against Avadiappa Chetty and the present plaintiffs 1 and 2 (defendants 1, 2 and 3 in that suit), Jayangondan and the present defendants 1 and 2 (defendants 4, 5 and 6), the present defendants 3 to 5 (defendants 7, 8 and 9) and Ramaswami Chetty (10th defendant), the executor of the will of S. A. Subrahmanya Chetty, for the recovery of the amount due on the 3,000 dollars loan. That suit was first dismissed by the Sub-Court but the dismissal was set aside by the High Court which remanded the case for fresh disposal. Then the Subordinate Judge held that the partnership became legally dissolved by the death of S.A. Subrahmanya Chetty in November, 1904, that at any rate it became dissolved by the retirement of Jayangondan in November, 1908, that Jayangondan had no authority to borrow money so as to bind Avadiappa Chetty and the V.R.M.A.S. firm, that, Jayangondan's acts would bind only the 3rd defendant and himself, that Ramanathan Chetty was the agent of the 3rd defendant alone and that the payment made by him of interest which was after the retirement of Jayangondan would bind only himself and not the other partners of the firm. Eventually the Court passed a decree for the amount on the 7th defendant alone and held that the debt was not binding on the other defendants. (*See* Exs. XXXII and E.) On appeal the High Court held that Avadiappa Chetty was and continued

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to be a member of the firm at the date of the deposit and subsequently, and that defendants 2 and 3, being the sons of Avadiappa Chetty the 1st defendant, were liable to the extent of the family property in their hands. As regards the 4th defendant the High Court held that his retirement from the firm after selling his share to the 7th defendant would not absolve him from liability as the plaintiffs had no notice of his retirement. In its opinion the payment of interest was made in the usual course of business and as such bound the partnership. A decree was therefore passed by the High Court also against defendants 1 and 4 personally and to the extent of the family property in their hands against defendants 2 and 3 (the present plaintiffs 1 and 2) and against defendants 5 and 6, the sons of the 4th defendant (the present defendants 1 and 2). The decree of the lower Court was confirmed in other respects: that is, the suit against the legal representatives of S. A. Subramanya Chetty, who were defendants 8, 9 and 10 was dismissed. The 3rd defendant had not appealed from the lower Court's decree. So the result of the High Court's decree was that the suit debt was made liable on defendants 1 to 7 in the suit who, as already stated, were Avadiappa Chetty and his son and grandson, the present plaintiffs 1 and 2 (defendants 1, 2 and 3 in that suit), Jayangondan and his sons, the present defendants 1 and 2 (defendants 4, 5 and 6), and the 7th defendant, the present 3rd defendant (*see* Exs. XXXIII and F).

In execution of the decree Avadiappa Chetty's house was attached and his sons, the present plaintiffs 1 and 2 (defendants 2 and 3 in that suit) deposited the decree amount of Rs. 12,693-10-8 into Court on 26th June, 1923 (*see* Exhibit J). It was drawn by the decree-holder Palaniyappa Chetty and satisfaction of the decree was entered up on 12th July, 1923. As already stated, in the suit out of which this appeal arises the plaintiffs claim Rs. 17,358 against the 3rd defendant alone or in the alternative, contribution from the defendants of their 14/20th share of the decree debt.

The plaintiffs' case is that the 3rd defendant alone is responsible for the suit debt. The liability of the 3rd defendant has been pressed on various grounds. It was contended that the V. R. M. A. S. firm was a subsidiary firm of the S. N. A. firm, that it had no independent business, that no loans

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were to be procured or obtained by it, that its liability was limited to its capital of 20,000 dollars, that the S. N. A. firm alone was responsible for all the losses over that amount, and that the 3rd defendant who now represents the S. N. A. firm was alone liable to discharge the decree debt. The plaintiffs also alleged that after the death of S. A. Subrahmanya Chetty in November, 1904, both S. N. A. and V. R. M. A. S. firms became dissolved and ceased to be going concerns, that the firms were afterwards only being wound up, that while so, Jayangondan had no power to borrow money on behalf of V.R.M.A.S. firm so as to bind the firm, that the loan borrowed by him would be binding only on the 3rd defendant whose agent alone Jayangondan was and not on Avadiappa Chetty; and that Ramanathan Chetty had no authority to pay the interest on behalf of the firm. The 3rd defendant's contention was that there was no such agreement as the one pleaded by the plaintiffs and that as a matter of fact both the firms continued working after the death of S. A. Subrahmanya Chetty, that Jayangondan had power to borrow money so as to bind the firm, and that the payment of interest made by Ramanathan Chetty would also be binding on the firm.

On all the above points the lower Court found against the plaintiffs' contentions and accepted the case of the 3rd defendant. It was therefore held that the 3rd defendant was not exclusively liable for the suit debt. With respect to the claim for contribution made by the plaintiffs the lower Court held that since the debt is a partnership debt and a suit for taking partnership accounts was barred, the claim for contribution also could not be sustained. In the result the plaintiffs' suit was dismissed.

In appeal each of the above findings has been contested by the learned counsel for the appellants; but the main question argued was whether the V.R.M.A.S. firm continued as a going concern after the death of Subrahmanya Chetty with power to borrow loans, the contention being that it was being wound up and the agent had no power to borrow any loan in the circumstances and that the defendants are liable to contribution. We will now proceed to consider these points in order.

The first point is whether there was an agreement between the partners when the V.R.M.A.S. firm was started that it

should not carry on independent business and that its liability should be restricted to its share capital of 20,000 dollars.

[His Lordship discussed the evidence and concluded.]

Taking the evidence as a whole we are inclined to hold that both the firms S. N. A. and V. R. M. A. S. were not dissolved after Subrahmanya Chetty's death in 1904, that these firms were continued as going concerns and were doing business at the time of the suit deposit, that this was known to Avadiappa, that he carried on correspondence with Jayangondan which shows his knowledge of the affairs, that he gave him advice with regard to the management of the business, that Jayangondan as a member of the V.R.M.A.S. firm had power to borrow from the M.A.S.M. firm so as to bind the partners and that the loan borrowed by Jayangondan is therefore binding not only on himself and the 3rd defendant but also on Avadiappa. Jayangondan's retirement and assignment of his liabilities to the S.N.A. firm will not also absolve him as no notice was given of his retirement. These are in the main the conclusions arrived at by the Subordinate Judge and were also the conclusions arrived at by the High Court on the previous occasion. In our opinion it has not been shown that the evidence does not warrant these conclusions.

Jayangondan after the loan was borrowed paid interest to the M.S.A.M. firm on the money every three months and when Ramanathan succeeded him he made one payment towards interest on 3rd September, 1909. Then came the suit O. S. No. 177 of 1912 already referred to. This suit instituted on 22nd July, 1912, though filed more than 3 years after the date of the loan was within three years of the date of payment made by Ramanathan. These payments of interest also bind the members of the V.R.M.A.S. firm. It is said that Ramanathan was appointed agent only by the 3rd defendant for the S.N.A. firm and that so far as Avadiappa was concerned he is not to be treated as his agent. This argument was not accepted before and cannot be accepted now in the light of the evidence adduced. It is true that Ramanathan was appointed agent for the S.N.A. firm by the 3rd defendant alone but the agent for the S.N.A. firm was also the agent for the V.R.M. A.S. firm. Avadiappa himself recognized him as agent of the firm in succession to Jayangondan. Exhibit XIX (1st October,

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1908) a letter from Ramanathan to the 3rd defendant, shows that Avadiappa has written to him to send money. This was long after the deposit by the M.S.A.M. firm. Evidence shows that Ramanathan was accepted both by Jayangondan and Avadiappa as the agent of the firm. The payment of interest by him was in the course of business and must therefore bind the members of the firm. For the above reasons, we hold that it has not been proved on the evidence that the 3rd defendant is alone liable to discharge the debt borrowed by the V.R.M. A.S. firm which must be held to be a partnership debt binding on all the members and the payment of interest by Ramanathan kept the debt alive.

In view of the conclusions arrived at by us on the evidence which are the same as those arrived at by the High Court on the previous occasion, it is not necessary to consider the question argued by the learned Advocate-General that the findings of the High Court are *res judicata* and that we are therefore precluded from reconsidering the evidence afresh. In our opinion, this plea of *res judicata* cannot be upheld. The *res judicata* pleaded in the case is one between co-defendants. The 3rd defendant and the present plaintiffs and other defendants, were co-defendants in O.S. No. 177 of 1912. The 3rd defendant did not contest the suit. The other contesting defendants, that is, the present plaintiffs and others, pleaded that they were not liable on the suit claim. The plaintiff obtained the decree against the present 3rd defendant, Avadiappa, his son and grandson (the present plaintiffs), Jayangondan and his sons—the main contesting defendants. The question is, "was there a real conflict of interest between the 3rd defendant and the present plaintiffs in that suit? Was it necessary to give relief to the plaintiff in the circumstances of the case to determine the rights and liabilities of the co-defendants in that suit? And was there such a determination of the relative rights and liabilities between the co-defendants?" In our opinion there was no conflict of interest between the 3rd defendant and the other defendants including the plaintiff in the suit of 1912. It is true that the 3rd defendant admitted his liability but the admission of his liability was not in any way affected by the question whether the co-defendants were liable to the plaintiff. Each would have been liable for the claim in full if the facts alleged in the case were substantiated. It would thus appear

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that there was no real conflict of interest between the co-defendants. The real contest in that suit was between the plaintiff and the defendants other than the present 3rd defendant. To decide this point it was not necessary to determine the rights and liabilities of the co-defendants *inter se*. The decision was only necessary to determine the contest between the plaintiff in that suit and the other defendants and further there was really no decision in the former suit as to the rights of the co-defendants. In these circumstances it is difficult to hold that the decision of the High Court in the previous suit operates as *res judicata* with regard to the conflict between the plaintiff and the contesting defendants in the present suit. The case under consideration falls strictly within the operation of the decision in *Fakirchand Lallubhai* v. *Naginchand Kalidas*[1].

The plaintiffs having failed to prove for the reasons given above that the 3rd defendant alone was liable to discharge the partnership debt, it becomes necessary to consider their alternative case that they are entitled to claim contribution from the defendants with respect to the payment made by them in discharge of the debt. Their father's share in the partnership being 6/20ths, they claim that they are entitled to be reimbursed to the extent of 14/20ths of the amount paid by them from the other defendants. The contention of the defendants sought to be made liable is that the decree amount discharged by the plaintiffs being with respect to a partnership debt, their only remedy is by way of a suit for accounts of the partnership and not by way of a suit for contribution, and that as the suit for accounts of the partnership is admittedly barred by limitation the plaintiffs are not entitled to any contribution at all. The learned Judge upheld this contention on the strength of the decision in *Gopala Chetty* v. *Vijayaraghavachariar*[2]. In that case the Privy Council held as follows:

"If a partnership has been dissolved and accounts have been wound up, the mutual rights and obligations of the partners therein being discharged, and an asset which has been forgotten or treated as valueless afterwards falls in, it ought to be divided between the partners in proportion to their shares in the partnership. But if no account has been taken, the proper remedy of a partner in respect of an asset so received is to have an account taken; if his right to sue for an account is barred by limitation, he cannot sue the partner who has received the asset for a share of it."

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1. (1915) I.L.R. 40 Bom. 210.
2. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P. C.).

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It has been argued by the appellants' learned counsel that the above decision does not apply to the present case for two reasons: (1) that the present suit is not one for an account or for dissolution by a member of the firm against the firm and that such a suit cannot be instituted by the plaintiffs who are only members of the family of Avadiappa, one of the partners; and (2) that the liability which is sought to be enforced is an amount made payable by the decree, that the debt thus gets transformed into purely a decree debt and that those who are made responsible to pay it by the decree must contribute towards its payment in proper proportions.

The point of law arising for decision on the facts found is not at all free from doubt and not one of the numerous cases cited before us directly bears on it, and so the question has to be decided on principle. It is clear from the facts as discussed above that the partnership which became legally dissolved by the death of S.A. Subrahmanya Chetty continued as a working concern in 1908, that the debt was contracted during the period of this continuing partnership by Jayangondan and that he paid the interest on it for some months. He retired in 1908. His retirement, strictly speaking, brought about the dissolution of this continuing partnership though it cannot absolve him from his liability as already pointed out. The payment of interest by Ramanathan kept the debt alive as against the entire firm. The liability of the V. R. M. A. S. firm to pay the debt cannot be disputed; and this was what was decided in O. S. No. 177 of 1912 to which the present plaintiffs, along with their father, the other partners and their sons, were parties. So far the facts are clear. It is also clear that the suit for dissolution of partnership and for the taking of accounts has already become barred. It is equally clear that the Privy Council decision does not *directly* bear on the question. In that case the contest was between partners of a firm, and that, with respect to a partnership debt; whereas in the present case the plaintiffs were not partners of the V. R. M. A. S. firm and the claim is made with respect to a liability. Further, that was not a suit for contribution. Bearing in mind these differences, we have to see whether that decision can be of any help in deciding the present case. In that case it was decided that as between partners the only remedy that is available is an action for an account; and if such an action is time-barred

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and if an asset has come into the hands of a partner, then the decision says that the other partners cannot sue him for a share of it. It seems to me that though it has not been decided by the Privy Council the same conclusion should follow if the claim arose with respect to a liability, as in the present case. (*See* A. S. No. 100 of 1923 and S. A. No. 392 of 1925 which will be referred to later.) It is argued, assume it is so, but what has that to do with the right of contribution claimed by the plaintiffs who were not partners of the firm? and this, I think, is the strongest point pressed by the appellants. To answer this it will be necessary to consider the nature of the liability incurred by the partners and in what relationship the plaintiffs stand to their father who was a partner of the firm with respect to that liability. The judgment of the High Court makes it clear that there is no distinction between the liability of the 3rd defendant and that of the 1st defendant and that the liability of the one with respect to this partnership debt stood on the same footing as the liability of the other. The liability of the sons of the 1st, 3rd and 4th defendants to pay their father's debts, not being illegal or immoral, arises on account of the pious obligation to save their fathers from sin. It is true that this liability is not a joint liability, nor is it a joint and several liability. It is also true that this liability is not one imposed upon the sons because they are the personal representatives of their father. It is said that in all strictness the liability of the sons has nothing to do with the contract or the partnership liability. All these may be conceded. But what do these all lead to? They do not, in my opinion, show that the liability of the sons is altogether an independent liability which has no connection with their father's liability. Suppose the plaintiffs' father Avadiappa filed a suit against the 3rd defendant's sons basing their liability on the ground of pious obligation. I take it they could raise all the defences which their father could raise. If the suit against the father is time-barred, the suit against the sons also must necessarily be barred; otherwise a partner cannot proceed against another partner, but can proceed against his sons. This I think follows from the representative character of the father. In this connection attention may be drawn to the decision in *Narayanan* v. *Veerappa*[1]. In that case the 1st defendant and his brother,

1. (1916) 31 M.L.J. 386: I.L.R. 40 Mad. 581.

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the 3rd defendant were adjudicated bankrupts. The 2nd defendant was the son of the 1st defendant and defendants 4 and 5 were the sons of the 3rd defendant. All the five were members of a joint Hindu family and had some family property. It was contended that the effect of the discharge of the father was only to release him from liability but that it does not affect the Hindu law of liability of the sons to pay the debts of the father and the creditor was entitled to sue the sons and recover the debt from out of their shares of the joint family property. Adverting to this argument the learned Judges, Ayling and Srinivasa Ayyangar, JJ., observed as follows: "The matter may also be viewed in another way. The effect of the discharge was undoubtedly to release the defendants Nos. 1 and 3, and no suit could have been instituted against them. If, as already stated, no suit can be instituted against the sons alone, at any rate so long as the father is alive and the family undivided, even though the father's liability is subsisting the present suit against the sons alone must *a fortiori* be bad. This, we think, is the necessary result of the extinction of the liability of the father, *for it is only so long as the liability of the father subsists that the pious obligation of the son lasts.*" (The Italics are mine.) I am using this decision only to illustrate the proposition that the obligation imposed upon a Hindu son to pay his father's debt (in this case a partnership debt) is not to be treated as such an *independent debt* which in its nature has no connection with the liability of the father. True, it is not a liability in the nature of a partnership debt, with respect to the son because he was not a partner and did not contract the debt but as originating initially on account of the father the liability can last only so long as the liability of the father can last and if that liability ceases to exist or becomes unenforceable, then the liability of the son arising though it does on account of the pious obligation must also become unenforceable. If this is true, then the liabilities are inter-dependent and it is not right to treat the son's liability, though it is not, strictly speaking, a partnership liability, as having nothing to do with the father or his liability. It comes into existence on account of the father's liability and everything that a father can plead to resist that liability can be pleaded in my opinion by the son also. In short, the son's obligation is limited by the nature of

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the obligation of the father. In my opinion the fact that the debt has become a decree debt does not alter the situation. If the plaintiffs' father cannot enforce the right of contribution against the defendants, this, I think, follows from *Gopala Chetty's case*[1]—then I think it must also follow that they cannot themselves enforce that right. In the circumstances I think it is difficult to treat the plaintiffs as strangers and the suit as a simple suit for contribution devoid of all its connection with the nature of the liability that is sought to be enforced, which in my opinion is essentially a partnership liability.

An unreported decision of this Court, A.S. No. 100 of 1923, supports the contention of the respondent. In that case the dissolution of the partnership took place in 1909. The partnership had by that time incurred a debt to a stranger. A suit was brought by him, O.S. No. 78 of 1915, against the partnership and a decree was passed on the 31st August, 1916. The plaintiff paid the decree amount on 16th February, 1917 and instituted a suit for contribution on the 17th January, 1921. It was held, on the strength of *Gopala Chetty* v. *Vijayaraghava-chariar*[1], that as the suit for a general account was barred by limitation the plaintiff's suit for contribution must also fail. No doubt the suit was by a partner against another partner, but that I think should not make any difference for the reason which I have already given. This decision was followed in S.A. No. 392 of 1925. It may be stated here that both these cases are authorities also for the position that the principles of the Privy Council case would apply if the claim arose out of debts paid, and one partner wants contribution from another arising out of the joint obligation to discharge the debts in proportion to their shares in the partnership. The Privy Council case is referred to and explained in another decision of this Court in *Arunachalam Servai* v. *Nottam Beer Vavu Rowther*[2]. Inferentially it lends some support to the respondent's contention. In that case, after the dissolution of partnership the two partners who once constituted the firm borrowed moneys on a promissory note for discharging partnership debt. On that promissory note the creditor obtained a decree against both the partners and realized the amount by executing it against one of the partners after the expiry of the period of limitation for

1. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.).
2. (1928) 27 L.W. 597.

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taking accounts of a dissolved partnership. The partner who had paid the whole of the decree amount sued the other partner for contribution. It was held that he could recover from the other partner. The decision proceeded upon the ground that the debt was not a partnership debt. If the debt was a partnership debt the learned Judges would probably have held that the plaintiff could not recover from the other partner. However, this and the other cases noted above are cases where one partner sued another for contribution. The decisions in *Arunachalam Servai* v. *Nottam Beer Vavu Rowther*[1] and *Ramaswami Pillai* v. *Muthukaruppan Chetty*[2] do not advance the case of the respondent very much. As already stated, none of the cases cited directly bears on the question we have to decide in this case. Though the plaintiffs are not partners, the debt out of which the rights and liabilities arose being a partnership debt, and the plaintiffs' liability to pay the same arising through and on account of the father's liability, I think the rule of the partnership law must apply and it must therefore be held in the circumstances of this case that the plaintiffs' suit for contribution must fail. I would therefore agree with the lower Court and dismiss the appeal with costs.

Stone, J.

*Stone, J.*—Save on the question of contribution I agree that the appeal should be dismissed. On the question of contribution I am of the opinion that the plaintiffs are entitled to contribution. The reason why I am of the opinion that the plaintiffs should have contribution is due to the fact that in my opinion, in the circumstance here present, the plaintiffs never were in the position of partners or in the shoes of a partner and consequently the law relating to partnership has no application to their rights. To make the point clear, it is necessary to state a few facts. Before the year 1904, there was a Nattukottai Chetti firm operating under the vilasam of S.N.A. and having large resources. S.N.A. is the name of a vilasam made up of two individuals whom I will refer to as S.N. and S.A. There was also another firm, a smaller Nattukottai Chetti firm, operating under the vilasam of V.R.M.A.S. V.R.M.A. stands for a person that I will refer to as A., and S. stands for a person I will refer to as Jayangondan or J. V.R.M.A.S. firm however comprised not only Jayangondan and A. but also S.N.A., and

1. (1928) 27 L.W. 597. 2. (1924) 48 M.L.J. 444.

the shares were divided as follows: S.N.A.-10/20ths, A-6/20ths, J-4/20ths. It is common ground that the firm S.N.A. cannot be regarded as juridical person and thus a partner, but must be split up into its constituent two parts S.N. and S.A. when considering the constitution of V.R.M.A.S., so that there emerges four partners in V.R.M.A.S.; S.N.-5/20th, S.A.-5/20th, A-6/20th, J-4/20ths.

Now A is the father of the plaintiffs who were at all material times minors. Being minors it will be observed that they could not have been made partners so as to be responsible for any partnership liability; in other words, *qua* partners had they been received into the firm, they could not, being minors, have been made liable for the partnership debts. They have in fact been made liable for the partnership debts and accordingly such liability cannot arise out of partnership. That indeed is not disputed, for it is nobody's case that they were ever partners.

In 1904 S.A. died, whereupon the firm, hitherto operating under the vilasam of V.R.M.A.S., suffered a dissolution by death. It is a matter of dispute as to whether the small amount of business that was thereafter done by V.R.M.A.S. was incidental to the winding up of the partnership or was such as to justify the inference that the surviving partners S. N., A. and J. or some of them had agreed to carry on a new partnership. I am assuming for the purpose of the present discussion, which I am restricting to the contribution point, that there was such an agreement, that there was a new partnership, and that A was a member of that partnership. The dissolution of the old firm having taken place in 1904, under Art. 106 of the Limitation Act the action for partnership accounts as regards that firm was time-barred in 1907.

In 1908, J., admittedly acting on behalf of S.N.,—that is to say, it is admitted by S.N. that J. in this transaction was acting on S.N.'s authority—contracted a debt, and the debt if contracted by a partner is of a kind that would be binding on the partnership assuming that that partnership is a going concern and not merely in the state of winding up. I am assuming for the purpose of this discussion that the debt was contracted on behalf of the new partnership. Later, in the year 1908, that new partnership was dissolved by the retire-

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ment of J. Under Art. 106 of the Limitation Act a suit for an account as regards the accounts of that new partnership would be time-barred before the end of 1911. From time to time after 1908 the loan was kept on foot by payments made. These payments were made by one R. who was the agent appointed by S.N.A. then in process of winding up. As a consequence of these payments the right of action by the creditor when he eventually filed his suit was not time-barred. A question was raised as to whether those payments were binding upon A., it being said he was not a partner, and did not expressly authorize. I am assuming for the purpose of this discussion that they were binding upon A. I am also assuming that the learned Judges who eventually disposed of the suit that the creditor brought against the partnership, or rather against the individuals who comprised the partnership, together with the sons of A. and the sons of J., rightly decided that all the partners and the sons of A. and the sons of J. were liable.

In my view such a decision involves the finding that in 1908 a new partnership was in existence composed of S.N., A. and J. and that J. was acting within his powers as a partner in contracting the debt and that he thereby bound the members of the partnership. The part of the case may be regarded as concerned with the obligations of a partner as such and the powers of a partner as such, and those individuals when joined in that action may be regarded as being sued as members of a firm. But when one comes to the position of the sons of those persons, this not being a case of joint family business or introducing any sort of complexity of that kind but being a case of a common law partnership *simpliciter*, it is to my mind obvious that before the sons can be held to be liable in respect of that contract one has got to look to some branch of the law other than the law of partnership.

One finds the appropriate branch of law in those texts that lay down the obligation imposed upon the sons of a Hindu to pay their father's debts where such debts are neither illegal nor immoral.

This obligation is placed upon sons by the sacred texts. It has nothing to do with contract or with partnership. It is not an obligation imposed upon them because they are the personal representatives of their father or because they have succeeded to their father's property. A Hindu son, when his

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father dies, does not succeed to his father's property. The death of the father simply causes a coparcener to drop out and to bring by way of survivorship to the surviving coparceners a share in the ancestral property that is larger than it was before the father's death.

Now the present point can be expressed thus: After the creditor who had sued S.N., A. and A.'s sons, and J. and J.'s sons (together with S.A. and S.A.'s sons who were found to be not liable S.A. having died before the critical date 1908), had recovered his decree, which was a decree against all, the sons being made liable to the extent of the ancestral property in their hands, he did what he was entitled to do: he picked out two of his judgment-debtors as the persons to execute the decree against, and the two he picked out were the sons of A. who, during the course of the litigation and before the time of execution had arrived, had died. Execution was effected, the ancestral property to the suit amount was sold. The result is this:—that in respect of a debt incurred by J., a stranger, partner in a firm of which A. was, by hypothesis, a member, two minors, strangers to the firm and in no way connected with J. either directly or otherwise and only connected with A. in that they were A.'s sons, have paid this partnership debt and none of the partners has paid a rupee.

I again observe that had the minors been partners they could not have been made liable as partners. But although not partners, they have been made solely liable. On the face of it that does not appear to be the right result.

They now sue the other defendants for contribution; that is to say, A. having died they sue S.N.J. and J.'s sons. They also include S.A.'s sons. Admittedly the latter cannot be made liable for S.A. had no share whatever in the original liability for the reasons stated. The reason why it is said that this right to contribution does not exist can be expressed as follows:—I hope I do not misstate the learned Advocate-General's argument which on this critical point never appeared to me to be entirely clear.

The Privy Council in *Gopala Chetty* v. *Vijayaraghavachariar*[1] has decided that as between partners the only remedy that is available is an action for an account. If therefore the action for an account is time-barred, and no accounts have been

1. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.).

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settled, and an asset comes into the hands of one of the partners, the other partners cannot claim a share in that asset. And it is said that the same reasoning applies to a case of a liability. Thus, where it appears that the liability arose in 1908 and the firm dissolved in 1908 as the right to an account was barred by 1911 if a partner is made liable by a decree passed in 1919 for the whole of the debt he has no right to claim, from his other partners and co-defendants to the suit, a contribution. I am by no means persuaded that their Lordships of the Privy Council have so decided. I shall later endeavour to state what I understand to have been decided in *Gopala Chetty's case*[1] as regards this point. But for the moment I content myself with saying that, assuming that case decides all that the Advocate-General says it decides, I still fail to see what it has to do with the right of contribution claimed in this case. In this case the persons claiming the right of contribution are not and never were partners. They never had at any time up to the filing of the claim in the creditors' action in 1912 any *locus standi* in any suit for partnership account, their father being the partner and being alive. They thus never had any such *locus standi* until such right of action was barred. I observe that under the pious obligation rule a son born in 1912 to A. could have been joined as co-defendant in the action that was brought in 1912 by the creditor whose loan was made in 1908 by a partnership which dissolved in 1908 and in respect of which the right for an account was barred in 1911. Can it be the law that such a person born after the right to an account was time-barred, can have his property taken from him because of a debt incurred by a father before his birth and remain without redress because the only possible redress that he has is contribution and that right of action is lost because he is to be regarded as a partner, which he is not, and therefore limited to a claim for an account which he never had and which was time-barred before he was born? I think not. I am satisfied that their Lordships of the Privy Council never laid down any proposition that would be capable of being stretched to such lengths.

In my opinion what *Gopala Chetty's case*[1] decides is this:—though I do not think that it is possible to state what it decides more aptly and more lucidly than in the words the Judicial

1. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.).

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Committee itself has used, I only express my own view as to what it decides in order to look at it from perhaps a slightly different angle. If partners purport by agreement to settle their accounts and by an oversight omit this item or that and at a later date the oversight is discovered and the item is found in the hands of a partner, then the partners, despite the fact that the action for an account has long since become time-barred, will not be limited to the action for an account but will be given a right to claim their share in the asset brought to light. But if partners do not attempt to settle accounts but allow the time in which to sue for an account to elapse without anything being done and then an asset is discovered which, had there been an accounting, would have been taken into account, no one of the partners will be able to claim that asset which will accordingly be retained by the partner that is fortunate enough to have reduced it to possession, the reason being that in such a state of facts it will be assumed that accounts have been taken, completely taken. It will, in other words, be presumed that there are no oversights, and therefore wherever the assets are, it will be assumed that there they ought to be. I should myself doubt whether that principle could apply to an asset which first came into existence after the accounting period. Such an asset would, in my opinion, belong to a new accounting period. Thus, for example, an asset which first came into existence after the date of dissolution could surely be claimed by a partner even though he had not within three years after dissolution claimed the taking of partnership accounts, that is, the taking of accounts up to the date of dissolution. Such a case I apprehend could arise in the course of winding up. The kind of asset that he could not claim, having failed to claim an account or to settle an account would be an asset which would have been taken into account had he claimed an account, that is a pre-dissolution asset, though one that is only subsequently discovered. It does not in my opinion relate to an asset which subsequently came into existence for the first time and not merely as a consequence of the conversion or alteration of some of the existing assets.

I do not however base my conclusion on this because it might well be (I say nothing as to this) that the debt of record created by the decree in the suit brought by the creditor relates to a liability that had been in existence ever since the original

debt was contracted in 1908 and therefore to a liability that was in existence prior to the dissolution in 1908 and thus to a liability (though it must be noted the liability is owed to a stranger and not to a partner) that would have been taken into account had there been a taking of partnership accounts as up to the date of that dissolution, the right to claim which was time-barred by the end of 1911. Nor do I consider it necessary to decide in this case whether the principle in *Gopala Chetty's case*[1] applies to a case of later discovered liabilities as it applies to the case of later discovered assets. It is not necessary in my opinion to decide either point. It is the policy of the law not to permit partners to litigate separately the various claims which one partner may have against another (not, I observe, the same thing as claims which a stranger has against the partnership) but to require them to settle their mutual claims by way of a mutual accounting by methods (which the Chancery Courts in England have worked out with great precision) that enable various claims between partners to be fairly and completely settled in one litigation instead of requiring a multiplicity of actions, it may be in various Courts, between this partner and that. That they ought to do and they cannot litigate about matters which would have found a place in such accounts if taken. It does not follow that they cannot litigate about matters which would not have found a place in such accounts.

But this reason has no weight when one is considering the position of strangers to the partnership. They are not limited to any particular form of action and, indeed, this form of action for the taking of partnership accounts is not open to them.

In my opinion it is quite fallacious to regard these minors as standing in their father's shoes so as to possess like him the character of partner. They are not made liable because they are the personal representatives of their father; they are not made liable because they have got their father's property. They are made liable expressly because they are the sons of their father upon whom is imposed a pious obligation, and not because they are to be deemed to stand in the shoes of the father—if the latter were the ground of liability pious obligation would be unnecessary and the exclusion of illegal and immoral (but legally binding) debts would be illogical—

1. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.).

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they would be as liable as their father was liable because by a fiction they would be deemed to stand in the shoes of their father. Once it is clear that they are not to be regarded as being made liable because they are to be deemed by a fiction as standing in the position of their father, the last fragment of partnership law connecting the creditors' claim with them and them with their co-defendants disappears and the last shred of reason for withholding the equitable remedy of contribution from them also disappears in my opinion.

This, in my opinion, distinguishes this case from the unreported decision in Second Appeal No. 392 of 1925 as to which therefore I say nothing except that on the facts of that case it is a matter for consideration whether the accounts of the partnership if taken in a partnership action brought within the period of limitation after dissolution could have included however perfectly taken an item of claim by one partner on the other which had not then come into existence and did not therefore fall to be included in such accounts.

If the item whether asset or liability belongs to a post-dissolution period different considerations appear to apply. It is different, I think, from the case where the asset or liability belongs to the accounting period in question (that is, a period terminating with dissolution) though the asset or liability is discovered at a later period.

S. A. No. 392 of 1925 cites with approval First Appeal No. 100 of 1923 in which case the decision of the Subordinate Judge was upheld. That case is distinguishable, in my opinion, on the same ground. That was a case where the dissolution was in 1909. The partnership had, before that date, incurred a debt to a stranger. That stranger sued on that debt the partners. A decree was passed and was paid by one of the partners in 1917. There had been no account taken and the suit for an account was barred. It was held that the principle in *Gopala Chetty's case*[1] applied. It was, in other words, a case of a partner suing a partner for contribution in respect of what was held to be a payment in respect of a pre-dissolution debt.

I do not think the matter is carried any further by *Damodara Shanabhaga* v. *Subraya Pai*[2] which decided that the

1. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.).
2. (1917) 33 M.L.J. 509.

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assignee of an alleged right to contribution cannot claim if, for any reason, the assignor could not have claimed. *Ramaswami Pillai* v. *Muthukaruppan Chetti*[1] does not advance the respondent's argument. On the contrary it, in my opinion, weakens it for this is certainly a claim "unconnected with the partnership business or only very remotely connected therewith."

In my opinion no English case can assist on a point like the present. Two were cited *Powell* v. *Dale and Hood*[2] and *Meyer & Co.* v. *Faber*[3]. Those cases were concerned with the relationship of partners *inter se*. The reason no English case could be very helpful is that by no possibility could these minors have been made liable were English law applicable and so no English case could deal with the kind of question here at issue or even with the branch of law applicable which branch is, I repeat, not partnership law, but the law which imposes a pious obligation upon a Hindu son.

It was urged in argument that a Hindu son could never be more liable than his father when sued under the pious obligation rule and that therefore J.'s sons could not in this action be asked to contribute by A.'s sons because J. could not be asked to contribute by A. But in my opinion, whatever may be the position had A. sued, when A.'s sons sue they sue the son's of J. not as a son of a partner but as co-defendants in an action wherein a decree, creating a debt of record has been passed against the present plaintiffs and the present defendants (that is, S.N., J. and J.'s sons) which debt should have been paid by all has, in fact, on the compulsion of the decree-holder, been paid wholly by the plaintiffs. Whereupon the equity arises which gives the right to claim contribution. This distinguishes this case from *Narayanan* v. *Veerappa*[4]. The plaintiff there was like the plaintiff in the former suit in which the decree was given, in satisfaction of which the present plaintiff's properties were attached. The plaintiffs here, are in my opinion in an entirely different position and the defendants J.'s sons are in an entirely different position. They are liable not *qua* sons but as persons against whom a decree has been passed. Further as S. N. *vis-a-vis* J. and J.'s sons admits liability this point does not arise in any but an academic form in my opinion.

1. (1924) 48 M.L.J. 444.
2. (1911) 105 L.T. 291.
3. (1923) 2 Ch. 421.
4. (1916) 31 M.L.J. 386: I.L.R. 40 Mad. 581.

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In my opinion therefore the appeal succeeds so far as relates to contribution with proportionate costs throughout except as against defendants 4 and 5. Further the 3rd defendant accepts liability as regards 1st and 2nd defendants and the decree should accordingly be against him only in the first place with liberty to proceed in execution against the 1st and 2nd defendants only after exhausting all remedies against the 3rd defendant.

As we differ on the plaintiff's right to contribution against the defendants 1 to 3 we refer under cl. 36 of the Letters Patent to a 3rd Judge or Judges the following point: "whether in the circumstances found by us on which we agree the plaintiffs are entitled to contribution against the defendants 1 to 3". After the decision of the point by the 3rd Judge or Judges the case will again be posted before a Bench for final disposal.

On this reference the appeal came up before Pandrang Row, J.

*B. Sitarama Rao* and *K. S. Venkatarama Aiyar* for Appellant.

*The Advocate-General (Sir A. Krishnaswami Aiyar), E. Vinayaka Rao, K. Subramania Aiyar, A. Swaminatha Aiyar, K. Venkateswaran, K. Gopalaswami* and *R. Swaminathan* for Respondents.

The Court expressed the following

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OPINION.—This appeal comes before me on a reference made by the Bench which heard the appeal as the result of a difference of opinion on the question of the plaintiffs' right to contribution that was sought to be enforced as against defendants 1 to 3. The question referred under cl. 36 of the Letters Patent is as follows:—

" Whether in the circumstances found by us on which we agree the plaintiffs are entitled to contribution against the defendants 1 to 3."

A brief statement of the facts is necessary for the purpose of dealing with this question. One Avadiappa Chetty, the father of the 1st plaintiff and the grandfather of the 2nd plaintiff, was a partner in a certain firm which was dissolved by the retirement of one of the partners, Jayangondan, in November, 1908. In February, 1908, this partner Jayangondan who was also the agent of another firm lent 3,000 dollars of that firm to the firm in which he and Avadiappa Chetty were partners. One Meyappa Chetty of the lending firm and his son instituted a

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suit in 1912 against all the partners, including Avadiappa Chetty as well as his son and grandson (the plaintiffs in the present suit) and obtained a decree in 1919 against all the partners and also as against the plaintiffs in the present suit to the extent of their shares in the joint family estate of themselves and their father who was one of the partners. In execution of that decree the plaintiffs' family house was attached, and Avadiappa Chetty having died in the interval, the plaintiffs were compelled to deposit the whole decree amount in June, 1923. The result was that the entire decree was satisfied by the present plaintiffs alone and they claimed to recover the share of the defendants in the decree debt.

The difference of opinion relates really to two points, namely, (1) the scope and effect of the decision of the Judicial Committee in *Gopala Chetty* v. *Vijayaraghavachariar*[1], and (2) the applicability of the law of partnership to the claim of the plaintiffs in the present suit. As regards the first point it was held by Madhavan Nair, J., that it follows from the Privy Council decision that the plaintiffs' father, if he were alive, could not enforce the present claim to contribution against the defendants, whereas the other learned Judge was of opinion that the Privy Council decision did not go to this length and did not lead to this conclusion. On the other point, Madhavan Nair, J., held that though the plaintiffs were not partners themselves, nevertheless they cannot be treated as complete strangers to the partnership and the suit by them for contribution cannot be regarded as being devoid of all connection with the nature of the liability that is sought to be enforced which is essentially a partnership liability. The other learned Judge was of the contrary opinion and held that the ordinary law of partnership had nothing to do with the right claimed by the plaintiffs in the present suit and that there was no reason for withholding the equitable remedy of contribution from them.

Before dealing with these points, it seems desirable to consider the nature of the right to contribution generally and also as between persons bound to one another by reason of a special relationship such as is created between them by a contract of partnership. In dealing with this matter the difference that lies between the substantive right to contribution

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1. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.).

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and the procedure whereby such right is enforced has to be clearly borne in mind, as different considerations would apply to a *right* to contribution and to an *action* for enforcing the right of contribution. The right to contribution as between partners is not essentially different from the right to contribution as between persons who are jointly liable in respect of a debt. The partner's *action* for contribution is conditioned, however, by the special law of partnership. The general law relating to contribution is based on the principle which prescribes equality of burden and benefit. As stated by Lord Eyre, C. B., in *Dering* v. *Earl of Winchelsea* (p. 488 White and Tudor II) the right of contribution:

> "is bottomed and fixed on general principles of justice; *in aequali jure* the law requires equality; one shall not bear the burthen in case of the rest, and the law is grounded in great equity."

The reference made in that case to the right of the King on the prisage of wine has some bearing on the facts of the present case. The King is entitled to one tun of wine before the mast, and one tun behind. It was held that a right to contribution accrues, for the King may take by his prerogative any two tuns of wine he thinks fit, by which one man might suffer solely. In the present case it is the creditor who has exercised the prerogative of selecting some particular debtors from among several co-judgment-debtors for the purpose of recovering the decree amount, and in such a case also a right of contribution will accrue. As among partners, there is no doubt the liability of the partners to contribute rateably to their shares towards the debts of the partnership. This liability to contribute, however, is not absolute and without reference to their special relationship as partners, and this is what is meant by the following passage in Halsbury, Vol. 7, S. 378 which was quoted at the bar, namely:

> "Where partners are under a joint liability in respect of a particular transaction arising out of and connected with the partnership, and one of them is compelled to pay more than his share of such joint liability, the Court will not enforce his right of contribution in respect thereof against his co-partners, except in an action for a general partnership account."

This rule has, however, no application

> "Where two or more persons engage in a particular transaction which is distinct and separate from their partnership business; in such case the right of contribution will be enforced."

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It would thus appear that the contract of partnership does not really affect the right to contribution but only the method of enforcing it. So long as the partnership continues or subsists and it is to be remembered in this connection that even after dissolution of partnership the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership (S. 263, Indian Contract Act) no separate action for contribution will lie and the right to contribution can be enforced only as part of a general suit for accounts of the partnership, the reason being that the right of contribution is subject to the special rights and obligations created by the contract of partnership. This special contract of partnership has the effect of preventing a partner either from suing for his share of any particular asset belonging to the partnership or for contribution in respect of any particular partnership transaction, because the contract of partnership implies that all individual claims of one partner against the others must be the subject of a single action for accounts and also because of the rule of law which discourages multiplicity of actions. It does not however follow that an action for contribution will not lie even in respect of a transaction or debt which does not or cannot form an item in the general partnership account, because the transaction or debt is not a partnership transaction or debt at all. As observed by Bramwell, B., in *Sedgwick* v. *Daniell*[1]:

"if a partner advances money on account of the partnership, he cannot recover it in an action against his co-partners, for the law will not imply a promise to pay it; and why? because at the time he made the advance he impliedly undertook that it should remain until an account was taken."

The same reason would apply in the case of an action for contribution and such an action would not lie because the contract of partnership implies an undertaking that the right to contribution should be claimed only when an account is taken. The reason for the general rule that no action for contribution by a partner against his co-partners will lie applies however only when the contract of partnership subsists, and only to cases where the action for contribution is brought by a partner as such against his co-partner as such. The rule of prohibition in such actions is necessitated by the peculiar obligations, rights and duties existing as between partners *inter se* which

1. (1857) 157 E.R. 132.

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attract the maxim "*frustra peteret quod mox restiturus esset.*" Where the partnership relation no longer exists, and where there is no likelihood of any restitution being necessary there is no reason in my opinion to apply the rule prohibiting actions for contribution as between persons who were once partners but have ceased to be such. When the reason for the rule does not apply, the rule itself does not apply. There can be no doubt that between partners as such the right to contribution itself is dependent on the state of account between partners. In this connection I may refer to the following observations of their Lordships of the Judicial Committee in the recent case *Arunachalam Chettiar* v. *Commissioner of Income-tax, Madras*[1]:

> "Questions may arise, regardless of whether the firm has otherwise made a profit or loss, as to the firm's right to be indemnified by a partner for loss caused to it by his wilful neglect. Between partners any right of contribution has reference, *prima facie* at least, to the ultimate balance appearing as the result of a general account."

Coming to the right of contribution as between co-judgment-debtors, there is, in my opinion, no reason why the right to sue for contribution which accrues to a co-judgment-debtor as such should be denied or made subject to any equities arising out of a contract of partnership many years after the partnership became dissolved and a suit for general account became barred and the relation of partnership came to an end. This right to sue for contribution as between co-judgment-debtors is not given by any special enactment. It arises out of equity, an equity all the more stringent in view of the provisions of S. 43 of the Indian Contract Act, which permits the promisee to compel any of several joint promisors to perform the whole of the promise. S. 43 of the Contract Act has thus taken away the benefit of the plea of abatement known to the English law, and also the old "*beneficium divisionis*" that was given by Roman Law whereby "*correi-debendi*" could compel the creditor to sue them only for their proportionate share of the debt. The equity of contribution as between co-judgment-debtors has always been recognised as part of the general equity which requires that one shall not bear the whole burden in case of the rest and this right to contribution between co-judgment-debtors comes into existence

1. (1936) 71 M.L.J. 772: L.R. 63 I.A. 233: I.L.R. 59 Mad. 716 at 725 (P.C.).

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only when the common burden is discharged and not before, for it is only on the discharge of the common burden that the rest are eased of that burden, and become subject to the liability to bear their share of the burden. It is sufficient on this point to refer to *Narayanamurthi Aiyar* v. *Marimuthu Pillai*[1] and *Abraham Servai* v. *Raphial Muthirian*[2]. The right to contribution claimed in the present suit is one that came into existence only when the joint decree was satisfied by the plaintiffs alone in June 1923, that is to say, nearly 12 years after a suit for accounts as between the partners had become barred and the partnership relation had come to an end for all purposes. If the whole decree had been satisfied by Avadiappa Chetty himself in 1923, can it be said that he would have had no right to sue the defendants 1 to 3 for contribution, merely because the decree debt itself was in respect of a partnership debt? In such a suit he would not be agitating any of his rights as partner but only his right as a co-judgment-debtor who had paid off entirely a decree debt which was binding on the defendants also. I fail to see how his action for contribution could be regarded as an action for contribution by a partner against his co-partners. His right would not be based to any extent on his right as a partner; and the partnership having come to an end long before, it is difficult to see why his right to contribution as a co-judgment-debtor should be held to be so intimately bound up with the extinct contract of partnership that it could only be exercised along with his right to take an account of the partnership.

Several English cases have been quoted in the course of the argument before me, but they do not throw much light on the question for decision. It is therefore enough for me to make a brief reference to them. For instance *Dale* v. *Powell*[3] was a case in which a partnership action was pending when the payment was made by one of the partners as a co-judgment-debtor. *Sadler* v. *Nixon*[4] was a case in which the partnership was existing at the time and it was an action for contribution in respect of money paid on account of the firm by one of the partners. *Batard* v. *Hawes*[5] and *Boulter* v. *Peplow*[6] are cases in which the parties concerned were "provisional committee

1. (1902) I.L.R. 26 Mad. 322.
2. (1914) 27 M.L.J. 746: I.L.R. 39 Mad. 288.
3. (1911) 105 L.T. 291.
4. (1834) 110 E.R. 1038.
5. (1853) 2 E. & B. 287: 118 E.R. 775.
6. (1850) 137 E.R. 984.

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men" who, it had been decided, are not partners. The latter case was, moreover, one in which a contract could be implied at the time when the original debt was contracted that the one who pays the whole of the debt should be reimbursed in their respective proportions by the other two. In other words, it was a case in which an implied special contract to make contribution existed and contribution was sought on the basis of this contract. *Sedgwick* v. *Daniell*[1] was a case in which some, but not all, partners executed a promissory note for securing a debt of the firm. One of the makers was compelled to pay the whole of the amount and he was held to be entitled to contribution from the other makers of the note, because the right to contribution was in respect of a matter not involved in the general account and did not depend on the fact that the makers of the note were partners. This case is of some importance as it has some bearing on the present question, because in the present case also the right to contribution claimed does not depend on the fact that the plaintiffs and the defendants were partners. Another English case, which has some bearing on the present question, is *Osborne and another* v. *Harper*[2]; the facts are somewhat similar. That was a case in which the original debt had been contracted in 1802, that is to say, nearly six years after the dissolution of the partnership in 1796, by one of the partners, namely, Harper signing certain bills of exchange for the firm, and the creditor had no notice of the dissolution of the firm before the bills were given. A decree being obtained by the creditor, and being satisfied by the other partners, namely, Osborne and another, the latter were held entitled to recover contribution from Harper. There was no controversy about the right to contribution in that case, but only about the point whether a single action by the two plaintiffs was maintainable.

Reference has been made to several Indian cases also at the hearing, namely, *Subbarayudu* v. *Adinarayudu*[3], *Durga Prosonno Bose* v. *Raghu Nath Dass*[4], *Karri Venkata Reddi* v. *Kollu Narasayya*[5], *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar*[6] and *Laban Sardar* v. *Choyen Mallik*[7], besides some other cases which are all prior in date to the Privy Council

1. (1857) 157 E.R. 132.
2. (1804) 5 East. 225 : 102 E.R. 1056.
3. (1894) I.L.R. 18 Mad. 134.
4. (1898) I.L.R. 26 Cal. 254.
5. (1908) 19 M.L.J. 10 : I L.R. 32 Mad. 76.
6. (1908) I.L.R. 32 Mad. 203.
7. (1914) 19 C.W.N. 768.

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decision in *Gopala Chetty* v. *Vijayaraghavachariar*[1]. The cases subsequent to the Privy Council decision are *Palepu Narayanamurthi* v. *Komali Chandrayya*[2], *Arunachalam Servai* v.*Nottam Beer Vavu Rowther*[3] and *Ellappa Mudaliar* v. *Swaminatha Mudaliar*[4] besides the two unreported cases which have been considered in the order of reference. It does not appear that in *Subbarayudu* v. *Adinarayudu*[5] the partnership had been dissolved or the action for accounts had become barred. Reliance was placed on *Sedgwick* v. *Daniell*[6] and apparently it was a case in which the suit transaction was not regarded as a partnership transaction. The correctness of the decision in *Subbarayudu* v. *Adinarayudu*[5] has been doubted in *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar*[7] on the ground that the English cases relied upon had no application. *Karri Venkata Reddi* v. *Kollu Narasayya*[8] does not deal with the point now in issue. It relates more to the question whether an action for partial account would lie, a question similar to the question referred to by their Lordships of the Judicial Committee in *Arunachalam Chettiar* v. *Commissioner of Income-tax, Madras*[9], namely:

> "Whether the old rule as stated by Lord Cottenham in *Richardson* v. *The Bank of England*[10] that 'pending a partnership, equity will not interfere to set right the balance between the partners' is still to be adhered to rigidly or not."

*Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar*[7] has been considered in the later case reported in *Arunachalam Servai* v. *Nottam Beer Vavu Rowther*[3] to have been overruled by the Privy Council decision in *Gopala Chetty* v.*Vijayaraghavachariar*[1] as it relies on *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar*[11] which was expressly overruled by the Privy Council. *Laban Sardar* v. *Choyen Mallik*[12] to some extent relies on *Subbarayudu* v. *Adinarayudu*[5] and *Sadhu Narayana Aiyangar* v. *Ramaswami Aiyangar*[7]. I am unable to say, after a careful consideration of all these cases, that the point has been decided beyond doubt one way or the other. Even in

1. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.).
2. (1927) 53 M.L.J. 174.
3. (1928) 27 L.W. 597.
4. (1933) 38 L.W. 316.
5. (1894) I.L.R. 18 Mad. 134.
6. (1857) 157 E.R. 132.
7. (1908) I.L.R. 32 Mad. 203.
8. (1908) 19 M.L.J. 10: I.L.R. 32 Mad. 76.
9. (1936) 71 M.L.J. 772: L.R. 63 I.A. 233: I.L.R. 59 Mad. 716 at 725 (P.C.).
10. (1838) 4 My. and Cr. 165, 172: 41 E.R. 65.
11. (1904) I.L.R. 28 Mad. 344.
12. (1914) 19 C.W.N. 768.

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*Arunachalam Servai* v. *Nottam Beer Vavu Rowther*[1] which was the case most relied upon on the side of the plaintiffs the facts appear to be similar to *Sedgwick* v. *Daniell*[2] and the original debt was found to be not a partnership debt. The general observations at page 600 appear thus to be mere *obiter dicta* though no doubt they were followed in *Ellappa Mudaliar* v. *Swaminatha Mudaliar*[3] by Ramesam, J. The unreported cases already referred to are however against the plaintiffs' contention. My own opinion on the question is that as a partner suing as such and claiming a share out of the partnership assets as such, or claiming contribution as a partner has no absolute or independent right against his co-partners, those rights can only be agitated as part of his general right to have an account taken of the partnership, and, if that action isbarred, any right which he can claim only as partner must be held to be lost, for, such a right cannot be agitated by itself, and this I take to be the real scope of the Privy Council decision in *Gopala Chetty* v. *Vijayaraghavachariar*[4]. That was a case which related to a claim to a share in certain partnership assets, and that claim was based only on the plaintiff's right as partner, because except as partner he could lay no claim whatever to share in the partnership assets. His right as partner however was not a right to share in particular partnership assets, but only a right to his proportion of the partnership assets *after* they have been realised and converted into money, and all the partnership liabilities have been paid and discharged, in other words, only after the due taking of accounts. That is really the *ratio decidendi* in *Gopala Chetty* v. *Vijayaraghavachariar*[4], namely, that the plaintiff could not make his claim good to the assets without showing that he would be entitled to a share therein upon the due taking of accounts as would be seen from the following passage at page 390:

"If, on the other hand, no accounts have been taken and there is no constat that the partners have squared up, then the proper remedy when such an item falls in is to have the accounts of the partnership taken; and if it is too late to have recourse to that remedy, then it is also too late to claim a share in an item as part of the partnership assets, and the plaintiff does not prove, and cannot prove that upon the due taking of the accounts he would be entitled to that share. It might well be the case that one of the reasons why no final balancing of accounts took place was that *A* owed the partner-

1. (1928) 27 L.W. 597. 2. (1857) 157 E.R. 132.
3. (1933) 38 L. W. 316.
4. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.).

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ship so much money that it was anticipated that *B* would hereafter receive a particutar item which would operate substantially to balance the claim."

The same reasoning would apply to a right of contribution which is based on the plaintiff's right as partner to receive contribution because such right also would be subject to the prepayment of debts due by the partnership to the reciprocal rights possessed by the other partners which could be determined only in a suit for general accounts, no contribution being allowed by reason of the contract of partnership in respect of individual transactions ignoring the other partnership transactions. The reasoning however does not in my opinion apply to the right to contribution sought to be enforced in the present case, for that has nothing to do, in my opinion with any right claimed as partner, and this would have been the case even if the original partner (Avadiappa) himself had been the plaintiff in the suit. His right of contribution would and could have been based, not on any right of his as a partner arising out of or subject to the contract of partnership, but on something which was independent of the partnership, namely, the payment of a joint decree debt by one of several co-judgment-debtors. So far as his cause of action was concerned, it would not have been governed by the law of partnership. It is the defendants who seek to rely upon their rights as partners as a defence to the action for contribution. Whether such a defence is open to them or not, namely, whether they can insist upon an account being taken even when an action for accounts would be barred, does not arise for decision by me, as that point is not included in the question referred to me. As in *Palmer* v. *Wick and Pulteneytown Steam Shipping Company, Limited*[1], this is a case in which the foundation of the claim rests on a decree which created a civil debt. If any one wants to go behind that decree it is not the plaintiffs but the defendants. That was no doubt a case in which the original liability arose out of a tort whereas here it arose out of a partnership debt, but in this case as well as in the other it is not the plaintiffs who have to allege or prove either the tort or the partnership, as the case may be, as the foundation of their claim which rests upon a decree constituting a civil debt jointly against the plaintiffs and the defendants. As observed by Lord Watson at page 332:

1. (1894) A.C. 318.

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" The respondent company (the plaintiff) do not require to allege and prove either delict or *quasi* delict as the foundation of their claim, which rests upon a decree constituting a civil debt against the appellant as well as against themselves. There might be some principle in a court of Law refusing to permit a suitor to aver and prove his own crime or moral delinquency as the medium of recovering from one whom he alleges to have been a co-delinquent. But the case is very different where the injured party's claim of damage is liquidated by a joint and several decree against all the delinquents. In that case—which is the present case—the sum decreed is simply a civil debt, and the meaning which the law attaches to a decree constituting a debt in these terms is, that each debtor under the decree is liable *in solidum* to the pursuer, and that *inter se* each is liable only *pro rata* or in other words, for an equal share with the rest. In this case it is the appellant who seeks to escape from the natural import of the decree, by going behind it in order to establish his own co-delinquency. It was urged for the appellant that, seeing it is impossible to determine the exact proportion of the total damage attributable to the fault of each debtor, the whole loss must fall upon the debtor against whom the creditor chooses to enforce the decree, otherwise contributors might have to pay in excess of their real share. I cannot appreciate the force of that reasoning. The creditor is not bound to recover the whole from one, he may take it from all in what proportions he chooses; but that right of selection is not given to him in order that he may assess the damage due by each, but for his own convenience and in order that he may get in his money with the least possible trouble. And I fail to see how any inequality in contribution, such as the appellant suggested, could be redressed by the adoption of a rule which would practically leave it to the creditor to determine whether his damages should be borne by one or more or all of the debtors, and if by all in what proportions. The result of the rule, in many cases, would be that the whole loss would fall upon the debtor who had the least share in causing the injury."

Reference may also be made to the following observation of Lord Herschell,. L.C., at pages 323 and 324:

" It was urged that the person seeking relief might be the more culpable of the delinquents; but it is just as likely that he should be the less culpable. In selecting from which of his co-debtors he will obtain payment, the creditor would be guided usually by considerations wholly independent of the relative culpability of those from whom he may recover it."

In the present case also, when the creditor chose to proceed against the plaintiffs' joint family property it cannot be said that he selected that judgment-debtor who in his opinion was in debt with the partnership. It may have been any other reason which led him to select the plaintiffs as the persons from whom the whole decree debt was to be recovered. His choice certainly does not decide the question of the rights of the co-judgment-debtors *inter se*. After careful consideration I am of the opinion that if the present suit for contribution had been brought by Avadiappa himself it would have been main-

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tainable and that the Privy Council decision in *Gopala Chetty* v. *Vijayaraghavachariar*[1] would not have stood in his way.

The other point may be dealt with far more briefly for on this question I generally agree with the views expressed in the judgment of Stone, J. Both the learned Judges are agreed that the plaintiffs themselves were not partners, and it is not seriously contended that they were partners in any sense of the term. The judgment of their Lordships of the Privy Council reported in *Pichappa Chettiar* v. *Chockalingam Pillai*[2], approving the following passage in Mayne's Hindu Law puts the matter beyond doubt:

"Where a managing member of a joint family enters into a partnership with a stranger, the other members of the family do not *ipso facto* become partners in the business so as to clothe them with all the rights and obligations of a partner as defined by the Indian Contract Act. In such a case, the family as a unit does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger; the partnership will be governed by the act."

In this case the 1st plaintiff as well as the 2nd plaintiff were minors even when the decree was obtained by the creditor. They are shown in the plaint in the suit of 1912 as being aged 6 and 3 years respectively. It is also admitted that it was Avadiappa who joined the firm as a partner; the plaintiffs were never in any sense of the term, and could never have been in any sense of the term, partners. The argument seems to be that though the plaintiffs never were partners, still they must be "deemed to stand in the shoes of their father", Avadiappa who was a partner and therefore be subject to all the disabilities as partner to which Avadiappa was subject. This metaphor of the son standing in the shoes of the father is a dangerous metaphor because it is misleading, and instead of shedding light on the subject merely darkens counsel. As a matter of law, the son does not "stand in the shoes" of his father even as regards debts not illegal or immoral incurred by the father. The doctrine of pious obligation which imposes the liability does not make the son personally liable nor the son's separate property liable. It only makes liable the joint family property of the father and the son. It is enough in this connection to refer to the observations of the Privy Council in

1. (1922) 43 M.L.J. 305: L.R. 49 I.A. 181: I.L.R. 45 Mad. 378 (P.C.).
2. (1934) 67 M.L.J. 366 at 371 (P.C.).

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*Sat Narain* v. *Sri Kishen Das*[1] which follows the decision in *Brij Narain* v. *Mangal Prasad*[2]:

"The doctrine (of pious obligation) was not based on any necessity for the protection of third parties but was based on the pious obligation of the sons to see their father's debts paid, and also that it was immaterial to the liability of the family estate whether the father was alive or dead. There can be no doubt that it is a liability of the joint estate."

No doubt the pious obligation of the son, which has become a legal obligation, is to see that the father's debt is paid, but the debt is nevertheless the father's debt; it does not become the debt of the son also because of this obligation though it is no doubt binding on the joint family estate. It can in no way be regarded as a debt due by the son himself. The doctrine really means nothing more than this, that while the managing member of a joint Hindu family who is not the father, can incur debts binding on the joint family property only for justifying necessity or benefit or where there is a *bona fide* belief by the lender after proper inquiry in the existence of such necessity or benefit, the father, who is the managing member of the family, can bind the joint family property in respect of all debts which are not illegal or immoral. The pious obligation of the sons in the latter case prevents them from denying the liability of the joint family estate. The effect of the doctrine is certainly not to make the sons debtors themselves or to make them stand in the shoes of the debtor-father. In this case moreover there is no question of enforcing or applying the doctrine of pious obligation. The pious obligation applies only to debts incurred by the father. In the present case, no doubt the original debt incurred in February, 1908, being a debt due by the partnership, was due also by one of the partners, namely, Avadiappa. So far as the creditor therefore was concerned, that debt was a debt in respect of which the pious obligation could attach, and he could enforce that obligation. But that is the position only *vis a vis* the creditor. But the other co-debtors (partners) cannot possibly rely on the pious obligation of the son of one of the co-debtors unless and until there is a debt due by that co-debtor, Avadiappa to them, and except in connection with such a debt. The mere incurring of a debt by one of the partners does not make it a debt due by any one

1. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).
2. (1923) 46 M.L.J. 23: L.R. 51 I.A. 129: I.L.R. 46 All. 95 (P.C.).

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partner to the other partners. Whether it results in any debt due by any one partner to the other partners will depend on the taking of accounts and not till then, because until the account is ascertained it is not possible to say whether any particular partner's account will show credit or debit. At no time were the accounts taken, and it is impossible to say whether Avadiappa, the father of the first plaintiff, ever owed any debt to the other partners. What the defendants are really trying to do is not to enforce any debt due to them by the father against the son, but to enforce what they claim to be an equity in their favour and available against the father as against the son. But the doctrine of pious obligation does not go to this length—that the same defence is available against the son as may be available against the father even in the absence of any debt due by the father to the defendants. There is in my opinion no warrant for such an extension of the doctrine of pious obligation. I therefore agree with my learned brother Stone, J., that the doctrine of pious obligation does not stand in the way of the plaintiffs' claim to contribution in the present suit. It follows therefore that the question referred to me must be answered in the affirmative and I answer it accordingly.

[After the above expression of opinion the appeal came up before their Lordships Madhavan Nair and King, JJ., who delivered the following

JUDGMENT.—It is now sought to be argued by the learned Advocate-General that we should order that an account should be taken of what is due to the plaintiff though the suit for accounts is admittedly barred. It is admitted by the learned counsel that the point was not argued before the Bench that referred the question of Law to the third Judge, but he now says on the reasoning of the decision of the learned Judge Pandrang Row in his judgment he is entitled to argue the question. In our opinion this argument tries to get round the point which has now been decided against him and seeks to open up the whole for a decision on the merits. We think this should not be permitted to be done. As the point was not argued before the Bench we disallow it from being raised now.

The result is that the lower Court's judgment is reversed so far as defendants 1, 2 and 3 are concerned and the plaintiff will get a decree for 14/20 of the plaint amount as against the

3rd defendant in the first instance with liberty to proceed against defendants 1 and 2 after exhausting all remedies against the 3rd defendant. The plaintiff will get subsequent interest on the amount allowed in his favour at 6 per cent. from the date of the decree. The interest up to the date of the decree will be 12 per cent. The appeal as against defendants 4 and 5 is dismissed without costs. The plaintiff will get proportionate costs as against defendants 1 to 3 in both the Courts; on the disallowed portion the 3rd defendant will get proportionate costs from the plaintiff in both the Courts.

This case having been set down to be spoken to this day, the Court delivered the following

JUDGMENT:—The decree as against defendants 1 and 2 and the legal representative of the 3rd defendant will be limited to the respective family assets in their hands except as to costs for which they will be personally liable.

In the latter portion of the judgment where it is stated that the "plaintiff" will get a decree the word "plaintiffs" will be substituted for the word "plaintiff" and the same alteration will be made in the judgment wherever necessary.

B. V. V. —— *Appeal allowed.*

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD THANKERTON, LORD ROCHE, LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Sardar Mohammad Nawaz Khan .. *Appellant**

*v.*

Bhagata Nand (Gurdwara Committee Panja Sahib at Hassan Abdal since substituted) .. *Respondent.*

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*Jurisdiction—Civil and Revenue Courts—Liability for* haq buha *or village cess—Statutory provision taking off jurisdiction of Civil Court—Suit for declaration of non-liability—Maintainability in Civil Court—Punjab Tenancy Act (XVI of 1887), S. 77 (3).*

On principle it is for the Civil Court to determine in the last resort the limits of the powers of a Court of special jurisdiction. But where there is a statutory prohibition as under S. 77 (3) of the Punjab Tenancy Act, preventing the Civil Court from entertaining suits regarding the liability of persons

* P. C. Appeal No. 135 of 1936. 27th May, 1938.

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in a village, say for levy of *haq buha* or village cess, and the Revenue Court is made the only Court competent to try a suit for a declaration that no such cess is leviable at all in the village, it cannot be held that the Civil Court can try a suit for a declaration that the plaintiff is not a member of the class liable therefor. The purpose of the prohibition in sub-S. (3) of S. 77 of the Punjab Tenancy Act is to prevent claims which are intended to be decided by the Revenue Court from being in effect carried before the Civil Court by altering the form in which the matter is raised. On the other hand if the suit brought in the Civil Court had been a suit to declare that *haq buha* was not a village cess within the meaning of the Punjab Tenancy Act and that Revenue Courts had no jurisdiction in respect thereof, such a suit could not have been regarded as incompetent.

*Gamu* v. *Karim Khan*, (1908) 33 P.R. 1908 (F.B.), approved.

*Sheikh Muhammad* v. *Habib Khan*, (1905) 67 P.R. 1905 and *Singh Ram* v. *Kala*, (1925) I.L.R. 7 Lah. 173, overruled.

Decision of the Lahore High Court reversed.

Appeal from a decree dated 16th May, 1934, of a Division Bench of the High Court, Lahore (Tek Chand and Monroe, JJ.) allowing an appeal from a decision of the same Court (Johnstone, J.) dated 28th October, 1930, affirming a decree of the District Court, Attock, which dismissed an appeal from a decision of the Subordinate Judge of Campbellpur.

*J. M. Gover, K.C.* and *J. E. Godfrey* for Appellant.—The objection to the plaintiff's action is twofold; it is barred by the terms of S. 77 (3) of the Punjab Tenancy Act, 1887, as being a suit for a sum payable on account of village cess, and it raises a matter which is *res judicata* in view of the Collector's adjudication on the matter. It is no less a suit for a sum payable because it happens to take the form of a suit for a declaration of non-liability to pay the sum in question.

*P. V. Subba Row* for Respondent.—The plaintiffs' suit is not within the terms of S. 77 (3) (*j*). It is a suit for a declaration that the plaintiffs are not of the class liable to pay village cess, and that cannot be said to be a suit for a sum payable within the meaning of the sub-section.

27th May, 1938. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The appellant, Sardar Mohammad Nawaz Khan, a Muslim, is the principal proprietor of the village Kot Fateh Khan in the district of Attock in the Punjab. According to the *wajib-ul-arz* prepared at the time of the settlement of 1904, the appellant as proprietor is entitled to realise a tax or cess called *haq buha* (door-tax). So far as material the entry is as follows:

"*Haq buha* is realised annually from the *kamins* or non-proprietors living inside the *abadi* of our village at a rate ranging from Re. 1 to Rs. 2.... *Haq buha* is taken by Sardar Mohammad Nawaz Khan only."

The original dispute in the present case was whether the appellant was entitled to claim this tax from one Parkasha Nand, who was the head or mahant of an old shrine called Deri Baba Than Singh situate in the village, and who has died pending the litigation. The claim is not made against the shrine as an institution or against any mahant by reason of his office, but is a claim preferred against the individual as being a non-proprietor of the village residing therein.

Chapter VII of the Punjab Tenancy Act (XVI of 1887) deals with jurisdiction and procedure, and the material parts of sub-section (3) of S. 77 and of the definition section (S. 4) of the Act, are as follows:—

"S. 77

* * * *

"(3) the following suits shall be instituted in, and determined by Revenue Courts, and no other Court shall take cognisance of any dispute or matter with respect to which any such suit might be instituted:—

"Provided that—

"(1) Where in a suit cognisable by and instituted in a Civil Court it becomes necessary to decide any matter which can under this sub-section be heard and determined only by a Revenue Court the Civil Court shall endorse upon the plaint the nature of the matter for decision and the particulars required by O. 7, r. 10, Civil Procedure Code, and return the Plaint for presentation to the Collector.

* * * *

"(*j*) Suits for sums payable on account of village-cesses or village expenses . .. ."

"S. 4.—In this Act unless there is something repugnant in the subject or context:—

* * * *

"(12) 'Village cess' includes any cess, contribution or due which is customarily leviable within an estate and is neither a payment for the use of private property or for personal service nor imposed by or under any enactment for the time being in force . . ."

In addition to these provisions it may be noticed that the Act empowers a Revenue Court (with the sanction of the Court to which it is immediately subject), if it considers that a question is more proper for decision by a Civil Court, to require any party to a proceeding in the Revenue Court to

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institute a suit in the Civil Court for a decision on the question (S. 98). Also that the Act empowers either Civil or Revenue Court to refer to the High Court questions as to jurisdiction (S. 99), and contains provisions enabling the High Court, where a suit has been determined by a Court of the wrong class, to order that the decree be registered in the Court which had jurisdiction (S. 100).

On the 9th August, 1925, the appellant sued Parkasha Nand in the Court of the Revenue Assistant at Attock for Rs. 28—being two rupees for each of the 14 years 1912-25 inclusive—on account of *haq buha,* which the plaint alleged to be a village cess realisable from Parkasha Nand in terms of the *wajib-ul-arz* on the ground that he was a non-proprietor living in the *abadi* of the village. The claim for 14 years' arrears was said to be saved from limitation by reason of the appellant's minority. Parkasha Nand disputed that he lived in the *abadi* or was a non-proprietor or was within the class of persons liable to the tax or that he or his predecessors had ever paid or been asked to pay it. He also disputed the jurisdiction of the Revenue Court. On the 17th November, 1925, the Revenue Assistant held that he had jurisdiction, and on the 5th January, 1926, Parkasha Nand brought in the Court of the Subordinate Judge at Attock the suit out of which the present appeal has arisen. At that date the suit in the Revenue Court had not been decided, but Parkasha Nand referred to it in his plaint and asked for a declaration from the Civil Court that he was not liable to pay *haq buha.* After unsuccessful endeavours by him to obtain a stay of proceedings in the Revenue Court, judgment therein was given on the 13th June, 1927. The Revenue Assistant held that the custom was valid, old and uniform and that Parkasha Nand was a non-proprietor, having a particular house as residence in the village: he also believed the evidence of a number of old *sadhus* connected with the shrine to the effect that previous mahants had paid the tax, and held that there was no evidence to prove that Parkasha Nand was exempt. An appeal was taken to the Collector from this decision, but before that appeal was decided the Subordinate Judge, on the 25th November, 1927, having refused to stay the civil suit, gave judgment against Parkasha Nand upon the merits, holding that *haq buha*

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was a customary cess and that Parkasha Nand was liable to pay it; but finding that neither he nor his predecessors had paid it in the past. In the next month (the 9th December, 1927), the Collector dismissed his appeal from the Revenue Assistant, holding that *haq buha* was a village cess and that it had been paid in the past by previous mahants. Parkasha Nand, having appealed to the District Judge against the Subordinate Judge's dismissal of his suit for a declaration, died while this appeal was pending and one, Bhagta Nand, was appointed by the District Judge (the 10th September, 1928), to be the appellant's representative for the purposes of the appeal.

On the 24th December, 1928, the District Judge dismissed the appeal, holding that the Civil Court's jurisdiction was ousted by sub-section 3 of S. 77 of the Act of 1887 and that in any case the matter was *res judicata* by reason of the decision of the Revenue Courts. On the merits he rejected the contention that Parkasha Nand was not a non-proprietor or was not resident in the village, but he held that neither Parkasha Nand nor any predecessor of his had ever paid *haq buha*; and that the custom did not apply to a person holding so peculiar a position as the mahant of the shrine. From this decree a second appeal was preferred by Bhagta Nand to the High Court at Lahore; this was heard and dismissed by Johnstone, J., on the 28th October, 1930, on the ground that the suit was not cognisable by a Civil Court. A letters patent appeal having been brought by leave of the learned Judge to a Division Bench, Tek Chand and Monroe, JJ., on the 16th May, 1934, reversed all the previous decrees in the suit; held that the suit was within the jurisdiction of the Subordinate Judge; and, as the District Judge had found as a fact that the village custom did not apply to a mahant of the shrine, held that the suit for a declaration must succeed. Thereafter, this appeal to His Majesty was brought by special leave from the decree of the Division Bench, and by an order of the High Court dated 6th April, 1936, the Gurdwara Committee, Panja Sahib, was appointed to contest the appeal in place of Bhagta Nand for reasons to which their Lordships see no need to refer.

Mr. Gover in his argument for the appellant took two points:—(1) that the suit brought in the Court of the

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Subordinate Judge for a declaration that the appellant was not entitled to demand any amount from Parkasha Nand as *haq buha* was one of which that Court was forbidden to take cognisance by the terms of sub-section (3) of S. 77 above quoted; (2) that the matter was concluded by the decision of the Revenue Court—that is, *res judicata*. Their Lordships do not find it necessary to deal with the second point.

On the first point their Lordships are of opinion that the appellant's contention is right, but they will preface their decision by stating that, had the suit brought in the Civil Court been a suit to declare that *haq buha* was not a village cess within the meaning of the Act of 1887 and that the Revenue Courts had not jurisdiction in respect thereof, such a suit could not have been regarded as incompetent. On principle it is for the Civil Court to determine in the last resort the limits of the powers of a Court of special jurisdiction and no statutory provision to the contrary has been drawn to their Lordships' attention in the present case. It is, however, found or assumed by all the courts in the present case that *haq buha* is leviable in this village by custom and is therefore a village cess; Johnstone, J., in his judgment states that in his Court this was agreed, and the Division Bench clearly proceeded on that view.

*Haq buha* being a village cess, S. 77 not only requires that a suit to recover sums payable on account thereof should be brought in the Revenue Court but forbids any other Court to take cognisance of "any dispute or matter with respect to which any such suit might be instituted." Their Lordships see no way of interpreting these words which would exclude from their scope the question of the liability of Parkasha Nand or any other person to pay the cess. His suit was not a "suit for a sum payable" within clause (*j*) because it was a suit for a declaration negativing his liability, but it raised a matter with respect to which a suit under clause (*j*) might have been instituted. The purpose of the prohibition in sub-section (3) is to prevent claims which are intended to be decided by the Revenue Court from being in effect carried before the Civil Court by altering the form in which the matter is raised. As many matters are brought under sub-section (3) of S. 77, it is important to notice that the mere fact

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that the "dispute or matter" is one which might arise incidentally in a suit of the character mentioned in such a clause as (*j*) is not sufficient to exclude it from the jurisdiction of the Civil Court. For example, the ordinary suit in the Civil Court for declaration of title to immovable property would not become incompetent merely by reason that one consequence of the plaintiff's getting a decree would be that as a proprietor he could not be charged with village cess. In such a title suit the "dispute or matter" of the action would not be the question of the plaintiff's liability to village cess. Of the present case it is clear that the matter in dispute is the very thing with respect to which a suit of the class described in (*j*) would be concerned as its subject-matter. Their Lordships are in agreement with the Full Bench decision of the Chief Court of the Punjab in *Gamu* v. *Karim Khan*[1]. The claim (according to the report) was for a declaration that the plaintiffs as occupancy tenants were not liable to pay *haq buha* and Robertson, J., delivering the judgment of the Court, observed:

"Liability for the payment of a cess alleged to exist in the village is the subject-matter of the dispute and the dispute or matter is one in regard to which a suit could be brought under S. 77 (3) (*j*). We think that a suit like the present for a declaration is of the same nature as a reply to a suit under S. 77 (*j*), which suit is clearly triable by a Revenue Court; and the mere fact that the form of the suit is one for a declaration that the cess is not payable, instead of an assertion that a definite sum is payable by way of cess, does not alter its character, or give the Civil Courts jurisdiction, when the dispute or matter itself is clearly one as to which a suit could be brought under S. 77 (3) (*j*)."

This principle was not followed in the present case by the learned Judges who heard the letters patent appeal, partly because of other decisions but chiefly because the Full Bench found in a case which had been previously decided by one of its members: *Sheikh Muhammad* v. *Habib Khan*[2], a distinction which they deemed to be applicable to the present case. In that case the Civil Court had been held competent to entertain a suit for a declaration that certain village dues were recoverable only from *kamins* who construct houses on land belonging to proprietors and that the plaintiffs

1. (1908) 33 P.R. 1908 (F.B.).

2. (1905) 67 P.R. 1905.

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as owners of their houses and cultivators were not liable therefor. The learned Chief Judge considered that "the dispute must be closely allied to the suit, in this case a suit for a sum payable" and that this could not be said of a suit for a declaration that the plaintiffs "shall be lifted out of a category affected by a clause in the *wajib-ul-arz* under which they are liable to pay *kamiana*." The Division Bench in the present case regarded the Full Bench decision as explained by the fact that the plaintiffs in the Full Bench case had asked for a declaration that *haq buha* was not leviable at all in the village —a circumstance which they discovered from the record. Their view was that the Civil Court has jurisdiction where the plaintiffs claim a declaration that though certain cesses are payable the plaintiffs are not liable to pay by reason of not belonging to classes from which payment can be claimed. Their Lordships cannot accept this as a sound construction or application of the terms of S. 77 (3). If the Revenue Court is the only Court competent to try a suit for a declaration that no *haq buha* is leviable at all in the village, it is impossible to hold that the Civil Court can try a suit for a declaration that the plaintiff is not a member of the class liable therefor. The latter claim is more exactly the counterpart of the suit described in clause (*j*) than the former, but both are suits which have for their subject-matter the liability of the plaintiffs for the cess. To lift the plaintiff out of the category of persons liable to the tax according to the village custom is only to hold that the custom does not apply to the plaintiff or that the plaintiff is not liable for the tax. The decision in *Sheikh Muhammad's case*[1] is in their Lordships' view open to the criticism that it permitted the fact that the plaintiff's suit was for relief of a very different kind from that mentioned in clause (*j*) to obscure the fact that what the Act calls "the dispute or matter" was the same in both. A suit to take the plaintiff out of any other category than that defined by a custom as to village cesses or expenses would not be rendered incompetent by the section so far as clause (*j*) is concerned; and if the suit was not a suit about the custom or the plaintiff's liability under the custom, it would be equally competent notwithstanding that the plaintiff's rights in the subject-matter of the suit depended upon his proving something which would

1. (1905) 67 P.R. 1905.

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be inconsistent with his being liable under the custom. After all, the same "category" may be employed for many different purposes. Their Lordships are of opinion that *Sheikh Muhammad's case*[1] and the cases which follow it (for example, *Singh Ram* v. *Kala*[2]) should be overruled.

It was suggested in argument for the respondents that clause (*j*) must be interpreted as applying only to cases where the sole dispute is as to the amount payable, but this is not consistent with the language of the statute or with the decisions. What clause (*j*) characterises is a class of claim; whether a suit comes within it or not does not depend on the defence taken to the claim.

Their Lordships think it convenient to notice that the sole question before the Civil as before the Revenue Court was the liability of Parkasha Nand, deceased, to pay the cess in his lifetime. Neither the shrine nor the office of mahant nor any successor of Parkasha Nand was a party to either suit or is bound by the result. If in the future any claim for the cess be made against a successor of Parkasha Nand, it will presumably be against him personally and as an individual, and he will not be precluded from contesting it anew. In view of the divergence of opinion disclosed by the present case upon the question whether a mahant of such a shrine as Deri Baba Than Singh is within the custom of this village, any Revenue Court will doubtless scrutinise the evidence as to the scope of the custom with special care, unless indeed it sees fit to use its powers under S. 98.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the suit dismissed with costs throughout.

Solicitors for Appellant: *Sharpe, Pritchard & Co.*

Solicitors for Respondent: *Hy. S. L. Polak & Co.*

R. C. C. ——— *Appeal allowed.*

1. (1905) 67 P.R. 1905. 2. (1925) I.L.R. 7 Lah. 173.

# PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, LORD ROCHE, LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Mahant Satnam Singh .. *Appellant**

*v.*

Bawan Bhagwan Singh .. *Respondent.*

*Religious endowments—Sikh Math—Succession to Mahant—Nomination by outgoing Mahant—Confirmation by members of fraternity—Procedure.*

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Succession to the office of Mahant and the ownership of the Math property limited by the tenure of the office should be regulated by the custom of the particular Math. Where the Mahant resigns during his life and installs his successor on the gaddi, it is necessary that the fraternity should be made aware of the proposed vacancy in the office and should be given the opportunity of confirming or refusing to confirm the nominee. As regards notice of the Mahant's intentions, that is not a matter of strict formalities, and the practice of sending a runner round with a verbal intimation would be sufficient. As regards confirmation by the *Bhek*, it does not involve anything in the nature of an election or the passing of a resolution. Where the members of the *Bhek* who are present actually take part in the ceremonies such as in application of "*telak*" to the forehead of the new Mahant and in making money presents the confirmation may well be said to be made.

Decision of the Allahabad High Court affirmed.

Appeal from a judgment of the High Court, Allahabad (Kendall and Iqbal Ahmad, JJ.) dated 18th September, 1934, affirming a judgment and decree of the First Additional Subordinate Judge, Benares, dated 3rd July, 1931, given in favour of the plaintiff-respondent.

*A. M. Dunne, K.C.* and *J. M. Parikh* for Appellant.—It was admitted on behalf of the respondent in the Court below that confirmation by the *Bhek* is necessary at the time of the installation of a person in the office of Mahant, and there is no sufficient evidence here that any such confirmation was ever given. The Mahant could not abdicate in his lifetime, and confirmation by the *Bhek*, if it takes place at all, does so on the seventeenth day after the death of the reigning Mahant at the end of his *Kriya Karam* ceremonies, when members of the *Bhek* who have come to attend those ceremonies either install or refuse to install the *chela* on the *gaddi*. Confirmation is necessary at the time of installation of a new Mahant, whether that installation takes place during the life-

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*P. C. Appeal No. 119 of 1936. 27th May, 1938.
Allahabad Appeal No. 37 of 1934.

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time of the existing Mahant or after his death. And in either case there should be a properly convened meeting. The gathering on 13th April, 1928, when the respondent was installed, was not a validly convened meeting.

Respondent not represented.

27th May, 1938. Their Lordships' judgment was delivered by

Lord Thankerton.

Lord Thankerton.—The appellant seeks reversal of both the judgment and decree of the Court of the First Additional Subordinate Judge at Benares dated the 3rd July, 1931, and the judgment and decree of the High Court of Judicature at Allahabad, dated the 18th September, 1934, which affirmed it. The appeal was heard *ex parte*, as the respondent did not appear.

The dispute relates to the office of Mahant of the Chaitanya Math, founded in Benares according to the rules and practice of Sadhus of a Sikh community known as the Nanakshahi Nirmali Sampradaya, according to the custom and usage of the Math. For the purposes of this appeal, the facts are much clarified by concurrent findings by the Courts below, and the matters in dispute are narrowed so that the main point left in dispute is whether the respondent, who is plaintiff in the suit, was validly installed as Mahant on the 13th April, 1928.

The last Mahant, Ratan Singh, died on the 23rd June, 1928, leaving a will dated the 5th June, 1928, under which he nominated the appellant as his successor and made him owner in possession of the Math property. The appellant claims that his nomination was subsequently accepted by the Bhek, or fraternity, and that he was duly installed on the gaddi by them on the 9th July, 1928, in accordance with custom. The appellant has since, in fact, continued in possession of the Math and the Math property.

While the validity of the appellant's installation has been disputed by the respondent on other grounds, the main ground is that the respondent had already been validly installed, and that accordingly there was no vacancy at the time of the appellant's installation. Mr. Dunne, on behalf of the appellant, admitted that this contention must succeed, if the respondent's installation was a valid one. If the respondent's installation was invalid, the suit must fail, as it is framed solely on the

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basis that the respondent is Mahant, and, in this view, it would be equally unnecessary to consider the validity of the appellant's installation. It may, however, be mentioned that the respondent's attack on the validity of Mahant Ratan Singh's will has failed, by reason of concurrent findings of the Courts below, and the only question is whether it was inoperative, on the ground that prior to its date Ratan Singh had already effectively divested himself in favour of the respondent. The decision of this appeal, therefore, turns solely on the validity of the respondent's installation.

There can be no doubt that succession to the office of Mahant, and the ownership of the Math property, limited by the period of tenure of the office, is to be regulated by the custom of the particular Math, and the respondent, as plaintiff in the suit, is bound to allege and prove what the custom of the particular Math is and that his acquisition of the Mahantship was in accordance with such custom. In the present case the pleadings disclosed material divergences between the appellant and the respondent as to the custom of this particular Math, but, with the possible exception of one point, these differences have been disposed of by concurrent findings of the Courts belo .r.

There is no dispute now that Mahant Ratan was entitled to resign his office during his lifetime, and the question is (1) whether he was entitled to appoint and install his successor at his own hand, without the approval and confirmation of the Bhek, and (2) if such approval and confirmation was necessary, whether the respondent was in fact installed by Mahant Ratan with such approval and confirmation.

On the first of these two questions, the respondent pleaded and went to trial on the allegation that that approval or confirmation by the Bhek was unnecessary, but after he had closed his evidence and after the appellant had been examined, his vakil made an important admission, which was recorded, namely :—

"Munshi Bahadur Lal, the plaintiff's vakil, stated that his case is this, that the plaintiff alone was installed to the gaddi, and for the period of his minority his father, Hardeo Singh, superintended over him.

"According to custom two Mahants cannot be installed at one and the same time.

"Confirmation is necessary at the time of installation to gaddi of Mahantship, and the members of the Nirmala Sanghat, and Sewaks and raises

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are invited. Whether any of these attend or not, confirmation is completed, unless there is some objection as to the gaddinashini.

"But it is not necessary that that person alone who has been nominated by the Guru should be made the gaddinashin."

The Subordinate Judge stated:—

"Both the parties agree that it is necessary that the fraternity should give a sort of approval at the time of the installation of a particular person as the Mahant of the Math in question. There is a definite allegation on this point on behalf of the defendant No. 1 in the written statement, while the learned advocate for the plaintiff has also accepted it in his statement recorded on paper No. 330-C."

In reference to this statement, the learned Judges of the High Court stated:—

"The natural interpretation of the admission appears to us to be that although a presiding Mahant may nominate his successor during his lifetime, it is necessary for the successor to be confirmed in the office by the members of the Nirmala Sanghat at the time of the installation; and also that it is necessary at the time of the installation of a new Mahant to invite the members of the Sanghat, who have the right on the occasion of the ceremony of either confirming or rejecting the candidate nominated. As there was some doubt in our minds as to the proper interpretation of the admission, however, we asked Mr. Bahadur Lal, who was present in Court, what he had intended to convey, and he stated that he was only referring to a case where a Mahant had nominated his successor, but not installed him during his lifetime."

The learned Judges were inclined to accept this qualification of the admission, but found it unnecessary to decide the question "because we have on the facts agreed with the finding of the trial Court, that the members of the Bhek did by their acts or omissions confirm the installation."

In the opinion of their Lordships, the admission of the plaintiff's vakil, as recorded, is quite unambiguous and clearly covers the installation of the respondent, his client, which is directly referred to in the first two sentences of the statement, and the appellant was thereafter entitled to proceed with the trial on that footing; the respondent's vakil should not have been permitted to qualify his clear admission.

As to the meaning of confirmation by the Bhek the Subordinate Judge states:—

"It means that at the time of the installation a sufficient number of persons of the fraternity or the Bhek should be present so as to signify their general approval of the appointment of that particular chela as the Mahant of the Math."

The learned Judge, after reviewing the evidence, stated that the documentary evidence conclusively and beyond any doubt established that the respondent was installed on the

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gaddi by the late Mahant Ratan Singh, and that all the facts went to prove that the installation of the respondent on the gaddi on the Baisakhi day (13th April) of 1928 was followed by confirmation of the Bhek people. He referred to the evidence of four of the appellant's witnesses who stated that they were present, but thought that it was a matter of entrusting the kitchen arrangements to the respondent and his father, and added, "but one fact becomes quite apparent that on the Baisakhi day of 1928 some function did take place in Chaitanya Math, that people had been duly informed about it, and consequently they did attend it. I hold that the plaintiff has established that his installation was followed by confirmation of the Bhek or fraternity." As already stated, the High Court concurred in this last finding, and they also held that the decision of the trial Court that the respondent was installed on the 13th April, 1928, was correct. In accordance with their usual practice, their Lordships would not interfere with such concurrent findings, unless there was no sufficient evidence to support them.

In the normal case of the death of a Mahant, the members of the fraternity will be fully aware of the vacancy in the office, and the usual practice will be for the installation of his successor, usually nominated by him, to take place on the seventeenth day after the death. On the other hand, when the Mahant resigns during his life and installs his successor on the gaddi, it is obvious that the fraternity should be made aware of the proposed vacancy in the office and should be given the opportunity of confirming or refusing to confirm the nominee. As regards notice of the Mahant's intentions, this is not a matter of strict formalities, and the practice of sending a runner round with a verbal intimation, which was adopted in the present case, appears to their Lordships to meet the situation. Further, in the present case, the evidence places it beyond doubt that the fraternity were fully aware of the Mahant's intentions, and the day chosen was a most important and auspicious one, being the birthday of Sikhism, which is observed as the New Year's Day in the Punjab, festivities and religious ceremonies being held in all the Gurdwaras and Sanghats.

Again, as regards confirmation by the Bhek, it does not, in their Lordships' opinion, involve anything in the nature of an

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election or the passing of a resolution; it is important to remember that the members of the Bhek present actually take part in the ceremony; the application of "tilak" to the forehead and the money presents made by them are a part of the ceremonies, and may well be held to establish confirmation of the person installed. In the opinion of their Lordships there was ample evidence to justify these concurrent findings, and the appeal must fail.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs, and the decree of the High Court should be affirmed.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

R.C.C. *Appeal dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE ABDUR RAHMAN.

Naivarani Matathil Ayya Pattar .. *Petitioner** (*Petitioner*)

*v.*

Krishnan *alias* Thondee Karuppasan *alias* Thondee Punathunnaval and others .. *Respondents* (*Respondents 1 and 3 to 15*).

Ayya Pattar v. Krishnan.

*Revenue Recovery Act (II of 1864), Ss. 38, 40 and 42—Sale of property for arrears of revenue due—Tenants on the property—Possession symbolical alone allowable—Tenants entitled to claim value of improvements and not right to encumbrances on the property.*

Where in a revenue sale properties were purchased by the petitioner and a sale certificate under S. 38 of the Revenue Recovery Act was issued in his favour, but when he applied for possession he was obstructed by the tenants on the property and the lower Court gave only symbolical possession to him and granted the value of improvements to the tenants,

*Held*, that the result of the sale under S. 42 of the Revenue Recovery Act was that the property became only free of encumbrances. It followed therefore that actual possession in the circumstances could not be granted. Under S. 40 of the Act such possession as will be given to a decree-holder under the Civil Procedure Code will be given to the purchaser (*vide* O. 21, r. 36).

*Chithambaram v. Natesan*, (1891) 1 M.L.J. 594; *Kelan v. Manikam*, (1888) I.L.R. 11 Mad. 330 and *Narasimha v. Surianarayana*, (1892) 2 M.L.J. 153 I.L.R. 16 Mad. 144, distinguished.

(2) that the tenants could not claim under S. 42 the right to be recognised as holders of encumbrances on the property having regard to the nature of their claim which was only a right to be paid the value of improvements.

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* C. R. P. No. 1695 of 1934. 25th April, 1938.

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Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsiff of Payoli, dated 17th July, 1934 and made in E. A. No. 1040 of 1933.

*K. P. Ramakrishna Aiyar* for Petitioner.

*B. Pocker* and *A. Achuthan Nambiar* for Respondents.

The judgment of the Court was delivered by

Madhavan Nair, J.

*Madhavan Nair, J.*—This Civil Revision Petition arises out of an application made by the petitioner before us under S. 40 of the Madras Revenue Recovery Act for possession of the property in pursuance of a Revenue sale certificate issued to him by the Collector.

The facts are these. The first respondent is the jenmi of the property. The second respondent is the kanamdar. Respondents 3 to 14 are tenants under the kanamdar. The property was sold for arrears of the Government Revenue due on it from the first respondent and it was purchased by the petitioner. A sale certificate under S. 38 of the Revenue Recovery Act was issued in his favour and it stated that the petitioner had purchased at a public auction the property mentioned therein when it was sold for arrears of revenue due by the first respondent. It did not make any mention of the second respondent or of respondents 3 to 14. When the petitioner applied for possession, respondents 3 to 14 claimed the value of the improvements. The lower Court passed an order that the petitioner is entitled to symbolical possession, holding that respondents 3 to 14 are entitled to the value of the improvements.

In this Civil Revision Petition two points are argued. The first is that the lower Court has committed an error in the exercise of its jurisdiction because it has refused to deliver actual possession to the petitioner what was delivered to him being only symbolical possession. It is contended that under S. 40 of the Revenue Recovery Act under which the application was made by the petitioner for possession the lower Court should have delivered to him actual possession. It appears to us that this argument is untenable. S. 40 says that the purchaser shall in the circumstances mentioned therein be put in possession "in the same manner as if the purchased lands had been decreed to the purchaser by a decision of the Court", that

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is, such possession as will be given to a decree-holder under the Civil Procedure Code will be given to the purchaser under this section. This is the kind of possession which the purchaser is entitled to get of the property mentioned in the sale certificate. Under O. 21, r. 35, Civil Procedure Code, actual possession will be delivered to the decree-holder by removing any person bound by the decree who refuses to vacate the property. Under O. 21, r. 36, Civil Procedure Code, if in execution of the decree the Amin finds that a person against whom no decree has been passed is in possession claiming right to the property, then symbolical possession only of the property will be delivered to the decree-holder. In the present case the revenue sale was directed against the first respondent (the jenmi) and the result of the sale under S. 42 of the Revenue Recovery Act was that the property became free of the encumbrance held by the second respondent. It follows that the sale bound the first and second respondents and not any other person directly; and so, when the Amin went to deliver possession of the property and found that other persons were on it claiming rights he could, under the Civil Procedure Code, deliver to the petitioner only symbolical possession; and that is what the learned Judge in the Court below has held that the petitioner is entitled to. It follows therefore that the argument that the lower Court should in the circumstances have ordered *actual* possession to the petitioner is not sound in law. A few cases were cited to us in support of petitioner's contention, namely, *Chithambaram* v. *Natesan*[1], *Kelan* v. *Manikam*[2] and *Narasimha* v. *Surianarayana*[3]. In none of these cases did the present question arise. In *Chithambaram* v. *Natesan*[1], the question was simply whether the Civil Procedure Code will apply to an application under S. 40 of the Revenue Recovery Act. In *Kelan* v. *Manikam*[2], the question was whether the sale in that case was free of the kanamdar's rights. In *Narasimha* v. *Surianarayana*[3], the question was whether a permanent lease will amount to an encumbrance or not. For the above reasons we must overrule the 1st point that the lower Court should have delivered to the petitioner actual possession instead of symbolical possession.

1. (1891) 1 M.L.J. 594. 2. (1888) I.L.R. 11 Mad. 330.
3. (1892) 2 M.L.J. 153: I.L.R. 16 Mad. 144.

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The next point argued is that respondents 3 to 14 should be considered to be holders of encumbrance on the property since they claim the value of improvements. The argument has not been supported by any authority and we cannot, having regard to the nature of their claim which is only a right to be paid the value of improvement hold that they have an encumbrance over the property within the meaning of S. 42 of the Revenue Recovery Act. In our opinion the decision of the lower Court is right and no error in jurisdiction or of irregularity in the exercise of it has been brought to our notice.

This Civil Revision Petition is dismissed with costs of respondents 7 and 8.

K.C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA RAO.

Balammal .. *Appellant* (2nd Plaintiff)*

*v.*

Palandi Naidu and others .. *Respondents (Defendants 1 and 2 and 1st Plaintiff).*

Balammal v. Palandi Naidu.

*Defamation—Instructions to vakil to reply a letter—Instructions found to be false and* per se *defamatory ·Vakil communicating the same to the opposite party—The instructions if absolutely privileged—Malice in so instructing found—Liable for defamation—Rule in* More v. Weaver, *if can be adopted in India.*

Where a father-in-law addressed a letter to his son-in-law complaining about the ill-treatment accorded to his daughter during her stay in his house and requesting him to take her back and live with her, and in reply thereto the son-in-law and his father instructed their vakil to issue a letter to the following effect that "on or about 7th January, 1927, your daughter Balammal ran away with one Manicka Asari from her husband clandestinely and was staying with him at Kadambathur for two days," and it was found that the case of elopement, etc., was untrue and malicious and made deliberately with a view to escape the possibility of any claim on the part of the wife,

*Held*, the communication though made to their legal adviser was not absolutely privileged. The privilege in circumstances like this is only a qualified privilege and not an absolute privilege. Unless a communication is made to a vakil in connection with a judicial proceeding or in connection with a necessary step preliminary thereto or with reference to an act incidental to the proper initiation thereof, it would not be absolutely privileged. *More* v. *Weaver*, (1928) 2 Q.B. 520, is doubted even in England and ought not to be adopted in India, where the law governing defamation in civil cases is justice, equity and good conscience and the older view in England before *More* v. *Weaver*, (1928) 2 Q.B. 520, of treating communications like the one

* Appeal No. 500 of 1931. 7th September, 1937.

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in question under the head of qualified privilege ought to be the rule of justice, equity and good conscience, as it is more equitable and just.

In as much as it was found that the words spoken concerning the wife (second plaintiff) were false and made from an improper motive, the defendants were liable in damages.

Appeal against the decree of the District Court of Chingleput in O. S. No. 9 of 1928.

*K. Rajah Aiyar, G. N. Tirumalachariar* and *G. N. Rangaswamy* for Appellant.

*P. Krishnamachari* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

*Venkataramana Rao, J.*—This is an appeal from the decree of the learned District Judge of Chingleput dismissing an action for damages for defamation instituted by the first and second plaintiffs. The defamatory matter complained of was a communication made by the first and second defendants to one Mr. G. Krishnamachari, a Vakil at Chingleput and repeated by the said Vakil in a letter dated 9th May, 1927, addressed to the first plaintiff. The second plaintiff is the daughter of the first plaintiff and the wife of the second defendant. The first defendant is the father of the second defendant. The matter complained of was concerning the second plaintiff in the letter addressed as aforesaid to the first plaintiff by the said Krishnamachari to the following effect:—

"On or about 7th January, 1927, your daughter Balammal ran away with one Manicka Asari from her husband clandestinely and was staying with him at Kadambathur for two days."

The second plaintiff was married to the second defendant in or about 1925 and was living with her husband till about March, 1927. Some time towards the latter part of 1926 misunderstandings seemed to have arisen between the second plaintiff and the defendants in regard to the *Kasimalai* worn by the second plaintiff and alleged to have been taken away from her by her husband the second defendant and not returned in spite of demand. As a result of this misunderstanding, the second plaintiff had to leave her husband's home and go to her parent's house in or about March, 1927. On the 25th April, 1927, the first plaintiff addressed a letter to his son-in-law the second defendant complaining about the ill-treatment accorded to his daughter during her stay in his house in consequence of the misunderstandings and requesting him to

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take his wife and live with her. In answer to the said letter, the first and second defendants instructed their Vakil Mr. Krishnamachari to issue the letter dated 9th May, 1927. On receipt thereof the first plaintiff through his Vakil Mr. Nageswara Aiyar complained of the defamatory character of the communication contained in the letter of 9th May, 1927 and called upon them to unconditionally withdraw the same and apologise for the wrongful act. The defendants having failed and neglected to comply with the said request, the first plaintiff instituted a complaint of defamation under S. 500 of the Indian Penal Code. The Joint Magistrate of Chingleput found that the defamatory matter complained of, namely, the running away of the second plaintiff with Manicka Asari, was false and convicted them of the offence charged. The present suit was instituted for recovery of damages.

The material allegations are contained in paragraphs 4, 5 and 9 of the plaint and they are as follows:—

"4. Subsequently on 25th April, 1927, the first plaintiff gave a registered notice to second defendant requesting him to take back second plaintiff to his house and the defendants sent a reply dated 9th May, 1927, accusing second plaintiff of having run away with one Manicka Asari and having lived with him for two days at Kadambathur.

"5. The allegation is absolutely false and was made quite maliciously and recklessly and was intended not only to ruin the character of the second plaintiff but also to ruin her for life and brand her as an unchaste woman.

"9. The defendants are therefore liable in damages to the plaintiffs for having unnecessarily defamed second plaintiff . . . . . . . The first plaintiff is also damnified by the false allegations against his daughter and is also entitled to damages."

Before the filing of the written statement, the first defendant seemed to have asked for particulars of the precise words complained of as being defamatory and the dates when and the persons to whom and the place where the defamatory matter was published by the defendants. In answer thereto, the plaintiffs gave particulars wherein the plaintiffs distinctly stated that they sued in respect of the statement contained in the notice of the defendants dated 9th May, 1927, which has been already quoted above. In regard to the publication complained of, it was stated to be at Chingleput and in regard to the persons complained of, it was alleged thus:—

"The publication was made to first defendant by the second defendant in the first instance, then by both, to the Vakil who gave the reply notice and again was repeated in the Court of the Joint Magistrate, Chingleput."

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In regard to the damages claimed, the plaintiffs contented themselves with the claim for damages on behalf of the second plaintiff. After the receipt of particulars, the defendants filed a written statement. Their main pleas were twofold, (1) justification of the matter complained of and (2) privilege. This second plea is worded thus:—

"They claim absolute immunity or absolute privilege and if not in any event, on account of a defeasible immunity or qualified privilege attaching to the alleged defamation by reason of the occasion of the publication by first defendant to second defendant and by both to their vakil."

The learned District Judge found that the defamatory matter was in substance true and that the evidence established that the second plaintiff ran away with Manicka Asari from her husband clandestinely but she did not live with him for two days and that portion of the matter must be found to be false. He further held that even assuming the plea of justification could not be made out, the defendants were absolutely privileged in making the statement by reason of the fact that the communication was made to Mr. G. Krishnamachari their legal adviser. He thought that in view of his finding as to the absolute privilege, the issue as to qualified privilege did not arise; however he was inclined to think that the plaintiffs have not proved that the defendants were actuated by malice in making and publishing such a statement. As a result of these findings, the learned District Judge dismissed the plaintiff's suit.

This appeal is preferred by the second plaintiff and the findings of the learned District Judge both on questions of fact and law have been canvassed by her counsel Mr. Rajah Aiyar. On the admitted facts, one thing seems to be clear. If the plea of justification is found against, there was the admitted publication of the defamatory matter to the first plaintiff which would sustain a cause of action in favour of the second plaintiff for damages, and the defendants cannot escape liability therefor unless they are able to sustain and prove that they were not actuated by malice in making the said statement. But it is rather curious that this seems to have escaped the notice and attention of the counsel on behalf of the plaintiffs as well as the Court below and the case seems to have been fought out on the question whether there was absolute privilege by reason of the communication by the defendants to their legal adviser, assuming the plea of justification was found against. So before

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dealing with the question of privilege, if the second plaintiff is to succeed, she has to displace the finding in regard to justification. Mr. Rajah Aiyar therefore first took up that point and proceeded to canvass the finding of the learned District Judge in regard thereto. Thus the evidence and probabilities completely establish that the case set up by the defendants that the second plaintiff eloped with Manicka Asari and lived for two days with him is false. There can be no doubt—and it is not denied that the matter complained of is *per se* defamatory—that the said statement is untrue, malicious and has been made deliberately with a view to escape the possibility of any claim on the part of the second plaintiff. The plea of justification cannot therefore prevail and must be rejected.

The next question is, is the plea of privilege sustainable? Under the English law from the earliest times for the discharge of public duties and for due administration of law and for the welfare and convenience of society, and for the transaction of the affairs of society in the ordinary course of daily life it was thought necessary that there should be freedom of speech and freedom of communication; and for that purpose the law has always recognised certain occasions as privileged conferring immunity from liability to an action either absolutely or conditionally, and commonly known as absolute privilege and qualified privilege. Where the plea is sought on the ground of absolute privilege the Courts are precluded from discussing . . . . . . . . . . . . . the good faith of the party who utters or publishes the defamatory statement. If the plea relied on is one of qualified privilege, the immunity the law confers is destroyed by proof of malice. Among the recognised classes of cases to which the doctrine of absolute privilege is held to apply are statements made in the course of judicial proceedings. The reason of the rule is thus stated by Folkard on the Law of Slander and Libel at pages 88 and 89:

> "And the reason is founded on the principle, that, 'the law will rather suffer a private mischief than a public inconvenience'; and that persons engaged in the administration of the law, and those who seek justice in respect of wrongs or injuries suffered or give evidence as to any such, or make defence thereto, may not be deterred from so doing by the fear of being harassed by actions or prosecutions for defamation in respect thereof. And accordingly the law, without regard to the question of intention, and on grounds of obvious policy, repels the claim to damages in respect of any publication, whether oral or written, made in the ordinary course of a judicial proceeding, Civil or Criminal. And this rule applies to Judges, Juries,

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Witnesses, Suitors and parties, in respect of anything stated by them in the course of any such proceeding."

As Brett, J., observed in *Munster* v. *Lamb*[1], it does not matter whether the defendants spoke the words maliciously or without any justification and whether the words spoken were irrelevant. It is not necessary to refer to many cases and it is sufficient if I should refer to *Henderson* v. *Broomhead*[2] where Erle, J., observed thus:

"An action will not lie for defamatory words spoken in the course of litigation which are relevant to that litigation. The authorities are collected in the note to *Lake* v. *King*[3] and the general rule is there stated: 'No false or scandalous matter contained in articles of the peace exhibited to justices of the peace, or in any other proceeding in a regular course of justice, will make it libellous'. Several authorities are cited; they extend over many centuries down to the time when the learned annotator collected them. In *Astley* v. *Younge*[4], where such an action was brought in the Court of King's Bench in Lord Mansfield's time, that learned Judge endeavoured to stop the counsel by saying, 'Shew that a matter given in evidence in a Court of justice may be prosecuted in a civil action as a libel. The Court, indeed, before which such evidence is given may censure it'. The party may be punished, and the abuse repressed by a prosecution for perjury, the result of which is to make the defendant infamous if he is convicted. It is said that the civil remedy should be allowed for the purpose of indemnifying the party injured. But the balance of inconvenience is strong against such an action". (*Henderson* v. *Broomhead*[2].)

The principle was applied to a case from India by their Lordships of the Privy Council in *Baboo Gunnesh Dutt Singh* v. *Mugneeram Chowdhry*[5]. Speaking with reference to the privilege of a witness, their Lordships observed thus at page 328:

"Their Lordships hold this maxim which certainly has been recognised by all the Courts of this country, to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages; but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."

There is sense and reason in the rule that was adopted by the English Courts. The Court has superintendence over what happens before it and can, as Erle, J., points out in *Henderson*

1. (1883) 11 Q.B.D. 588.
2. (1859) 4 H. & N. 569 at 576: 157 E.R. 964 at 967.
3. (1668) 1 Wms. Saund. 131-*b*, Note 1: 85 E.R. 137.
4. (1759) 2 Burr. 807 at 810: 97 E.R. 572.
5. (1872) 11 Beng.L.R. 321 (P.C.).

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v. *Broomhead*[1] prevent reckless utterances defaming or slandering others by either censuring the party or the witness or by taking proceedings for perjury (*vide* Folkard on Libel and Slander, p. 97). But it will be seen that two conditions are necessary in order that a party may avail himself of this privilege (1) the proceeding must be judicial and (2) the utterance must have been made in the capacity of a suitor or a litigant in the course of and with reference to such proceeding. *Odgers on Libel and Slander*, 1905 Ed., at p. 230, puts it thus:

"But the proceeding must be in its nature judicial, that is, it must be either the adjudication and determination by a competent tribunal of the legal rights of the parties before it, or some necessary step preliminary thereto."

On an illustration to this rule Odgers relies on *Bank of British North America* v. *Samuel Strong*[2] and states the effect of that decisions thus:

"The service on a debtor of a notice under the Canadian Insolvent Act of 1869, demanding payment of a debt, though an important piece of evidence, should bankruptcy proceedings follow, *is not in itself a judicial proceeding* and the delivery of such a notice to a lawyer's clerk for service is privileged, but not an absolutely privileged, publication."

It is on this principle that statements in pleadings, affidavits or applications made to Court have been held to be absolutely privileged and the principle is extended to cases where instructions are given to a legal adviser for the preparation of a proof before trial, *Watson* v. *M'Ewan* and *Watson* v. *Jones*[3], but the rule of public policy does not extend the protection any further. Spencer Bower in his book on "Actionable Defamation" at page 92 explains the scope of the privilege thus:

"Such expression (published in the course and for the purpose of any judicial proceeding) does not apply to or include any publication of defamatory matter before the commencement or after the termination of the judicial proceeding, unless such publication is an act incidental to the proper initiation thereof, or the giving of legal effect thereto; nor does it apply to or include any publication of defamatory matter to any person other than those to whom, or in any place other than that in which, such publication is required or authorised by law to be made for the proper conduct of the judicial proceedings."

Unless therefore a communication is made to a solicitor in connection with a judicial proceeding or in connection with

1. (1859) 4 H. & N: 569 at 576: 157 E.R. 964 at 967.
2. (1876) 1 A.C. 307.
3. (1905) A.C. 480.

a necessary step preliminary thereto or with reference to an act incidental to the proper initiation thereof, *Bottomley* v. *Brougham*[1], it would not be absolutely privileged and therefore *prima facie* the communication made by defendants 1 and 2 to Mr. Krishnamachari in connection with the reply notice dated the 9th of May would not be protected by the absolute immunity from liability to an action. But in 1928 the Court of Appeal in England seems to have extended the doctrine of absolute privilege even to communications between a solicitor and a client though not connected with any judicial proceeding or a necessary step preliminary thereto. In *More* v. *Weaver*[2], Scrutton, L.J., enunciated this view of the law relying on the observations of Lord Herschell and Lord Bowen in *Browne* v. *Dunn*[3] and on a passage from Fraser on Libel and Slander and differing from the view of Darling, J., in *Morgan* v. *Wallis*[4]. If the case of *Browne* v. *Dunn*[3] is examined, it does not seem to support the view of Scrutton, L.J. The defamatory matter complained of was a statement taken by a solicitor from a client for the purpose of obtaining an authority to take proceedings against the plaintiff who brought an action for defamation against the solicitor.

What Lord Herschell said was:

"When communications pass between a solicitor and those who, he reasonably believes, will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of these communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged."

But he in more than one place points out that there was no evidence of malice in that case, and throughout, his discussion was to establish that the defendant was not actuated by malice in uttering or publishing the defamatory matter. Bowen, L.J., while affirming the view taken by Lord Herschell in regard to the communication as falling within the category of professional privilege, observed that he very much doubted whether malice destroyed that kind of privilege, unless it was shown that what had passed was not germane to the occasion. He more than once stated that that point was not necessary to be decided and that he would desire to keep it open. The observations in this case were never understood by the leading text

1. (1908) 1 K.B. 584 at 588 and 589. 2. (1928) 2 K.B. 520.
3. (1893) 6 Rep. 27. 4. (1917) 33 T.L.R. 495.

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writers on the law on Libel and Slander except Fraser as establishing that communications between a solicitor and a client, once the relationship is established, are absolutely privileged. For example, Odgers at p. 246 (4th Edn., 1905) cites *Browne* v. *Dunn*[1] under the head of qualified privilege. This question of absolute privilege came up for discussion before the House of Lords in the case in *Minter* v. *Priest*[2] where every law Lord expressed the opinion that the case in *More* v. *Weaver*[3] required reconsideration. Lord Buckmaster there observed:

> "I only desire to add without decision that it does not follow that when once the privilege due to the relationship is waived, the privilege of the occasion is absolute."

Viscount Dunedin remarked thus:

> "It must be admitted that the older authorities point rather the other way, and that the privilege of solicitor and client has been generally dealt with in the books as qualified privilege."

Lord Atkin also remarked thus:

> "The decision considerably extends the protection which up to its date had been confined to communications made by Judge, Counsel and witnesses in the course of judicial proceedings, and is based upon a view of public policy which appears to be somewhat widely stated and is certainly not the view accepted in Scotland. I prefer to leave the correctness of the decision entirely open for consideration hereafter in this House."

It will be seen that the view of Viscount Dunedin is that the older authorities are the other way. A confidential communication between solicitor and client has always been treated under the head of qualified privilege because the communication is supposed to have been made in the protection of self-interest or by reason of common interest existing between the party communicating and the party communicated to. The rule is that for the welfare and convenience of societies the occasion must be deemed to be *prima facie* privileged unless it is shown that the communication was made with an improper motive. Street in his book on the 'Foundations of Legal Liability', Vol. I, observes thus at page 311:

> "One of the most extensive heads of qualified privilege is found in connection with communications between individuals concerning matters that are of moment to one or both of the parties. Communications between parties occupying confidential relations, as between principal and agent, master and servant, physician and patient, attorney and client, clergyman and parishoner,

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1. (1893) 6 Rep. 27.
2. (1930) A.C. 558.
3. (1928) 2 K.B. 520.

parent and child, are privileged so far as the substance of such communications pertains to matters about which the relation of confidence exists. Here the parties have a common interest in the subject-matter of the communication."

Odgers in his book (4th Edn., 1905) at page 230 expresses the opinion that:

"A case laid before a counsel for his opinion is not absolutely privileged; at all events, if no writ be yet issued,"

and cites an unreported case *Minter* v. *Brockman.* If the reason of the rule is examined, this view seems to be sound. The doctrine of absolute privilege is, as pointed out by Channel, J., in *Bottomley* v. *Brougham*[1] based on the fact that in the public interest it is not desirable to enquire whether the words or acts of certain persons are malicious or not; he would prefer to call it a right of the public, the theory being "public advantage almost amounting to public necessity". That is why, as already pointed out, a party communicating any matter to a solicitor in connection with any judicial proceeding or in connection with any necessary step preliminary thereto is absolutely immune from an action. Moreover the Court in the exercise of its supervision over the judicial proceeding has got the means, as already pointed out, to censure or punish the party. But no such safeguard is available in the case of communications where the matter does not come to Court. The privilege relating to a communication between a solicitor and client is a very ancient head of privilege in order to encourage free intercourse between them and this is the foundation of the principle that communications between a lawyer and client should not be disclosed without the permission of the client. Therefore the law does give an adequate safeguard in protecting such communications from disclosure. There is no reason why, having this protection, they should also be immune from liability to an action, when the said protection is not availed of and the communications are made, not with a view to being kept confidential, but intended to be published to a party. Every client in seeking legal advice is expected to put before his legal adviser the true and correct facts on which legal advice is sought. If the facts are known to be false to the knowledge of the client, he is not really seeking or expecting any proper legal advice at all but is attempting to make an improper use of the confidential relationship for purposes of his

1. (1908) 1 K.B. 584.

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own. And there is neither reason for nor public necessity nor public benefit in according absolute immunity from liability to action to such communications. That is why the law has always classed such communications, until the decision of the Court of Appeal, under the head of qualified privilege so that if the communication was not made from an indirect motive or actuated by a malice, the law gave such communications, the protection. The Courts have also dealt with the matter under the head of qualified privilege. In *Morgan* v. *Wallis*[1], a defamatory matter uttered by a solicitor in delivering a bill of costs to his client was held not to be absolutely privileged. Justice Darling in that case observed thus:

"Mr. Lewis Thomas contended that the occasion was absolutely privileged, which means that it is like the reports of what passes in these courts or what is in a legal document issued by authority. I cannot see any reason to suppose that a solicitor is endowed with the right to publish whatever he likes about every body provided that it is in a bill of costs. . . . . if a solicitor puts into his bill of costs matters not necessary for the information of the client in order that he may know for what he is paying, or that he may get the bill properly taxed, if there is evidence that he put them in out of malice, then the privilege would be destroyed. I know that I am perhaps giving a decision on the point of law to which Lord Bowen referred. I must give it. That is my view about it."

I may say that this view is in consonance with that of Bramwell, J., in a very early decision *Bruton* v. *Downes*[2] and this case has been cited with approval by Folkard in his book on "Law of Slander and Libel" at page 98 (also Odgers, 4th Edition, 231; 6th Edition, 202). It may be observed that in the article on Libel and Slander by Vaugham Williams, L. J., in Volume XVIII, Halsbury's Laws of England (1st Edition), paragraph 1254, absolute privilege in connection with judicial proceedings is limited to proceedings at the trial and to the proceedings which are essentially steps in judicial proceedings; but Lord Hewart, C.J., in the Hailsham Edition, paragraph 465, seems to extend this by including under this head not only statements in pleadings but also communications passing between a solicitor and client relying on *More* v. *Weaver*[3]. The editor of Salmond on Torts in the latest edition observes that it is uncertain whether the privilege is absolute or qualified. This is the state of the English Law at present. If the view which prevailed before the decision of the Court of appeal in *More* v. *Weaver*[3]

1. (1917) 33 T.L.R. 495. 2. (1858-1867) 1 F. & F. 668: 175 E.R. 899.
3. (1928) 2 K.B. 520.

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is taken, there can be no doubt that the communication made by the defendants to Mr. Krishnamachari on the 9th May, 1927, would come only under the head of qualified privilege.

Coming to the Indian decisions, a distinction is drawn between an action for defamation in a Civil Court and a criminal prosecution for defamation. In regard to the latter it has been held that the absolute privilege accorded in England to a party or a witness or an advocate in connection with judicial proceedings cannot apply ; it is only qualified privilege and it must come within one of the exceptions of S. 499 of the Indian Penal Code—vide *Tiruvengada Mudali* v. *Tripurasundari Ammal*[1], *Satish Chandra Chakravarti* v. *Ram Doyal De*[2] and *Bai Shanta* v. *Umrao Amir*[3]. The reason given is that the law having been codified by statute, the latter must prevail. But for civil wrongs there has been no such codification and the rule of law that is applicable is justice, equity and good conscience. It is no doubt anomalous that in connection with the same matter one principle of law should apply for the purpose of a criminal case and another for the purpose of a civil action. But the anomaly is there, and until the Legislature intervenes, it must be recognised. However, the rule which is now to be applied for the case on hand is the rule of justice, equity and good conscience, which has been generally understood to be the principles of common law in England so far as they are applicable to Indian Society having regard to the circumstances of the case. But where the principles of common law in England are in a state of uncertainty, there is nothing to preclude us applying that view of the law which is essentially just and equitable (cf. *Parvathi* v. *Mannar*[4]) and which is in consonance with the principle on which the doctrine of privilege is based. In our opinion the older view of treating communications like the one in question under the head of qualified privilege ought to be the rule of justice, equity and good conscience. Even in England authority is not wanting for the view that the doctrine of absolute privilege should not be extended (*vide* Lopes, L.J., in *Royal Aquarium and Summer and Winter Garden Society, Ltd.* v. *Parkinson*[5]). And where the Indian Legislature has chosen to depart for the purpose of

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1. (1926) 51 M.L.J. 112: I.L.R. 49 Mad. 728 (F.B.).
2. (1920) I.L.R. 48 Cal. 388 (S.B.). 3. (1925) I.L.R. 50 Bom. 162 (F.B.).
4. (1884) I.L.R. 8 Mad. 175. 5. (1892) 1 Q.B. 431 at 451.

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criminal law from the doctrine of absolute privilege as applied by the common law of England, it seems to us that the extension made in *More* v. *Weaver*[1] should not be adopted here. Therefore the defendants cannot escape liability for their wrongful act unless it is proved that in so doing they were not actuated by malice. We have already found that the words spoken concerning the 2nd plaintiff were false and made from an improper motive. As observed by Lord Esher in *Royal Aquarium, etc.* v. *Parkinson*[2]:

"If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion."

Lord Justice Lopes in the same case said:

"If it be proved that out of anger or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it not stopping or taking the trouble to ascertain whether it is true or not—stated it recklessly by reason of his anger or other indirect motive—the jury may infer that he used the occasion not for the reason which justifies it, but for the gratification of his anger or other indirect motive."

Applying this principle to this case, we have no hesitation in finding that the defendants were actuated by malice in uttering and publishing the matter complained of.

In this view, it is unnecessary to deal with the application for amendment of the plaint made by Mr. Rajah Aiyar requesting leave to amend by claiming damages for the publication of the defamatory matter to the first plaintiff.

The only question that remains for consideration is the question of damages. We think in the circumstances of this case an award of Rs. 500 would meet the ends of justice. We therefore reverse the decision of the learned District Judge and pass a decree in favour of the appellant (the second plaintiff) for the sum of Rs. 500 with interest at six per cent. from the date of plaint. The appellant will have her costs both here and in the Court below.

S. V. V. —— *Decree reversed.*

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1. (1928) 2 K.B. 520. 2. (1892) 1 Q.B. 431 at 443.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE STODART.

B. Venkatachala Mudaliar .. *Petitioner** (*Plaintiff*)

*v.*

The Coimbatore Municipality by its Chairman .. *Respondent* (*Defendant*).

Venkatachala Mudaliar *v.* Chairman, Coimbatore Municipality.

*District Municipalities Act (V of 1920), Ss. 3 (25), 93 (1) (b) and 354—Person absent from the municipality for nearly six months—Intention to return to the place of residence signified—Whether he must be deemed to be residing in the place when he was actually absent—Liability for tax—Decision of council—Finality of—Suit in Civil Court does not lie.*

Where the petitioner had a house within a District Municipality where he ordinarily lived and he actually lived there between the 1st and 7th April and from 9th to 30th September of a particular year though between 7th April and 9th September he was absent at a hill station, on the question whether he should be said to have abandoned his intention of returning when he merely signified his intention of being absent at a hill station for a certain period in order to escape profession tax leviable by the Municipality,

*Held*, (1) that though he did not reside for 60 days in the ordinary sense of the term under S. 93 (1) (*b*), he must be deemed to have resided within the Municipality within the meaning of S. 3 (25).

(2) If the provisions of the Act had been complied with the decision of the council was final and no suit could lie. *See* S. 354.

Petition under S. 23 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsiff of Coimbatore in S. C. S. No. 1400 of 1935.

*V. Govindarajachari* and *P. Rajeswaran* for Petitioner.

*M. Krishna Bharathi* for Respondent.

The Court delivered the following

JUDGMENT:—Without seeing the order of the Council (assuming that there was such an order) it is impossible to say on what ground the Council justified the levy of profession tax on the petitioner, and without knowing that, it is impossible to say that the provisions of the Act have not been complied with. If they have been complied with the decision of the Council is final and no suit lies. *See* S. 354 of the Act. The lower Court should have I think satisfied itself on this point.

However that may be, I agree with the lower court's finding on the merits.

Petitioner has a house in Coimbatore where he ordinarily lives and he actually lived in the Municipality from 1st to 7th April and from 9th to 30th September. Between 7th April and

* C. R. P. No. 563 of 1936. 7th January, 1938.

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9th September he was absent at Coonoor. That has been so found by the learned District Munsiff. Before going to Coonoor he informed the Municipal Commissioner that he intended to be absent from the 7th April till about the end of August. Under S. 93 (1) (*b*) a person who in any half year resides in the Municipality for not less than sixty days shall pay a half yearly profession tax on income from pension or investments. Petitioner did not reside in the Municipality for 60 days in the ordinary sense of the term. Did he reside in the sense defined in S. 3, sub-S. 25?

Sub-S. 25 is

"A person is deemed to reside in any house if he sometimes uses any portion of it as a sleeping apartment."

and

"Is not deemed to cease to reside in any such house merely because he is absent from it if he is at liberty to return at any time and has not abandoned his intention of returning."

It is the last clause which has to be construed. Had the petitioner ceased to reside in his house within the meaning of this clause during the whole of the period 7th April to 9th September.

There can be no doubt that he was at liberty to return at any time as he had not let the house to any one else; so the only question is whether the second part of the clause applies. Leaving out the words about liberty to return, the clause reads a person is not deemed to cease to reside in any such house merely because he is absent from it if he has not abandoned his intention of returning. Can a man be said to have abandoned his intention of returning when he merely signifies his intention of being absent at a hill station for a certain period? I do not think so. All that the petitioner said here was that he might reoccupy the house about the end of August.

I dismiss the petition with costs.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

The Secretary of State for India in Council, represented by the Collector of Madura .. *Appellant* (Defendant)*

*v.*

Muniappan Chetti and others .. *Respondents (Plaintiffs 2 to 6).*

Secretary of State for India in Council *v.* Muniappan Chetti.

*Water sources—Customary source of irrigation altered and new source assigned by Government—Ryot entitled to the customary supply of water—His making arrangements to secure his rights—Penal cess levied—Claim for damages allowable—Madras Irrigation Cess Act (VII of 1865), S. 1, sub-S. (b), proviso 2.*

Where a suit was filed for a declaration that the plaintiff was entitled to irrigate his registered wet fields with water flowing from a Sluice No. 3 and for a refund of the penal water rate with interest that was collected from him by the revenue authorities, and the concurrent findings of the Courts below were that the plaintiff was entitled as of right to irrigate his registered wet fields with water from Sluice No. 3 and that it was impossible to irrigate lands with water from Sluice No. 2 assigned by the Government, on the questions whether (1) that no declaration should have been given because of the Crown's prerogative to alter and to assign sources of irrigation at its own pleasure, and (2) that the respondents were not entitled to refund the penal water cess collected at the time it was levied as there had been no previous adjudication by a Civil Court as to the source of water and at most they were entitled to mere damages,

*Held*, (1) that while the Government is entitled to supply water from such source as it thinks proper, this right is subject to the condition that the ryot who is entitled to get water for his wet fields gets his accustomed supply of water from the usual source as long as Government does not make an efficient alternative provision. This is according to law laid down already.

*Fischer* v. *Secretary of State for India in Council*, (1908) 19 M.L.J. 131: I.L.R. 32 Mad. 141; *Basavana Gowd* v. *Narayana Reddi*, (1930) 61 M.L.J. 563: I.L.R. 54 Mad. 793 at 798 and *Secretary of State* v. *Nageswara Aiyar*, (1936) 71 M.L.J. 268, followed.

(2) That even assuming that at the time the cess was levied it was not illegal, the plaintiff should not take water in defiance of Government's order but was entitled to damages, because diminution in the accustomed supply of water for his lands would be affecting him.

If the words 'has been' found in the second proviso to S. 1, sub-S. (*b*) of the Madras Irrigation Cess Act was to be construed as indicating that a previous adjudication of a Civil Court should have been given in order to enable a plaintiff to seek refund of penal cess from the Government it would mean that during the pendency of a civil suit the ryot who is found later to have been merely exercising the right given to him by law, namely, of irrigating his lands from the customary source, would be legally liable to pay penal water cess, and his only remedy would be to institute a suit for damages. Such a construction would be hard on the ryot. Moreover *prima facie* the legislature did not intend the penal cess to be allowed to be levied in cases where the ryot is only exercising his undoubted rights.

* S. A. No. 722 of 1936. 3rd January, 1938.

Secretary of State for India in Council *v.* Muniappan Chetti.

*Secretary of State* v. *Narayanaswami Pillai*, A.I.R. 1936 Mad. 692, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in A. S. No. 5 of 1935, preferred against the decree of the Court of the District Munsiff of Periyakulam in O. S. No. 155 of 1931.

*The Government Pleader* (*K.S. Krishnaswami Aiyangar*) for Appellant.

*K. Rajah Aiyar*, *T. P. Gopalakrishna Aiyar* and *T. R. Sangameswara Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit instituted by one Muniappa Chettiar, who died during the pendency of the suit and who is now represented by his legal representatives, the respondents in the second appeal. The suit was for a declaration that the plaintiff was entitled to irrigate his registered wet fields with water flowing from what may be briefly described as Sluice No. 3 and for refund of the penal water rate with interest that was collected from him by the revenue authorities for fasli 1339. The source of irrigation assigned to the wet fields in question was Sluice No. 2 and the plaintiff's case was that it was impossible to irrigate his wet fields in this manner, namely, from Sluice No. 2, for the simple but sufficient reason that the level of the sluice as well as the channel taking from it was lower than the level of the wet fields. The plaintiff's case also was that he had been irrigating his wet fields for many years past according to custom, that the assignment of Sluice No. 2 for his lands was objected to by him on several occasions and that the revenue authorities did not give him any redress. Both the Courts below have found that the substantial foundation of the plaintiff's case is true, namely, that he is entitled as of right to take water from Sluice No. 3, and that it is impossible to irrigate his registered wet fields with water from Sluice No. 2, which was assigned to him by the revenue authorities. These concurrent findings of fact have not been questioned in this second appeal.

The points argued on behalf of the Secretary of State for India in Council are (1) that no declaration should have been given in favour of the plaintiff because of the Crown's prerogative to alter and to assign sources of irrigation at its pleasure, and (2) that the respondents are not entitled to refund

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of the penal water cess collected from them because at the time the cess was levied the levy was legal as there had been no adjudication by a Civil Court as to the source of irrigation in respect of the plaint lands, and that at the most the respondents would be entitled only to damages. As regards the first point, there is really very little substance in it because the declaration given by the Subordinate Judge is not unconditional or absolute but subject to a condition, namely, that the respondents are entitled to take water from Sluice No. 3 only so long as the Government does not make an efficient alternative provision. This declaration is in my opinion in accordance with law. It is well settled—vide *Fischer* v. *Secretary of State for India in Council*[1], *Basavana Gowd* v. *Narayana Reddi*[2] and the *Secretary of State* v. *Nageswara Aiyar*[3]—that while the Government is entitled to supply water from such source as it thinks proper, this right is subject to the condition that the ryot who is entitled to get water for his registered wet fields gets his accustomed supply of water. As was observed in *Basavana Gowd* v. *Narayana Reddi*[2]:

> "Government by undertaking that the obligation to supply him with water also undertakes that it shall be at his disposal by the usual and customary method, that is, by channel constructed either by Government or by the ryot or both, until and unless some other method is adopted."

Then again at page 799 it was observed that

> " While the wet ryot cannot insist as against Government that he has any right to have his supply carried by any particular channel and cannot object to Government altering the channel of supply, he has a right as against other wet ryots and even, subject to Government's right to give him an equally efficient supply, as against Government to the protection of law for that supply once it has passed into the channel at present ear-marked for his supply."

I am therefore of opinion that the declaration made by the lower appellate Court, namely, that the plaintiffs are entitled to get water from Sluice No. 3 subject to the condition mentioned therein, is according to law.

As regards the second point, stress is laid by the learned Government pleader on the words "has been" found in the second proviso to S. 1, sub-S. (*b*) of the Madras Irrigation Cess Act. It is contended that the use of the perfect tense indicates that so long as there has been no actual adjudication by a Civil

1. (1908) 19 M.L.J. 131 : I.L.R. 32 Mad. 141.
2. (1930) 61 M.L.J. 563 : I.L.R. 54 Mad. 793 at 798.
3. (1936) 71 M.L.J. 268.

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Court as to the source of irrigation for any particular wet land, the levy of a penal water cess would be legal even though it is subsequently decided by a competent Civil Court that what the ryot had done was merely to act according to his rights. Reference may be made in this connection to the observations in *Athlumney*, In re[1], regarding the partiality of legal draughtsmen for the use of the perfect tense. If this contention is accepted it would mean that during the pendency of a suit in the Civil Court the ryot, who is found later on to have been merely exercising the right given to him by law, namely, of irrigating his lands from the customary source, would be legally liable to pay penal water cess, and his only remedy would be to institute a suit for damages, after his right has been declared in a previous suit; if the decision of the previous suit takes more than the time allowed by the law of limitation for the suit for damages even this remedy would be lost to him. The further result would be that the ryot would either have to raise a dry crop or leave the land waste if a dry crop cannot be grown and there would be loss to the public by reason of the less production of food grains, and the Government would certainly have to pay damages subsequently thus causing another and an additional loss to the public. Moreover, it appears to me *prima facie* that penal cess was not intended by the legislature to be allowed to be levied in cases where the ryot is only exercising his undoubted rights; in other words, that the ryot was to be penalised for doing nothing more than exercising his undoubted rights. It is, however, not quite necessary for me to decide this question definitely and I shall assume for the purpose of this second appeal that the contention of the learned Government Pleader is right and that at the time the cess was levied it was not illegal. Even then it is not contended that the plaintiff would not be entitled to damages; in fact, the law as laid down by Wadsworth, J., in *Secretary of State* v. *Narayanaswami Pillai*[2] (which decision was no doubt reversed on appeal on another ground altogether) has been accepted by the learned Government Pleader. Wadsworth, J., was of opinion that:

"The words adjudged by the competent Civil Court in S. 1 (*b*), proviso 2 of the Madras Irrigation Cess Act, refer to an adjudication prior to the use of the water, and that it is not open to a Civil Court to say that, though there

1. (1898) 2 Q.B. 547.
2. A.I.R. 1936 Mad. 692.

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has been an unauthorised user of water, the revenue authorities ought to have authorised this user and therefore a decree will be passed against the Government."

He was of opinion that if as the result of a change in the source of supply made by the Government there was a diminution in the accustomed supply, the remedy of the plaintiff was not to take water in defiance of the order of the Government but by a proper proceeding to seek redress for the damages done by the change in the prescribed manner of irrigation. It is therefore conceded that the plaintiffs are entitled to damages. On the question of the amount of damages there is no finding by either of the Courts below, and in these circumstances the learned Government Pleader after addressing the Collector of Madura states that the damages payable to the plaintiffs would be Rs. 675-8-0 and no more. This amount is no doubt less by a small amount than the amount of the penal cess, the refund of which has been allowed by the lower appellate Court. The learned Advocate for the respondents has agreed to accept this amount of Rs. 675-8-0 as the correct amount of damages caused, as he thinks it is not worthwhile to have the matter sent down for a finding. As the respondent's advocate has agreed to this amount, I shall allow only this amount instead of the amount allowed by the lower appellate Court, though, in my opinion, the attitude taken up on behalf of the Government is hardly to be commended. In fact, the suggestion made by the learned Government Pleader was that the refund of Rs. 719 which was allowed by the lower appellate Court might be affirmed provided the plaintiffs are made to pay the costs of the Government both in the original Court as well as in the lower appellate Court and in this Court. This suggestion is, if I may say so, quite unreasonable because there is no reason why the plaintiffs should not only not get their own costs but be made to pay the costs of the Government when they have succeeded and when it is clear that they have been the victims of arbitrary action by the revenue authorities who have assigned to them a source of irrigation from which no water can possibly flow to their fields, and who have given them no redress whatever in spite of the petitions addressed to them. It can hardly be doubted that the Legislature never intended that the powers given to the revenue authorities to levy penal water cess should be exercised in an arbitrary and unjust manner. However, as the respondent's advocate has agreed, in

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order to avoid further trouble to accept the amount of Rs. 675-8-0, which according to the Government's case is the amount of damages, the decree of the lower appellate Court will be modified by allowing this amount instead of Rs. 719 allowed by the lower appellate Court. Subject to this modification, the second appeal fails and is dismissed with costs.

Leave to appeal is refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

K. V. Venkataramanier and another .. *Petitioners (Accused)*

*v.*

Varadarajulu Chetty .. *Respondent (Complainant).*

Venkataramanier *v.* Varadarajulu Chetty.

*Criminal Procedure Code (V of 1898), S. 190 (1) (c)—Scope—Case begun as summons case—Magistrate finding warrant case procedure to be applicable—Continuance of trial.*

S. 190 (1) (*c*), Criminal Procedure Code, is concerned with extra-judicial information, knowledge or suspicion and it has nothing to do with knowledge gathered by a Magistrate in open Court from the evidence of witnesses given during a trial. If a Magistrate begins a trial as a Summons Case and then finds that an offence triable only by Warrant Case procedure has been committed, he is bound to apply Warrant Case procedure thenceforward and he is not in any way disqualified from proceeding with the trial.

*Rajaratnam Pillai, In re,* (1936) 70 M.L.J. 340: I.L.R. 59 Mad. 442, dissented from.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the District Magistrate, Salem, in his letter dated 9th December, 1937, against the order of the Stationary Sub-Magistrate, Omalur, dated 12th October, 1937, framing charges against the accused in C. C. No. 836 of 1937.

The facts of the case appear from the following order of reference: In this case the petitioners were complained against in respect of offences under Ss. 430 and 352, Indian Penal Code, that is that the petitioners dug a channel in the complainant's land and when he objected, he was beaten. The petitioners themselves on the same day laid a complaint against the respondents for the same offences, that is, that they filled up their own channel and when this was objected to, they were beaten. The Sub-Magistrate, however, took both complaints on file under Ss.426 and 352, Indian

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* Crl. R. C. No. 994 of 1937
Case Ref. No. 55 of 1937
and
Crl. R. C. No. 3 of 1938.
Crl. R. P. No. 3 of 1938.

14th April, 1938.

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Penal Code, and adopted summons procedure. After hearing the prosecution evidence in the first case, the Sub-Magistrate decided that an offence under Ss. 430 and 352, Indian Penal Code, had been made out and framed a charge under S. 430, Indian Penal Code, and S. 352, Indian Penal Code, thus converting the summons procedure into warrant procedure. In the other case, defence was called for. The vakil for the petitioners in applying for a transfer of the case urged that under S. 435, Criminal Procedure Code, read with S. 438 (1) the case might be referred for the orders of the High Court, as an illegality had been committed which could not be cured by a mere transfer. He relied upon the ruling in *Rajaratnam Pillai, In re*[1], in which it was held that once a Magistrate had taken cognisance on a summons case, he cannot convict the accused for anything but an offence triable as a summons case. This ruling appears to apply to this case (C. C. No. 836 of 1937) on the file of the Stationary Sub-Magistrate, Omalur. The procedure adopted by the Sub-Magistrate appears to be illegal, as following the ruling quoted above, I consider that he was precluded under S. 246, Criminal Procedure Code, from framing a charge for an offence not triable as a summons case. Relying upon the same ruling, the vakil for the petitioner also argued that since the Magistrate after recording the sworn statement took the case on file only under S. 426 and S. 352, Indian Penal Code, it must be held that he took cognizance of an offence under S. 430, Indian Penal Code, not upon receiving a complaint of facts as contemplated in S. 190 (1) (*a*) but upon information received from witnesses as contemplated in S. 190 (1) (*c*) and that therefore the Magistrate ought to have informed the petitioner that he had the right to be tried by another Court. This contention seems to be in accordance with the view held in the penultimate paragraph of the ruling in *Rajaratnam Pillai, In re*[1]. It appears therefore that the Magistrate should have followed the procedure laid down in S. 191, Criminal Procedure Code.

*T. Krishnaswamy Aiyangar* for Petitioners in Crl. R. C. No. 3 of 1938.

*K. Narasimha Aiyangar* for Respondent (Complainant in Crl. R. C. No. 3 of 1938).

*The Public Prosecutor (V. L. Ethiraj)* on behalf of the Crown in both cases.

The Court made the following

ORDER.—I am unable to accept this reference. With all respect to King, J., I am unable to follow the reasoning in

1. (1936) 70 M.L.J. 340: I.L.R. 59 Mad. 442.

Venkata-ramanier v. Varada-rajulu Chetty.

*Rajaratnam Pillai*, In re[1]. S. 190 (1) (*c*), Criminal Procedure Code, is concerned with extra-judicial information, knowledge or suspicion and it has nothing (in my opinion) to do with knowledge gathered by a Magistrate in open Court from the evidence of witnesses given during a trial. If a Magistrate begins a trial as a Summons Case and then finds that an offence triable only under Warrant Case procedure has been committed, he is, I think, bound to apply Warrant Case procedure thenceforward and he is not in any way disqualified from proceeding with the trial. Let the papers be returned and the case proceed.

B. V. V. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE STODART.

Venkadari Somappa .. *Appellant* in both (Counter-Petitioner)*

*v.*

The Official Receiver of Bellary .. *Respondent in both (Petitioner).*

Venkadari Somappa v. Official Receiver of Bellary.

*Provincial Insolvency Act (V of 1920), S. 54—Date of transfer—Date of registration not execution material—Unregistered document of transfer—Whether can be construed as agreement to convey—Registration Act (XVI of 1908 as amended), Ss. 45 and 47.*

For the purpose of S. 54 of the Provincial Insolvency Act the date of the transfer is the date of the registration of the document and not the date of its execution, and the transfer cannot be ante-dated by the operation of S. 47 of the Registration Act.

*Muthiah Chettiar* v. *Official Receiver of Tinnevelly District*, (1932) 64 M.L.J. 382 and *Iswarayya* v. *Subbanna*, (1934) 67 M.L.J. 380, followed.

An unregistered document of transfer is not of itself sufficient to support a suit for specific performance of an agreement to transfer. The law on this point is in no manner modified by the new proviso to S. 49 of the Registration Act.

*Venkatasami* v. *Kristayya*, (1893) 3 M.L.J. 169: I.L.R. 16 Mad. 341 and *Satyanarayana* v. *Chinna Venkatarao*, (1925) 50 M.L.J. 674: I.L.R. 49 Mad. 302, relied on.

Appeal against the order of the District Court of Bellary dated 20th December, 1935 and made in I. A. No. 251 of 1934 in I. P. No. 53 of 1933 and appeal under cl. 15 of the Letters

1. (1936) 70 M.L.J. 340: I.L.R. 59 Mad. 442.

* A. A. O. No. 72 of 1936 and L. P. A. No. 96 of 1936. 25th November, 1937.

Venkadari Somappa *v.* Official Receiver of Bellary.

Patent against the order of the Hon'ble Mr. Justice K. S. Menon, dated 1st September, 1936 and made in C. M. P. No. 508 of 1936 in the said A. A. O. No. 72 of 1936 on the file of the High Court.

*B. Somayya* for Appellant.

*V. S. Narasimhachariar* for Respondent.

The Court delivered the following

JUDGMENT.—The appeal is against the order of the learned District Judge of Bellary, passed in insolvency declaring void a mortgage executed by the insolvent in favour of the appellant. The Official Receiver attacked this mortgage both under Ss. 53 and 54 of the Provincial Insolvency Act. The learned District Judge however declared it void on another ground, namely, that it was completed after the insolvency petition had been presented and after the appellant had come to know of that fact. On the face of it the mortgage-deed was executed on the 5th March, 1933. It was presented for registration on the 27th June in the office of the Sub-Registrar. The mortgagors denied registration and the Sub-Registrar held an enquiry and finally refused to admit the document to registration. On appeal to the District Registrar the latter directed the document to be registered and this was finally done on the 11th December, 1933, under the provisions of S. 75 of the Indian Registration Act (XVI of 1908). Meanwhile on the 28th August, 1933, the mortgagors had presented their insolvency petition and they were adjudicated on the 11th January, 1934. Admittedly the appellant knew of the presentation of the insolvency petition when he was conducting proceedings under Ss. 73 to 75 of the Registration Act to get the document registered. The learned District Judge held that this mortgage was effected between the date of the presentation of the petition and the date of adjudication, that it was in favour of a man who at the time knew of the filing of the petition and that it was therefore liable to be set aside. It is hardly necessary for us to say that on the facts assumed by the learned District Judge he was clearly right. Transfers effected after the petition has been filed are if the transferor is ultimately adjudicated insolvent void as against the Official Receiver. That is the effect of S. 28, sub-Ss. 2 and 7 of the Provincial Insolvency Act. And it would obviously be absurd if an insolvent could

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effectively transfer his property after he had filed his petition and thus deprive the Court of its power to administer the property for the benefit of the whole body of creditors. S. 55 of the Act protects a transferee for valuable consideration who takes the transfer without knowledge of the pendency of the insolvency petition—which was not the case here. But the learned District Judge as the basis of his finding assumed that the date of registration, was the 11th December, 1933, the date when the document was registered under S. 75 (2) of the Indian Registration Act. We think however that he should have applied the provisions of S. 75 (3) to the case. That sub-section is:

"Such registration [that is, registration effected by the order of the District Registrar under S. 75 (2)] shall take effect as if the document had been registered when it was first duly presented for registration."

The mortgage in this case must therefore be deemed to have been registered on the 27th of June. And on the 27th June, no insolvency petition had been presented. The insolvency petition was as we have said presented on the 28th August. On this footing the case is merely an example of the case where the Official Receiver prays for the annulment of a transfer effected before the filing of the insolvency petition.

Now since the transfer cannot be regarded as void for the reasons stated by the learned District Judge, it remains to be considered whether it can be avoided under S. 53 or S. 54 of the Provincial Insolvency Act. It so happens that the learned District Judge has, viewing the transaction as a contract to mortgage, taken up for consideration the question whether it was entered into with the intention of preferring the mortgagee over the other creditors of the insolvent. He has come to the conclusion that it was so intended. There is therefore sufficient material before us to enable us to come to a conclusion on the point, namely, whether this transfer should be deemed fraudulent and void as against the Receiver. The two points we have to consider are:

1. Was the mortgage effected with the intention of giving the mortgagee a preference over the other creditors, and

2. Was it effected within the three months next preceding the presentation of the insolvency petition.

Before examining these points however it should first be explained why the learned District Judge having found that there was no mortgage prior to the insolvency petition thought

it necessary to adjudicate the case under S. 54. He did so because he thought that the document executed on 5th March, 1933, even if it had never been registered could have been put forward by the appellant as against the Official Receiver as the basis of a motion to compel the Official Receiver to complete a contract to mortgage. The learned District Judge says in para. 5 of his judgment:

"If the mortgage was set aside for the reasons given above (that is, because it was effected during the pendency of the insolvency petition) it would still be open to the counter-petitioner to apply to the Court to instruct the Official Receiver to complete the contract to mortgage. Evidence has therefore been let in in order to avoid further proceedings, etc."

Now the learned District Judge in the first place appears to have overlooked the fact that regarded as a contract to mortgage the document executed on the 5th March, 1933, was immune from attack under S. 54. The Insolvency Petition was as we have said presented on 28th August. The only transactions that could have been avoided under S. 54 were transactions effected on or after the 28th of May, that is, within the three months next preceding the filing of the petition. But apart from that we wish to observe that in our opinion that it was not open to the appellant to set up the document of the 5th March as a contract to mortgage. We note in passing that the appellant in his formal answer to the Official Receiver's petition never raised this question nor has he done so in his grounds of appeal to this Court. We would also note that the existence of such a contract would be no bar to the Official Receiver selling the property though it might furnish a cause of action in a suit for specific performance. The existence of such a contract does not constitute a danger which the Official Receiver is bound to forestall by an application under S. 54.

Was the document executed on the 5th March a contract to mortgage which the mortgagee could enforce? The learned District Judge has as we have said held that it was, and we think that he was wrong. It is well-settled law in this Presidency that an unregistered document of transfer is not of itself sufficient to support a suit for specific performance of an agreement to transfer. If an instrument is executed in my favour, which is, in terms, and is intended to be, a transfer of immovable property then provided it is a document which is required to be registered I must in order to give it validity get it registered by employing the procedure laid down in the

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Registration Act. It is not open to me to ignore the provisions of the Registration Act and, treating, the instrument as a contract to transfer—which it is not—compel the transferor to execute a formal transfer—which he has already done. That is the effect of *Venkatasami* v. *Kristayya*[1], which was recently followed and affirmed in *Satyanarayana* v. *Chinna Venkatarow*[2]. In the latter case Coutts-Trotter, C.J., said:

"I should have thought it very vicious method of construction to say that a document which purports to be one thing is to be allowed to be treated as a valid document of a different order altogether."

Mr. Somayya for the appellant contends that the new proviso to S. 49 of the Indian Registration Act has changed all that.

S. 49 (*c*) is

"No document required to be registered shall be received as evidence of any transaction affecting any immovable property comprised therein unless it has been registered."

And the new proviso is:

"Provided that an unregistered document affecting immovable property and required to be registered may be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purpose of S. 53-A of the Transfer of Property Act."

But that is not the same thing as saying that the unregistered instrument is itself the contract. In the present case it is not established that any separate agreement to mortgage was entered into prior to the execution of the mortgage deed, to prove which, the mortgage deed might have been tendered in evidence.

We are now ready to examine the substantive question which we think arises for decision, namely, whether this mortgage is one which should be annulled under S. 54 of the Provincial Insolvency Act. Two points as we have said arise, (1) was it, as the learned District Judge has held, a preference of the appellant over the other creditors and executed with that intention and (2) was it effected within three months next preceding the presentation of the insolvency petition. The second point presents some difficulty. The date of execution was the 5th March, 1933 and the date of registration was the 27th June. If the former date is taken as the date of the transfer then the transfer cannot be impugned under S. 54. And Mr. Somayya contends that by the operation of S. 47 of

1. (1893) 3 M.L.J. 169: I.L.R. 16 Mad. 341.
2. (1925) 50 M.L.J. 674: I.L.R. 49 Mad. 302.

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the Indian Registration Act it is the date of execution which must be taken as the date of the transfer. That section is,

"A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration."

Applying this principle to alienations of property made by dishonest debtors in anticipation of insolvency we get the somewhat anomalous position that the debtor can register such transfers of his property to-day and file his petition to be adjudicated insolvent to-morrow and the alienations, however, fraudulent they may be within the meaning of S. 54, cannot be attacked under that section if they were executed more than three months ago. For the respondent it is argued that prior to registration there was no transfer and nothing for the Court to annul. To which however the learned counsel for the appellant replies that a person who has obtained an executed document from the debtor is justified in believing that it cannot be set aside when three months have elapsed and no insolvency petition has been filed; and in that belief, can proceed to have it validated by registration.

The short question is, for the purpose of S. 54 of the Provincial Insolvency Act is the transfer to be regarded as having been made on the date of execution of the document or on the date of its registration. After mature consideration we have come to the conclusion that the date of the transfer is the date of registration and that for the purpose of this section the transfer cannot be ante-dated by the operation of S. 47 of the Indian Registration Act. By the definition in S. 5 of the Transfer of Property Act a "transfer of property" is "an act by which a living person conveys property". And by S. 59 when the transfer is a mortgage securing Rs. 100 and upwards it can be effected only by a registered instrument signed by the mortgagee and attested by at least two witnesses. Using the words of S. 54 of the Provincial Insolvency Act, when we say that a transfer by way of mortgage is "deemed fraudulent and void" we must mean that it is the act of conveyance constituted by the registration of a duly executed instrument, which is void. But if the registration is void there is no question of S. 47 of the Indian Registration Act operating to validate the document as from the date of execution. The matter we think is clear if it is remembered that it is the act of the transferor

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which is liable to be deemed fraudulent and void under S. 54 of the Provincial Insolvency Act, and that that Act includes the registration of the instrument either by the transferor presenting it for registration himself or delivering to a person who is competent to present it under S. 32 of the Registration Act. If he does so and the instrument is registered, he is doing something which is void if an insolvency petition is presented within three months, provided that is to say the transfer is intended to prefer the transferee over other creditors. And if the registration goes, there is no transfer. It follows we think that such instruments of transfer can be impeached under S. 54 of the Provincial Insolvency Act if the registration is effected within the three months next preceding the presentation of the insolvency petition.

As against this position, Mr. Somayya for the appellant advances the argument that in the facts of this particular case the act of registration is not the act of the transferor. Here it will be remembered the transferors denied execution and the document was finally registered under S. 75 of the Indian Registration Act. We do not think however that this makes any difference. Let us look again at the definition of transfer in S. 5 of the Transfer of Property Act. Transfer means "an act by which a living person conveys property." Can it be said that the transferor does not convey the property when the registration which is an essential part of the conveyance is effected against his will? We think not. But if the transferor conveys the property he must be held to have done everything necessary to the conveyance. The registration therefore is in effect the act of the transferor. Practically speaking when he has duly executed the document and with the intention that it should be registered has delivered it to the transferee—who is entitled to present it for registration—he has irrevocably consented to the registration, and when on account of his subsequent denial of execution the document is ultimately registered under S. 75 of the Registration Act, that registration must be held to have been effected on his behalf and with his consent.

We must add that the view we have taken of the application of S. 54 to transfers of this kind, namely, where the date of execution is more, and the date of registration is less, than three months before the presentation of the insolvency petition

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is not without authority. One of us sitting as a single Judge came to the same conclusion as we have come to know in the case of *Muthiah Chettiar* v. *Official Receiver of Tinnevelly District*[1]. The finding on this point is as follows:

"In a case like the present up to the date of registration there can be no valid transfer . . . under S. 59 of the Transfer of Property Act. If the time was to run from the date of execution of the document the object of S. 54 (of the Provincial Insolvency Act) could easily be frustrated. A dishonest insolvent has only to date such fraudulent transfers with a date more than three months prior to the filing of the petition and then they cannot be avoided under S. 54."

Then a similar point was decided by a Bench of this Court in *Iswarayya* v. *Subbanna*[2]. There the question was whether an insolvency petition presented by a creditor could be founded on a transfer which had been executed more than, but registered less than, three months before the presentation of the petition. That judgment also was delivered by one of us, the same Judge who decided the case previously cited. The finding is:

"Ex. C in the present case cannot be considered an act of insolvency unless a valid transfer of property was made by that document and such a valid transfer could be said to have been made only when the document was registered. In our opinion therefore the act of insolvency can be considered to have taken place on 13th February, 1930 (the date of registration of the document)."

Mr. Somayya contends that these decisions have been overruled in the Full Bench case *Chenchuramana* v. *Arunachalam*[3]. But that case dealt with quite a different point. The question there was whether an insolvency petition presented by a creditor on the opening day after the recess of the Court could be founded on a transfer which had become more than three months old during the recess. There was no question there of a conflict between the date of execution and the date of registration as constituting the date of the transfer for the purpose of S. 9 (1) (*c*) of the Provincial Insolvency Act. On the contrary the learned Chief Justice in stating the facts of the case said:

"This act of insolvency admittedly occurred more than three months before the date of the presentation of the petition." (Page 795.)

Lastly we have to consider whether the learned District Judge's finding on the merits of the case can be supported. It

1. (1932) 64 M.L.J. 382. 2. (1934) 67 M.L.J. 380.
3. (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.).

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is true as we have explained that he treated the transaction not as a valid mortgage but as a contract to mortgage which could be enforced against the Receiver. But his findings of fact apply equally to the transaction considered as a completed mortgage.

The learned District Judge has very fairly summed up the evidence on the point in paragraphs 6 and 7 of his judgment. In January, 1933, a creditor of the Insolvents had filed suits and attached their property. The Insolvents saw that their property was going to be brought to sale and that there were many other creditors whom they could not hope to pay. It was in these circumstances that the mortgage was executed to the appellant in March for Rs. 10,000 of which Rs. 9,201 represented money already due or alleged to be due to the appellant. The learned Counsel for the appellant points out that the property mortgaged was by no means all the property of the insolvent and that there was other property which has realised Rs. 12,000. This is true. But the debts admitted to proof amounted to Rs. 51,240. Besides the Rs. 9,200 odd alleged to be due to the appellant, claims to the extent of Rs. 42,000 had to be satisfied. It has not been suggested that the value of the unmortgaged property, namely, Rs. 12,000 plus the value of the equity of redemption of the mortgaged property consisting of lands and a house comes to anything like Rs. 42,000. On the contrary it is in evidence that at the Official Receiver's sale the price fetched per acre of land was between Rs. 35 and Rs. 40. At the higher figure the value of the lands alone which were comprised in the mortgage would be only Rs. 4,860, and it is not likely that the house which was also included in the mortgage would be worth more than Rs. 6,000. Little if anything therefore remained out of the equity of redemption of the mortgaged property to meet the claims of the other creditors. The mortgage did in fact operate to the substantial detriment of the latter. Mr. Somayya however contends that there is nothing to show that it was intended by the insolvents to have this effect but that on the contrary it was executed to stave off a suit which the appellant threatened to file against the insolvents and a notice of suit dated 9th February, 1933 (Ex. VII) is relied on to show that the appellant was pressing the insolvents to pay their debts. On the other hand it is in evidence that the appellant is a friend

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of the insolvents. Why should the insolvents execute a mortgage to this appellant merely on the threat of a suit rather than to the creditor (P.W. 2) who had already filed suits against them and who had actually secured an attachment of some of their property? It appears to us that the motive behind the mortgage was to give the appellant a preference over the other creditors. So far therefore we are in agreement with the learned District Judge. There are sufficient materials on the record for us to find that for the reasons stated by the learned District Judge this mortgage is under S. 54 of the Provincial Insolvency Act void and must be annulled.

This finding we think is sufficient to dispose of this appeal which is accordingly dismissed with costs. We observe however that the Receiver had moved the Court to annul the mortgage not only under S. 54 of the Provincial Insolvency Act but also under S. 53, namely, as being a voluntary transfer voidable under that section. Paragraph 4 of his petition is:

"The insolvents with a view to defraud the creditors and shield the property . . . . have executed a mortgage for Rs. 10,000 in favour of the counter-petitioner. . . . . The mortgage is nominal and not supported by consideration."

And again in paragraph 5:

"Even if the recitals about the consideration are true the mortgage is void as it was intended to show fraudulent preference to one creditor."

The Receiver therefore asked the Court to annul the mortgage on the alternative ground that it was not a transfer made in favour of an incumbrancer in good faith and for valuable consideration. The Court did not take up this question for consideration, namely, the question of the reality of the consideration. It left it to be decided by the Receiver when the counter-petitioner came in with proof of his debts under S. 33 of the Act. *See* the direction at the end of the learned Judge's judgment:

"The counter-petitioner may prove before the Receiver for whatever may be due to him."

We do not think it necessary considering that it is nearly two years since this order was passed to send the case back to the District Court for the point to be tried and decided there, nor is there in the appellant's Memorandum of Appeal any indication of a desire that we should do so. Appellant merely

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states therein that the case should have been considered as falling under S. 53 only and since there was no evidence to prove a case under that section the transaction should be upheld. But we think that if the learned District Judge had not allowed the Receiver's petition on other grounds he would have required the Receiver to proceed with his proof on this part of the case, namely, that the recitals of consideration in the document were false. It appears to have been agreed at the trial that this question should be left to be decided at a later stage when the counter-petitioner tendered his proof of the alleged debts which form the bulk of the consideration. We do not think that this procedure has prejudiced the appellant and we do not therefore remit the case.

The Letters Patent appeal is against an order of our learned brother Menon, J., refusing to stay the sale by the Receiver of the mortgaged property. In the light of our substantive decision that appeal also must fail. It is dismissed.

B. V. V. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

T. Venkatasubba Pillai .. *Petitioner* (Petitioner-Complainant).*

Venkatasubba Pillai, *In re.*

*Criminal revision—Magistrate giving no reasons for not issuing process to an accused—High Court—Right of interference—When exists.*

Where it appears from the records that there are no sufficient grounds for issuing notice to an accused person, the High Court will not be justified in interfering in revision merely because the Magistrate, who had cognizance of the matter failed to give reasons for not issuing the process.

But if from the records the High Court finds that the magistrate had not good grounds for not issuing process then certainly it will be justified in interfering in revision and setting aside the order.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate, Trichinopoly, in Crl.R.C. No. 17 of 1937 (C. C. No. 74 of 1937, Sub-Divisional First Class Magistrate, Ariyalur).

*T. R. Srinivasan* and *J. R. Gundappa Rao* for Petitioner.

*A. Srirangachariar* for the 7th Accused.

*N. Somasundaram* for *The Public Prosecutor* on behalf of the Crown.

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* Crl. R. C. No. 1018 of 1937. 4th May, 1938.
(Crl. R. P. No. 950 of 1937).

Venkatasubba Pillai, *In re.*

The Court made the following

ORDER.—The petitioner filed a complaint in the Court of the Sub-Divisional Magistrate of Ariyalur to the effect that accused 1 to 6 illegally distrained his bulls at the instigation of the seventh accused. The Sub-Divisional Magistrate, without assigning any reasons, declined to take any action against the seventh accused. He merely passed an order, "Issue summonses to A-1 to A-6". The petitioner went in revision to the District Magistrate who passed an order:

"The enquiry under S. 202, Criminal Procedure Code, showed that the seventh accused took no part in the alleged removal of bulls and was not present at the scene of the alleged offence. The lower Court was right in declining to issue process to him. I see no reason to interfere in revision."

It is argued by the learned Advocate for the seventh accused that this Court has no jurisdiction to entertain this revision petition. Although the offence is said to have been one under S. 212 of the Madras Estates Land Act and the petitioner applied in revision to the District Collector under S. 205 of the Act, yet the procedure to be adopted is governed by the Criminal Procedure Code. The complaint was made to the Magistrate under S. 202, Criminal Procedure Code, and the Magistrate made enquiry under S. 202 and eventually passed an order under Ss. 203 and 204, Criminal Procedure Code. If the Magistrate does not act as he should under S. 202, Criminal Procedure Code, then undoubtedly the petitioner would be entitled to file a revision petition before the District Magistrate; and this Court would have jurisdiction under the Code to interfere, if necessary, in the interests of justice. There can therefore be no doubt that this Court has jurisdiction to entertain this revision petition.

I agree with the learned Public Prosecutor that where it appears from the records that there are no sufficient grounds for issuing notice to an accused person, this Court will not be justified in interfering in revision merely because the Magistrate, who had cognisance of the matter, failed to give reasons for not issuing the process; but I find from the records before me that the Magistrate had not good grounds for not issuing process. It may be that he misunderstood the complainant's case in the same way as the District Magistrate seems to have done. The complainant has not said that the seventh accused played any part himself in the actual distraint or seizure of the

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bulls; nor that he instigated accused 1 to 6 at the time when the bulls were seized. The complainant states that he has evidence to show that the seventh accused instigated his servants A-1 to A-6 to go and distrain the animals. If so, the Sub-Divisional Magistrate should have considered the complaint against the seventh accused and if, in spite of the allegations made, he was of opinion that there was no reason for believing that the seventh accused instigated A-1 to A-6, he could have refused to issue process to the seventh accused and given his reasons for not doing so.

It is further contended by the learned Advocate for the seventh accused and the learned Public Prosecutor that as the evidence already recorded does not show any case against the seventh accused there is no need to order further enquiry; but it has to be remembered that any evidence by these witnesses of instigation by the seventh accused would have been irrelevant to the enquiry against accused 1 to 6. The fact that there is no evidence on record against the seventh accused is not in itself a sufficient reason therefore why this Court should not interfere in revision. In a case where serious allegations of tyranny are made, I think the interests of justice require that this Court and the complainant should be satisfied that the Sub-Divisional Magistrate has considered the allegations against the seventh accused and has come to a decision either that there is no case against him or that there is. If there is, the Magistrate must issue process to him.

This petition is therefore allowed and the Sub-Divisional Magistrate ordered to consider the complaint as far as it concerns the seventh accused and to pass a proper order under S. 203 or to issue process under S. 204, Criminal Procedure Code.

K. C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Pichandhi Murugappa Mudali and another .. *Appellants** (*Plaintiffs*)

*v.*

Kuppuswami Mudali and others .. *Respondents* (*Defendants 7, 9 to 16, 18 to 71, 1, 4, 5, 6, 8 and 72 to 80*).

*Right to conduct religious festival in the public thoroughfare—How far conditioned—Magistrate to regulate order and manner.*

Murugappa Mudali *v.* Kuppu-swami Mudali.

It has been settled that in India there is a right to conduct a religious procession with its appropriate observances through a public street so that it does not interfere with the ordinary use of the street and subject to lawful directions by the Magistrates [*Manzur Hasan* v. *Muhammad Zaman*, (1924) 48 M.L.J. 23: L.R. 52 I.A. 61: I.L.R. 47 All. 151 (P.C.)]. A religious festival does not stand on a different footing from that of a religious procession, but the right is of course subject to the directions of the Magistrate and the rights of the public, and it is for the Magistrate to regulate the order and manner of performance of the festival.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput in A. S. No. 16 of 1932 (A. S. No. 124 of 1931 on the file of the District Court, Chingleput) presented against the decree dated 4th February, 1931, in Original Suit No. 290 of 1930, D. M. C., Madurantakam (O. S. No. 374 of 1929, D. M. C., Conjeewaram).

*K. V. Ramachandra Aiyar* for Appellants.

*A. Viswanatha Aiyar* and *A. Ramaswami Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The appellants are residents of Kandappar Koil Street in Ayyampet Village and the suit out of which the Second Appeal and Memorandum of Objections arise was instituted by them on behalf of the residents of that street for a declaration of their right to perform the Surasamharam festival of the Subramaniaswami of Kandappar Koil in front of the Mokambari Amman Temple on the Shashti day in Arpasi month and an injunction restraining the defendants from interfering with the performance of the festival. Their right to perform the festival in the public highway in front of the Mokambari Amman Temple was declared by the District Munsiff

* S. A. No. 281 of 1934. 6th April, 1938.

Murugappa Mudali *v.* Kuppuswami Mudali.

without specifying that it is subject to the directions of the Magistrate and the rights of the public, and the defendants were restrained from interfering with the performance of the festival. An appeal was taken and the suit was dismissed by the Subordinate Judge on the ground that the right to perform festival in the public highway was not claimed in the plaint and that even otherwise such a right is not recognised by law.

The plaint is comprehensive enough to include the public highway which is in front of the Mokambari Amman Temple and the Privy Council has laid down in *Manzur Hasan* v. *Muhammad Zaman*[1] that in India there is a right to conduct a religious procession with its appropriate observances through a public street so that it does not interfere with the ordinary use of the street and subject to lawful directions by the Magistrates. A religious festival does not stand on a different footing and the view of the Subordinate Judge that such a right is not recognised by law is untenable. The right is of course subject to the directions of the Magistrate and the rights of the public, and it is for the Magistrate to regulate the order and manner of performance of the festival though it is found by the Courts below that the festival of Subramaniaswami of Kandappar Koil used to be celebrated before the festival of Balasubramaniaswami of the temple of the defendants. The decree of the Subordinate Judge is therefore set aside and the decree of the District Munsiff is restored with the modification that the right of the appellants to perform the festival will be declared to be subject to the directions of the Magistrate and the rights of the public. The order of the District Munsiff regarding costs will stand and the parties will bear their respective costs in the lower appellate Court and here.

K. C. —— *Appeal allowed.*

1. (1924) 48 M.L.J. 23: L.R. 52 I.A. 61: I.L.R. 47 All. 151 (P.C.).

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR HORACE OWEN COMPTON BEASLEY, *Kt., Chief Justice* AND MR. JUSTICE CORNISH.

Mrs. Evelyn Popaly .. *Appellant** (*Respondent*)

*v.*

The Official Assignee of Madras .. *Respondent* (*Applicant*).

Evelyn Popaly *v.* Official Assignee of Madras.

*Presidency Towns Insolvency Act (III of 1909), S. 7—Amendment of, by S. 2 of Act XIX of 1927—Scope of—Matters falling under sub-S. (5) of S. 36—Title to property in dispute—If covered by sub-S. (5)—Examination under S. 36 regarding a house—Examinee denying title of insolvent to the property—Not a matter under sub-S. (5)—Subsequent petition under S. 7 maintainable.*

Sub-S. (5) of S. 36 of the Presidency Towns Insolvency Act contemplates only cases where it is contended that the property admittedly belongs to the insolvent and its possession is alleged to be with the person examined and not cases where the title to property is in issue. It does not apply to a case where the Official Assignee contends that property admittedly in the possession of the person examined under S. 36 belongs to the insolvent and not to the person in whose possession it is. The amendment of the clause does not affect the question as it does not touch the words "property belonging to the insolvent."

Where, therefore, the Official Assignee applied to the Insolvency Court under S. 7 for a declaration that certain property purchased in the name of the insolvent's wife was the property of the insolvent, the fact that the wife was examined by the Official Assignee under S. 36 previously is not a bar to the maintainability of the application, where the wife denied at the examination that the property had been purchased with her husband's money and asserted that she had purchased the property out of her own funds and thereby brought in a question of title which is outside the scope of sub-Ss. 4 and 5 of S. 36, which matters alone are excepted from S. 7 by the amendment of S. 7 by S. 2 of Amending Act (XIX of 1927).

On appeal from the order of the Honourable Mr. Justice Wadsworth dated the 12th day of February 1937 and passed in the exercise of Insolvency Jurisdiction of the High Court in Application No. 12 of 1937 in I. P. No. 271 of 1936.

*V. Rajagopala Aiyar* and *K. G. Srinivasa Aiyar* for Appellant.

*K. S. Krishnaswami Aiyangar* instructed by *The Official Assignee of Madras* for Respondent.

The Court delivered the following

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*O. S. Appeal No. 13 of 1937. 6th April 1937.

Evelyn Popaly *v.* Official Assignee of Madras.

Beasley, C.J.

JUDGMENTS. *The Chief Justice.*—The Official Assignee applied to the Insolvency Court under S. 7 of the Presidency Towns Insolvency Act for a declaration that certain houses are the property of the insolvent purchased in the name of his wife, the 2nd respondent, or in the alternative that the insolvent has a half interest in those houses. At the hearing before Wadsworth, J., the 2nd respondent raised the preliminary objection that as the 2nd respondent had been examined under S. 36 of the Act the proceedings against her under S. 7 were barred. That objection the trial Judge overruled holding that the previous examination under S. 36 of the Act was no bar to the proceedings before him. The hearing of the application has been stayed pending this appeal.

The point before us is to what extent this case is covered by the Full Bench decision in *Official Assignee of Madras* v. *Narasimha Mudaliar*[1], and its determination depends upon whether the subject-matter of the application is one which falls within sub-S. (5) of S. 36 of the Act.

The summons under S. 36 reads as follows:—

"Take notice that you are hereby required to appear before the Master in Chambers on Thursday, the 20th day of August, 1936, at 3 P.M. and to give evidence touching the insolvent, his dealings and property and regarding the properties standing in your name and suspected to be his properties and to produce any documents in your possession or control relating to the said properties standing in your name and acquired by you since 1928 and the pass books of all the banks in which you have had accounts from the commencement up to date and also all documents relating to the fixed deposit and chit transactions had by you."

From the questions put in the examination of the 2nd respondent it is perfectly clear that the sole object of the examination was to establish the fact that the houses had been purchased by the insolvent in her name, that is to say, that the purchases were *benami*. The 2nd respondent denied that the property had been purchased with her husband's money, and asserted that she had herself purchased the houses out of her own funds. The appellant's case is that this was an examination to establish that the 2nd respondent had in her possession property belonging to the insolvent and that no admission to that effect having been got from her, proceedings under S. 7 of the Act could not be taken against her without her consent by reason of the amendment of S. 7 by S. 2 of Act XIX of 1927 which adds the following proviso:

1. (1929) 57 M.L.J. 145: I.L.R. 52 Mad. 717 (F.B.).

Evelyn Popaly *v.* Official Assignee of Madras.
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Beasley, C.J.

"Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under S. 36, be exercised only in the manner and to the extent provided in that section."

In *Official Assignee of Madras* v. *Narasimha Mudaliar*[1], which was a case of a simple money claim it was held that when once the Official Assignee has summoned a witness under S. 36 of the Act and that witness disputes his indebtedness, the Official Assignee has no option but to proceed by way of suit unless the witness agrees to the disposal of the matter in the Insolvency Court. In a later decision, namely, *Chinnappa Mudali* v. *Official Assignee of Madras*[2], it was held that the amendment of S. 7 of the Act by S. 2 of the Amending Act (XIX of 1927) refers only to such proceedings under S. 36 of the Act as come under sub-S. (4) which deals with simple money claims and sub-S. (5) which deals with the examination of persons supposed to be in possession of some property of the insolvent and to no other matters and that sub-S. (5) of S. 36 does not touch the case of a person who is examined for the purposes of ascertaining whether the status of joint family is subsisting between the insolvent and the other members of the family and whether a business is a joint family business. The Full Bench case was on the question of simple money claims and in *Chinnappa Mudali* v. *Official Assignee of Madras*[2] was distinguished on that ground. On page 387 it is stated:—

"Throughout the decision in that case the only case in contemplation was the case of a simple money claim."

The appellant's endeavour, in consequence of these two decisions has been to show that the matter is one under sub-S. (5) of S. 36 contending that the sub-section embraces not only cases where the property admittedly belongs to the insolvent but also where the Official Assignee contends that property admittedly in the possession of the person examined belongs to the insolvent and not to the person in whose possession it is and that if the person examined denies that the property belongs to the insolvent and asserts that it belongs to him or herself, it is a denial that that person is in possession of property belonging to the insolvent and therefore the sub-section applies. On the other hand Mr. K. S. Krishnaswami Aiyangar contends that the section has in contemplation only cases where it is contended that the property belongs to the

1. (1929) 57 M.L.J. 145: I.L.R. 52 Mad. 717 (F.B.).
2. (1931) 62 M.L.J. 103: I.L.R. 55 Mad. 385.

Evelyn Popaly *v.* Official Assignee of Madras.

Beasley, C.J.

insolvent and its possession is alleged to be with the person examined and not cases where the title to property is in issue. It is for us to decide which of the two contentions is correct. The matter is singularly bare of authority and the two cases already referred to and the Calcutta decision to which reference is made in the Full Bench case and an earlier decision of this High Court, namely, *Abdul Kadhar Sahib* v. *Official Assignee of Madras*[1], appear to be the only ones relating to it. In the last named case the scope of S. 36 was discussed and it is stated that the main object of S. 36 is discovery. There the facts were that property had been transferred by the insolvent four months before the order of adjudication though under circumstances which might render the transfer voidable under S. 55 of the Presidency Towns Insolvency Act and it was held not to be "property belonging to the debtor" within the meaning of S. 36 (5) of the Act and that it was not therefore open to the Court under that section on the examination of the transferee to declare the transaction bad under S. 55 and direct the delivery of property to the Official Assignee and that the object of S. 36 is to enable the Official Assignee or any creditor who has proved his debt to obtain information with reference to the property belonging to the insolvent on which proceedings might be taken for the purpose of impeaching transactions which are voidable under the sections of the Act relating to voluntary transfers fraudulent preferences and cognate matters. On page 310, Sir Arnold White, C.J., says:—

> "Now I do not think it can be held that the property in question in this case at the time that this examination was held can be said to be property belonging to the insolvent within the meaning of the sub-section. *Prima facie* it belonged to the man in whose name the title deeds stood and who had taken a transfer of property in January, 1912, *i.e.*, about 4 months before the date of adjudication."

This case, in my opinion, strongly supports the contention of the respondent. It shows that the sub-section has in view only the case of property admittedly belonging to the insolvent at the time of the examination. The object of the sub-section is to enable the Official Assignee to discover its whereabouts. The procedure in sub-Ss. (4) and (5) to S. 36 is of the most summary nature; and before the amendment of those sub-sections, if the Court, on the examination of the person

1. (1913) 25 M.L.J. 308.

Evelyn Popaly *v.* Official Assignee of Madras.

Beasley, C.J.

was satisfied under sub-S. (4) that he was indebted to the insolvent and under sub-section (5) that he had in his possession any property belonging to the insolvent, the Court could at once order the payment, of the amount owing or the delivery up of the property to the Official Assignee. Clearly sub-S. (5) at that date did not enable the Court to pass any such drastic order under this very summary procedure in cases where the title to property was in issue. The amendment substituted for "if on the examination of any such person the Court is satisfied" the words "if on his examination any such person admits." The amendment does not touch the words "property belonging to the insolvent." "Property belonging to the insolvent" both before and after the amendment has the same meaning. I am satisfied that sub-S. (5) to S. 36 relates only to property admittedly belonging to the insolvent and not property the ownership of which is in dispute. The proceedings under S. 7 of the Act are therefore not barred by reason of the examination of the second respondent under S. 36 of the Act and this appeal fails and must be dismissed with taxed costs.

Cornish, J.

*Cornish, J.*—I agree. In his application to have Mrs. Popaly examined the Official Assignee stated that she had considerable properties in her name and that his information was that these properties were purchased with moneys belonging to her husband, the insolvent. Neither the application nor the summons indicates the character of these properties but it appears from the examination of Mrs. Popaly that they are houses. The purpose of the examination was, therefore, to discover whether Mrs. Popaly or the insolvent was the owner of this immovable property. This involved enquiry into the title to the property, which is a different thing from discovery whether Mrs. Popaly was in possession of property belonging to her husband. Indeed, property which *prima facie* belong to Mrs. Popaly would not rightly be described as property belonging to her insolvent husband within the meaning of S. 36 (5); *Abdul Kadhar Sahib* v. *Official Assignee of Madras*[1]. There is nothing in the amended S. 7 of the Act to prevent the Insolvency Court from deciding a disputed question of title between the Official Assignee and some other person. It is open to the Court if it thinks fit to refer the question for determination in a suit. That is a matter within the Court's discretion.

1. (1913) 25 M.L.J. 308.

Evelyn Popaly *v.* Official Assignee of Madras.

Cornish, J.

But whether the Official Assignee proceeds under S. 7 or by suit, he can only recover by the strength of the insolvent's title to the property which he is asserting, and which he must establish. The jurisdiction given to the Insolvency Court by S. 7 to decide all questions arising in any case of insolvency is qualified only to the extent laid down in the proviso to the section. What exactly is intended by the words in the proviso "any matter arising under S. 36" is not at all clear, but I do not think they necessarily mean any matter which has been the subject of examination under S. 36. If that had been the intention the Act could easily have said so. The result of the Full Bench ruling in the *Official Assignee of Madras* v. *Narasimha Mudaliar*[1] and the later Bench decision in *Chinnappa Mudali* v. *Official Assignee of Madras*[2], is that there are two matters arising under S. 36 which are subject to the special provision, namely, the question under sub-S. (4) whether the person examined is indebted to the insolvent and under sub-S. (5), whether he is in possession of property belonging to the insolvent. If he admits indebtedness or possession there is nothing for the Court to decide; an order for payment or delivery may be made on the application of the Official Assignee. But if he denies indebtedness to the insolvent or possession of the insolvent's property then, unless the parties otherwise agree, the jurisdiction of the Insolvency Court to decide the matter is excluded and the Official Assignee must proceed by suit to enforce his claim. The subject-matter of Mrs. Popaly's examination, however, is not a matter arising under S. 36, sub-S. (4) or sub-S. (5). It is a question of title which falls outside the scope of these sub-sections. I am accordingly of opinion that the objection raised to the Insolvency Court's power to decide it is ill-founded and that the appeal fails.

S. V. V. —— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Syed Mustafa Sahib and others .. *Petitioners** (*Accused*).

Syed Mustafa Sahib, *In re.*

*District Municipalities Act (V of 1920), Ss. 178 and 339—Breach of agreement—Failure to comply with conditions of the Municipality—Conviction—Requirements for.*

1. (1929) 57 M.L.J. 145: I.L.R. 52 Mad. 717 (F.B.).
2. (1931) 62 M.L.J. 103: I.L.R. 55 Mad. 385.

* Crl.R.C. No. 775 of 1937. 25th March, 1938.
Crl.R.P. No. 727 of 1937.

Syed Mustafa Sahib, *In re.*

To sustain a conviction under S. 178 of the District Municipalities Act for failing to comply with an order of the Municipality requiring the petitioners to metal the streets and lanes constructed on their sites and to do other things undertaken by the petitioners when licence was issued to them by the Municipality, it has to be shown that the petitioners are owners or occupiers of the lands abutting the roads.

No objection could be sustained to a trial on the ground that various breaches of an agreement have been taken together in a charge, if the agreement must be taken as a whole.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Salem and passed in C.A. No. 61 of 1937, preferred against the judgment of the Court of the Sub-Magistrate of Salem Town and passed in C.C. Nos. 348, 349 and 350 of 1937.

*K. S. Jayarama Aiyar* and *C. K. Venkatanarasimhan* for Petitioners.

*The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The three petitioners have been convicted under Ss. 178 and 339 of the District Municipalities Act for failing to comply with an order of the Municipality requiring them to metal the streets and lanes constructed on their site and to do other things undertaken to be done by the petitioners when the issue of a licence was sanctioned to them by the Municipality to erect houses and to sell them.

The petitioners jointly petitioned the Municipality to grant them sanction to sell certain plots of land as building sites and they undertook to metal the roads, cut side drains, and to make provision for scavenging lanes. Roads were laid but nothing else was done. On 24th February, 1937, notices were sent to the petitioners requiring them to do what they had undertaken to do on pain of prosecution. The petitioners soon afterwards wrote to the Municipality offering to give up the roads and making them over to the Municipality. The Municipal Council sanctioned the taking over of the roads; but they were never formally taken over because it was discovered that the petitioners did not metal the roads and put them in a condition to be taken over by the Municipality. Several notices were issued to them but with no effect. Three cases were laid against the three petitioners for disobeying the orders. The Sub-Magis-

Syed Mustafa Sahib, *In re.*

trate has convicted them and the convictions have been confirmed in appeal.

S. 178 appears to be primarily intended for the proper maintenance of private streets; and the Municipality is given power, in case the streets are not in a satisfactory condition, to issue notices requiring the owners or occupiers of buildings or lands fronting or abutting the streets to carry out the necessary repairs. The persons who are liable under this section seem to be the owners or occupiers of the houses or lands abutting the streets and not the owners of the streets themselves. It would therefore seem necessary, in order to sustain a conviction under this section, that the petitioners are owners or occupiers of the lands abutting the roads. Evidence has been let in to the effect and no objection has been taken to it in the Courts below.

The petitioners were also charged under S. 339, and for a conviction under that section it would not be necessary to prove that the petitioners had any ownership in the land abutting the road. They were bound to metal the road and to carry out the various stipulations contained in their agreement with the Municipality and upon failure to do that after receiving notice, they would be liable under S. 339.

Objection has been taken to the trial on the ground that various breaches of the agreement have been taken together in the charge; but I do not see any objection to that, because the agreement must be taken as a whole and except as to the laying out of road the petitioners have done nothing to satisfy the agreement.

A more important objection is that the Magistrate has adopted the objectionable practice in trying the three cases together and recording evidence in all the cases together. Where there are three cases, those three cases should be kept distinct, evidence let in in each case separately, and conclusions drawn on the evidence let in in each particular case. However, in considering whether the revision petition should be allowed on that ground, one has to consider whether the petitioners suffered any prejudice by these three cases being clubbed together. In most cases of improper clubbing together of cases it would undoubtedly be held that the accused had suffered prejudice by being called upon to meet three cases at the same time; but the present case is particularly simple. It was only

necessary to produce a few documents and to examine one witness. I have little doubt that the three petitioners could have been tried together in one case; and I do not think that their defence has been rendered more difficult because the case against them has been split up into three parts—one against each person. The accused applied together to the Municipality for permission to divide their lands into plots for house sites and to sell them; and they seem at all times to have acted together.

Syed Mustafa Sahib, *In re.*

In the particular simple circumstances attending this case, I do not find sufficient reason to interfere in revision. The petitions are accordingly dismissed.

K. C. — — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

V. R. K. M. Kumarappa Chettiar .. *Petitioner** (*Petitioner*)

*v.*

K. M. V. R. Chidambaram Chettiar and another .. *Respondents* (*Respondents*).

Kumarappa Chettiar *v.* Chidambaram Chettiar.

*Provincial Insolvency Act (V of 1920), Ss. 9 (1) (c) and 35—Fraudulent preference—Petition after 3 months—Basis of petition—Previous adjudication —Subsequent annulment—Want of jurisdiction for adjudication—Power to annul adjudication by the same Court later.*

Where a petition for adjudication was based on fraudulent transfer of immovable property but was more than three months after the transaction, it could not be made the basis of an insolvency petition by reason of S. 9 (1) (*c*) of the Provincial Insolvency Act.

*Chenchuramana* v. *Arunachalam*, (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.), followed.

But where before the insolvent was adjudicated by the Subordinate Judge in British India, the insolvent was adjudicated in a Burma Court, and the present petitioner applied under S. 35, Provincial Insolvency Act, for an order cancelling the adjudication and the object of the creditor in doing so was to ensure that the proceedings in the Burma Court should not be interfered with, and the Subordinate Judge annulled the adjudication in view of

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* C. R. P. No. 1297 of 1937. 4th April, 1938.

Kumarappa Chettiar *v.* Chidambaram Chettiar.

the Full Bench decision in *Chenchuramana* v. *Arunachalam,* (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.), but the District Judge in appeal reversed it, and on revision to the High Court,

*Held*, that there having been no act of insolvency on which the adjudication order could be passed the Court had no jurisdiction to adjudicate. Therefore the adjudication was annulled, but the order would not affect proceedings of the Burma Court.

If on the materials before the Court at the time the order of adjudication was passed it is clear that the Court had no jurisdiction to pass the order, S. 35 clearly empowers the Court to annul the adjudication. It is true that the Provincial Insolvency Act does not confer upon the Court the wide powers given by S. 8 of the Presidency Towns Insolvency Act which allows the Court to review, rescind or vary any order made by it under its insolvency jurisdiction, but S. 35 is sufficient for the purpose of this case and leaves the Court no discretion in the matter.

Petition under S. 75 of the Provincial Insolvency Act, praying the High Court to revise the decree of the District Court of Ramnad at Madura in C. M. A. No. 39 of 1936, preferred against the order of the Court of the Subordinate Judge of Devakottah dated 23rd March, 1936, and made in I.A. No. 338 of 1935 in I. P. No. 40 of 1934.

*V. Ramaswami Aiyar* for Petitioner.

*V. Rajagopala Aiyar* and *T. V. Ramiah* for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

*The Chief Justice.*—On the 22nd January, 1935, P.L.S.P. L. Palaniappa Chettiar, the second respondent, was adjudicated an insovlent on the petition of K.M.V.R. Chidambaram Chettiar, the first respondent, by the Subordinate Judge of Devakottah. The adjudication was based on a transfer of immovable property dated the 23rd February, 1934, which was said to constitute a fraudulent preference. The petition for adjudication was filed on the 3rd of July, 1934, that is, more than three months after the transaction. Therefore the transaction, even if it constituted a fraudulent preference could not be made the basis of an insolvency petition by reason of S. 9 (1) (*c*) of the Provincial Insolvency Act. The reason given for filing the petition beyond three months was that the Court was closed for the summer vacation and it was not possible to file it before the 3rd July, 1934, but the fact the Court was closed made no difference, as a Full Bench of this Court has pointed out *Chenchuramana* v. *Arunachalam*[1]. That was a case where the petition was filed on the 29th June, 1931, the re-opening day after the Court's vacation and the act of insolvency was a deed

1. (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.).

Kumarappa Chettiar *v.* Chidambaram Chettiar. — Leach, C.J.

of sale said to have been executed fraudulently on the 28th February, 1931. The Court considered that the period of three months fixed by S. 9 (1) (*c*) of the Provincial Insolvency Act was not a period of limitation, but constituted a condition to an adjudication and consequently where the alleged act of insolvency had taken place more than three months prior to the presentation of the petition it could not be set up as a ground for adjudication.

Before the second respondent was adjudicated by the Subordinate Judge of Devakottah, an adjudication order had been passed against him by the District Court of Tharawady in Burma and his estate in Burma was being administered in insolvency by that Court. On the 7th November, 1935, the present petitioner applied to the Subordinate Judge of Devakottah for an order cancelling the adjudication. The application was made under S. 35 of the Provincial Insolvency Act which provides that where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent have been paid in full, the Court shall, on the application of the debtor, or of any other person interested, by order in writing, annul the adjudication. The petitioner is a creditor and his object in seeking the annulment of the adjudication by the Subordinate Judge of Devakottah was to ensure that the proceedings in Burma should not be interfered with. The learned Subordinate Judge granted the application and annulled the adjudication in view of the decision in *Chenchuramana* v. *Arunachalam*[1]. From that order there was an appeal to the District Judge who considered that the Subordinate Judge was wrong in annulling the adjudication, his reason being that the order adjudicating the insolvent might have been wrong, and was wrong in the light of *Chenchuramana* v. *Arunachalam*[1], but there was no appeal and, therefore, it ought not to be disturbed. Accordingly he reversed the order of the Subordinate Judge. The order of the District Judge now comes before us on an application for revision.

In the first instance the application came before Burn, J., but it was placed before a Bench because the learned Judge

1. (1935) 69 M.L.J. 283: I.L.R. 58 Mad. 794 (F.B.).

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was doubtful whether S. 35 of the Provincial Insolvency Act gave authority to a Judge sitting in insolvency to revise, on the ground of want of jurisdiction, his own order or an order of a predecessor adjudicating a person insolvent. If on the materials before the Court at the time the order of adjudication was passed it is clear that the Court had no jurisdiction to pass the order, S. 35 clearly empowers the Court to annul the adjudication. It is true that the Provincial Insolvency Act does not confer upon the Court the wide powers given by S. 8 of the Presidency Towns Insolvency Act which allows the Court to review, rescind or vary any order made by it under its insolvency jurisdiction, but S. 35 is sufficient for the purpose of this case and leaves the Court no discretion in the matter. The corresponding section in the Presidency Towns Insolvency Act is S. 21 in which the word 'may' is used, and therefore gives the Court a discretion.

What we have to ascertain in this case is whether the Court acted without jurisdiction when it passed the order of adjudication. The answer must be that it did. More than three months had elapsed from the date of the alleged fraudulent transfer to the date of the presentation of the petition and these facts were before the Court. There being no act of insolvency on which an adjudication order could be passed the Court had no jurisdiction to adjudicate.

A point which was not taken in the lower courts has been taken before us and we will deal with it. When the case was in the list for hearing on the 18th March, 1938, it was postponed at the instance of the advocate for the respondent as he wished to set up that there were other grounds for adjudication than the alleged fraudulent preference. All the necessary papers are now before us and it does appear that in paragraph 5 of the petition the first respondent did allege that the second respondent had, with a view to defeat and delay his creditors, secreted his jewels and movable properties and had "absented himself from the reach of his creditors." But in the next paragraph there was the definite allegation that the second respondent had given a fraudulent preference in favour of one P.L.P.P.V.R. Veerappa Chettiar on the 23rd of February, 1934, and in paragraph 7 it was stated:

"The said transfer is an act of insolvevcy and as this Hon'ble Court was closed in May and June this application is filed to-day."

Kumarappa Chettiar v. Chidambaram Chettiar.

Leach, C. J.

The prayer for adjudication then followed. Paragraph 7 clearly shows that the act of insolvency relied on was the alleged fraudulent preference, but as the adjudication order was passed by consent, the learned Advocate for the respondents says that it should be deemed to be based also on the allegations in paragraph 5 of the petition. He is in difficulty here, because in the counter-affidavit which his client filed in opposition to the petition under S. 35 of the Provincial Insolvency Act his client said (paragraph 8):

"I submit that the respondent in I. P. No. 40 of 1934 has been adjudicated an insolvent upon a definite act of insolvency and upon the admission of the respondent, it is not now open to the present applicant to question or set aside that order."

On his own showing the adjudication was upon one definite act of insolvency. The only definite act of insolvency was the fraudulent preference set out in paragraph 6 of the petition for adjudication. Moreover, not a word was said in the Subordinate Judge's Court about other acts of insolvency and in the memorandum of appeal to the District Court it was not alleged that the order of the Subordinate Judge's Court was bad, because there were other acts of insolvency. In these circumstances we are unable to regard the adjudication as being based on other grounds than that of a fraudulent preference. The adjudication being on that ground alone and the transfer attacked having taken place more than three months before the presentation of the petition, the Court had, as I have already said, no jurisdiction to pass the order of adjudication.

For these reasons the petition will be allowed and the order of the District Court set aside. It follows that the adjudication is annulled; but, this order will, of course, not affect the insolvency proceedings in Burma. The petitioner is entitled to his costs here and in the Court below.

K. C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

S.Rm.Rm. Chockalingam Chettiar .. *Petitioner* (3rd Counter-Petitioner)*

*v.*

A. R. P. L. S. P. Muthiah Chettiar (deceased) and others .. *Respondents (Petitioner, Counter-Petitioners 1 and 2 and Nil).*

Chockalingam Chettiar *v.* Muthiah Chettiar.

*Insolvency—Petitioning creditor's right to be solely entitled to a debt —Debt accruing to him later by an award—Amendment of petition—Leave to amend—Whether permissible.*

Where a creditor presented a petition alleging that a large amount was due by the insolvent and asserted his claim to be solely entitled to the debt but it happened that on the date of the petition an arbitration was pending in regard to a dispute between the petitioner and a certain other party who claimed an interest in the partnership with the petitioning creditor and only four days later by the award the petitioning creditor became entitled solely to the debt on which the insolvency was founded, on the question whether he could be allowed to amend his petition and proceed with it.

*Held,* that the petition could be amended, but all that was needed to be done was to allow the petitioning creditor to amend his petition by adding that the inchoate right which he had previous to the petition became perfected in virtue of the award delivered four days later.

Ex parte *Dearle*: In re *Hastings,* (1884) 14 Q.B.D. 184 and In re *Ellis* (1887) 4 Morrell's Bankcy. Rep., p. 283, relied on.

Petition under S. 75, cl. 1 proviso of the Provincial Insolvency Act, praying the High Court to revise the order of the District Court of Ramnad at Madura in C.M.A. No. 55 of 1932 (I.P. No. 10 of 1930, Sub-Court, Sivaganga).

*M. Patanjali Sastri* and *P. S. Narayanaswami Aiyar* for Petitioner.

*K. Rajah Aiyar* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

*Venkatasubba Rao, J.*—This raises an important question bearing upon the power of the Court to allow an insolvency petition to be amended. The petition in the lower Court was presented by a person who described himself as a creditor of the insolvent. He alleged that Rs. 16,000 odd was due by the

* C. R. P. No. 1177 of 1933. 3rd May, 1938.

Chocka-lingam Chettiar *v.* Muthiah Chettiar.

Venkata-subba Rao, J.

insolvent to a certain firm of which he claimed to be the sole proprietor; it was upon this assertion that he founded his claim to be solely entitled to the debt. The petition was filed on the 24th November, 1930, but on that date, an arbitration enquiry was pending, in regard to a dispute between the petitioner and a certain third party who claimed an interest in the partnership. By an award made on the 28th November, 1930, the petitioner became solely entitled to the debt on which the insolvency petition was founded. It being assumed that the petition as originally filed is incompetent (it is unnecessary in the view we have taken to discuss this point), the question arises whether the petitioner can be allowed to amend his petition and proceed with it. On the facts stated, the petition would require to be amended by the petitioner being allowed to state that four days after the presentation of the petition, the entire right to the debt vested in him by reason of the award. The learned District Judge allowed the petition to be amended, but according to him the amendment that was needed was to change the date from the 24th into the 28th. In our opinion the lower appellate Court's view that the petition could be amended, is right, although the particular amendment indicated by the learned Judge is wrong.

The petition was founded on alleged acts of bankruptcy that occurred on the 17th September, 1930, and the 13th October, 1930, that is, within three months of the petition. Even should the date of its filing be taken as the 28th November, the petition would still be within time.

In Ex parte *Dearle*: In re *Hastings*[1] a bankruptcy petition was filed by a person who was a mere trustee of the debt for his sister, and the Registrar dismissed it, holding that the *cestui que trust* was a necessary party. The Court of Appeal agreed with the Registrar that the petition as filed was incompetent, but long after the three months period, gave leave to amend the petition. The debtor's counsel is reported to have contended:

> "The amendment would be equivalent to the presentation of a new petition, founded on an act of bankruptcy more than three months old."

That the trustee had no right to present the bankruptcy petition is, as already stated, declared by the Court of Appeal.

1. (1884) 14 Q.B.D. 184.

Chockalingam Chettiar *v.* Muthiah Chettiar.

Venkatasubba Rao, J.

Brett, M.R., observes that the trustee was not a good petitioning creditor alone, but that the *cestui que trust* ought to have joined in the petition. Similarly, Lindley, L.J., says that it has been the settled rule in bankruptcy that in order to maintain a bankruptcy petition in respect of a debt due to a trustee, the *cestui que trust* must join in the petition. In spite of this, however, leave to amend was granted, Lord Coleridge, C.J., observing:

> "A blunder by no means unnatural has been made in the construction of the Act; it is a mere slip." (Ex parte *Dearle*: In re *Hastings*[1].)

The Court of Appeal in a yet later decision re-affirmed this principle and allowed a similar amendment. (In re *Ellis*[2].) Ex parte *Owen*[3], though not directly in point, throws some light upon the matter in hand. There the petition as originally filed was properly constituted, but before the hearing, the interest of one of the partners of the creditor firm (petitioners) became vested in a trustee. The Registrar, even in the absence of the trustee, made a receiving order. The Court of Appeal held that the trustee was a necessary party and that the proper course was to correct the irregularity by joining him as a petitioner. Leave was accordingly given to amend the petition (Ex parte *Owen*[3]). The appellant, however, strongly relies upon In re *Maund*[4], which of course is an authority to the extent to which it goes; but surely it cannot be suggested that it has the effect of impairing the value of the decisions of the Court of Appeal. In the case of *Maund*, In re[4], certain creditors, the aggregate of whose debts was of the requisite amount, filed the bankruptcy petition. Some of the alleged debts, it was found, had in fact no existence. The Registrar allowed the petition to be amended by the names being added of two other persons as petitioning creditors. At the time of application for amendment was made, more than three months had elapsed from the date of the committal of the act of bankruptcy on which the petition was founded. The learned Judges of the Queens Bench Division held that the Registrar's order was wrong. The point of distinction between the Court of Appeal decisions and this case is most clearly brought out in the very

1. (1884) 14 Q.B.D. 184.
2. (1887) 4 Morrell's Bankcy. Rep., p. 283.
3. (1884) 13 Q.B.D. 113.
4. (1895) 1 Q.B.D. 194.

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Venkatasubba Rao, J.

terse judgment of Wright, J. The learned Judge observes:

"As I understand the matter, every debt sought to be added, as ground of the petition, after three months from the date of the Act of bankruptcy, is unavailable for that purpose; but if within that period a debt has been made ground of the petition, and it afterwards becomes desirable to add another party to the petition in respect of that debt, leave may be given to join that other party as a petitioner where it will not lead to any injustice."

Vaugham Williams, J., puts the test in words very similar; Is the effect of the amendment to introduce creditors as petitioning creditors who could not themselves present a petition after the three months have elapsed? To express the same idea differently, is its effect to introduce a debt which, after the same period has elapsed, would not be a debt upon which the petition could be founded? If that is what is sought to be done, the Court will not grant leave to amend. But if on the contrary, as Wright, J., in the passage quoted above observes, within that period a debt has been made a ground of the petition and it afterwards becomes desirable to add another party, the case stands on an entirely different footing. In the case before the learned Judges it was sought to introduce new creditors and new debts, and leave on the principle mentioned above, was refused. The facts here bring the case directly within the principle of the two cases, already cited, of the Court of Appeal. Here there is, as in those cases, "a good petitioning creditor's debt" (*per* Brett, M. R., in Ex parte *Dearle*: In re *Hastings*[1] referred to above). The petitions there were not properly constituted owing to the *cestui que trust* not having been joined; the defect in the present case is the non-joinder of the other partner. The parallel seems to be complete and we must respectfully dissent from *Vaithianatha Aiyar* v. *Vaithinatha Aiyar*[2], a decision of Cornish, J. The learned Judge's attention was not called to the crucial cases on the point—the decisions of the Court of Appeal. The lower Court has thus acted rightly in granting leave to amend; but as already stated, all that need be done is to allow the petitioning-creditor to amend his petition by adding that the inchoate right which he had previous to the petition, became perfected in virtue of the award delivered four days later. As observed by Lord Coleridge, C.J., in Ex parte *Dearle*: In re *Hastings*[1], the person who has made the blunder must pay for it and the lower Court has very properly directed the petitioning-creditor to pay the

1. (1884) 14 Q.B.D. 184.
2. (1931) 61 M.L.J. 544.

Chockalingam Chettiar v. Muthiah Chettiar. — Venkatasubba Rao, J.

costs that have been thrown away. The contention of the petitioner therefore fails.

Next it has been argued for him that in regard to the merits the lower appellate Court's order of remand is wrong. There can be no doubt, as the District Judge suggests, that in the trial Court the petitioning creditor thought, not unreasonably, that the contest was in regard to the preliminary question alone. The various entries in the B. Diary support the lower appellate Court's inference and the Subordinate Judge, it seems to us, dealt with the merits, not because they were gone into, but because he imagined that to make his judgment complete he had to touch on them.

The petition will be amended in the lower Court within one month from the re-opening of the Sub-Court.

In the result, the Civil Revision Petition fails and is dismissed with costs.

K. C. —— *Petition dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

T. N. Borai Goudar .. *Petitioner* (Accused)*

*v.*

Commissioner, Ootacamund Municipality .. *Respondent (Complainant).*

Borai Goudar v. Commissioner, Ootacamund Municipality

*Criminal proceedings—Suit before Bench of Magistrates—Order of transfer to Stationary Sub-Magistrate of another place—Before receipt of order actually disposal of suit by the Bench of Magistrates—Jurisdiction lacking to dispose of the suit.*

Where a petition under Ss. 249 and 313 of the District Municipalities Act was pending before the Bench of Magistrates of *O* and during the pendency of the case a transfer was made of the same case to the Court of the Stationary Sub-Magistrate *C* but before the order had been communicated to the Bench Magistrates Court the case was tried and the accused convicted of the offence and ordered to pay a fine,

*Held*, that the Bench Court when it took up the case and disposed of it had no jurisdiction. In civil cases the order for transfer must operate from the date on which that order is passed and therefore any Court which continues to do any act after the order is passed even though a copy of the order has not been received by it is acting without jurisdiction. The same reasoning would apply to criminal proceedings.

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* Crl. R. C. No. 1005 of 1937. Crl. R. P. No. 940 of 1937. — 4th May, 1938.

*Ademma* v. *Venkatasubbayya*, (1933) 65 M.L.J. 137: I.L.R. 56 Mad. 692, relied on.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order and conviction passed by the Court of the Bench Magistrates at Ooty, dated 9th September, 1937, in S. T. Case No. 807 of 1937.

*P. S. Narayanaswamy* for the Petitioner.

*N. Somasundaram* for *The Public Prosecutor* on behalf of the Crown.

*K.V. Muthukumaraswami* for *N. Gopala Menon* for Complainant.

The Court made the following

ORDER.—The petitioner was charged before the Bench of Magistrates, Ootacamund, under Ss. 249 and 313 of the District Municipalities Act for storing firewood. During the pendency of the case before the Bench, the accused put in a transfer application in the Court of the Joint Magistrate of Coonoor, who ordered the transfer of the case to the Court of the Stationary Sub-Magistrate, Coonoor. Before however that order had been communicated to the Bench Magistrate's Court, the case came up for before the Bench and on the accused's plea he was convicted and sentenced to pay a fine of Rs. 5. This petition has been filed on the ground that the Bench Court ceased to have jurisdiction after the order of the Joint Magistrate and that therefore the order of that Court is illegal.

With regard to stay applications in civil matters it has been held by the Full Bench in *Venkatachelapati Rao* v. *Kameswaramma*[1] that the stay order operates only from the date of which the order is communicated to the Court whose proceedings are stayed. The reason seems to be that the Court having seisin of the matter in question has jurisdiction to proceed with it and that the appellate Court in ordering stay is merely prohibiting that Court from proceeding further with the matter until further orders. But the order of prohibition does not take away the jurisdiction of the trial Court; it merely suspends it. If therefore the order has not been received the Court does not lose its jurisdiction because the order has been passed. It therefore follows that any act done after the order

1. (1917) 33 M.L.J. 515: I.L.R. 41 Mad. 151 (F.B.).

Borai Goudar *v.* Commissioner, Ootacamund Municipality

of stay is passed is still valid unless the order of the higher Court has been disobeyed. This reasoning would not however apply to an application for transfer. The ordinary rule is that an order operates from the date on which it is passed, the rule with regard to stay proceedings and injunctions being exception to that general rule. Although no authority has been quoted which deals with the date on which a criminal order of transfer operates. *Ademma* v. *Venkatasubbayya*[1] deals with that question with regard to civil suits. It was there held that the order for transfer must operate from the date on which that order is passed and that therefore any Court which continues to do any act after the order is passed—even though a copy of the order has not been received by it—is acting without jurisdiction. The same reasoning would, I think, apply to criminal proceedings; and I am therefore of opinion that in the present case the Bench Court, when it took up the case of the accused and disposed of it had no jurisdiction to do so.

Nevertheless, it does not follow from the mere fact that the Bench Court had no jurisdiction, that its order is void. I think that S. 531, Criminal Procedure Code, would apply to a case of this kind and so prevent the passing of this order without jurisdiction from being void. The whole principle underlying the various provisions of Chapter 45 is that no order or sentence shall be void on the mere ground of some irregularity or want of jurisdiction, unless it leads to a miscarriage of justice or prejudices the accused. It seems to me in the present case that it is immaterial whether the case of the accused was considered by the Bench Court or by the Stationary Sub-Magistrate. No miscarriage of justice having occurred this Court will not interfere in revision and set aside the order.

The petition is therefore dismissed.

K. C. —— *Petition dismissed.*

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1. (1933) 65 M.L.J. 137: I.L.R. 56 Mad. 692.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

G. N. Subba Rao and others .. *Petitioners* (Accused Nos. 1 to 3 and 5 to 20)*

*v.*

Anna M. Venkatachalapathi Aiyar .. *Respondent (Complainant).*

*Defamation—Presentation of petition against a person to a Sub-Inspector of Police—Complaint that the statement was defamatory—Offence if any—No signatures of petitioners—Defect cannot be cured by examination of witnesses—Criminal Procedure Code, S. 342.*

Subba Rao *v.* Venkatachalapathi Aiyar.

Where it is clear that the publication of an information regarding a person was to a person in authority and was really intended to give information about some offences with a view to get redress or protection, the offence, if any, must be only the furnishing of false information or the making of a false accusation. It cannot be said that the offence is committed simply because some part of the information or the accusation may be found to be defamatory and false.

Where there was really no evidence of publication inasmuch as the signatures of persons alleged to have presented the petition to the Sub-Inspector of Police have not been proved by the prosecution, it is a serious defect and cannot be cured by examining the accused persons under S. 342, Criminal Procedure Code.

*Jeremiah* v. *Vas*, (1911) 22 M.L.J. 73: I.L.R. 36 Mad. 457 and *Rangappa Goundan* v. *Emperor*, (1935) 70 M.L.J. 447: I.L.R. 59 Mad. 349, followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the City First Class Magistrate of Madura in C. C. No. 71 of 1937.

*K. S. Jayarama Aiyar* and *O. V. Baluswami* for Petitioners.

*R. Krishnaswami Aiyangar* for Respondent.

*K. Venkataraghavachari* for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioners, nineteen in number, have been convicted of the offence of defamation and sentenced under S. 500, Indian Penal Code, to pay a fine of Rs. 20 each and in default of payment to suffer simple imprisonment for one month. The defamation consisted in the presentation of a certain petition to the Sub-Inspector of Police by the residents of a certain locality in Madura against the complainant alleg-

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* Crl. R. C. No. 701 of 1937.
.. Crl. R. P. No. 659 of 1937.

5th May, 1938.

Subba Rao *v.* Venkata-chalapathi Aiyar.

ing that he was in the habit of getting drunk and abusing people and threatening to do evil by the use of black art and praying for protection against the complainant. There can be no doubt that the so-called defamation was the presentation of a petition to a public officer with the intention of protecting the interests of the people who sent the petition. That fact stands out unmistakably, and this outstanding fact has been practically ignored by the learned Magistrate. The case clearly fell under the 8th exception which declares that:

> " It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of the accusation."

It is not pretended that the Sub-Inspector was not a person having lawful authority over the complainant in the present case with respect to the subject-matter of the accusation contained in the petition made to him. Good faith has to be presumed in view of the fact that it is admitted by the complainant that he does not know the accused personally and in the absence of any evidence of any express malice or enmity. Apart from the merits of the case which even on a superficial examination would have convinced any Magistrate that there was really no substance in the charge of defamation, it is argued that the Magistrate was incompetent to take cognisance of the offence inasmuch as the offence, if at all, was one of giving false information to a public officer or of making a false accusation—an offence punishable under S. 182 or 211, Indian Penal Code; offences of this nature cannot be taken cognisance of by a Magistrate in the absence of a complaint by the public servant concerned or of some authority to whom the public servant is subordinate; *see* S. 195 of the Criminal Procedure Code. I am of opinion that this contention is well founded. Where it is clear that the publication was to a person in authority and was really intended to give information about some offences with a view to get redress or protection the offence if any must be only the furnishing of false information or the making of a false accusation. It cannot be said that the offence of defamation is also committed simply because some part of the information or the accusation may be found to be defamatory and false. The point to my mind is quite clear and it is hardly necessary to refer to the authorities relied upon by

Subba Rao *v.* Venkata-chalapathi Aiyar.

Mr. K. S. Jayarama Aiyar, namely, In re *Nagarji Trikamji*[1], *Prafulla Kumar Ghose* v. *Harendra Nath Chatterjee*[2] and *Swee Ing* v. *Koon Han*[3].

Another ground of attack is that there is really no evidence of publication by the petitioners inasmuch as their signatures in the petition have not been proved by the prosecution. This is a serious defect. Apparently the Magistrate thought this difficulty could be cured by examining the accused themselves as to whether they had signed in the petition in the hope that they would admit it. In any case, there could have been no other reason for asking them in the course of the examination under S. 342 whether they had signed the petition, as there was no evidence whatever on the side of the prosecution to the effect that they had signed it. It is obvious that the gap in the prosecution evidence cannot be filled in this manner by examining the accused persons under S. 342, Criminal Procedure Code. It is enough in this connection to refer to *Jeremiah* v. *Vas*[4] and *Rangappa Goundan* v. *Emperor*[5]. The examination of the accused for this purpose was contrary to law, and the prosecution cannot be permitted to rely on admissions of the accused in these circumstances. The prosecution has failed to prove that these accused have signed the petition. It follows that the present petition must be allowed and the convictions of the petitioners and the sentences imposed on them should be set aside and the fine if paid should be refunded.

K. C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE ABDUR RAHMAN.

S. Muniyandia Pillai .. *Petitioner* (Plaintiff)*

*v.*

Muthusami Servai and another .. *Respondents (Defendants 2 and 3).*

Muniyandia Pillai *v.* Muthusami Servai.

*Chit fund—Suit against father for recovery of refund of subscription—Father conducting chit fund—Liability of sons whether existing after father's death.*

1. (1894) I.L.R. 19 Bom. 340.
2. (1916) I.L.R. 44 Cal. 970.
3. A.I.R. 1935 Rang. 163.
4. (1911) 22 M.L.J. 73: I.L.R. 36 Mad. 457.
5. (1935) 70 M.L.J. 447: I.L.R. 59 Mad. 349.

* C. R. P. No. 654 of 1937. 26th April, 1938.

Muniyandia Pillai *v.* Muthusami Servai.

Where the question was whether the sons of a deceased stake-holder of a chit fund were liable to pay their father's debt out of their joint family properties in view of the decision in *Sesha Aiyar* v. *Krishna Aiyar*, (1935) 70 M.L.J. 36: I.L.R. 59 Mad. 562 (F.B.), which held that stake-holders were personally liable for the refund of moneys subscribed to the fund because they committed an offence under S. 294-A, Indian Penal Code, in so conducting the chit fund.

*Held*, that the sons were exempted from liability to pay their father's debt.

*Muthusami Servai* v. *Mytheen Pichai Rowther*, (1937) 1 M.L.J. 231, followed.

*Toshanpal Singh* v. *District Judge of Agra*, (1934) 68 M.L.J. 1: L. R. 61 I.A. 350: I L.R. 56 All. 548 (P. C.), applied.

Petition under Ss. 25 of Act IX of 1887 and 224 of the Government of India Act, praying the High Court to revise the decree of the Court of the Subordinate Judge of Sivaganga dated 18th January, 1937 and passed in S. C. S. No. 123 of 1936.

*L. S. Veeraraghava Aiyar* for Petitioner.

*V. Ramaswami Aiyar* for Respondents.

The judgment of the Court was delivered by

Madhavan Nair, J.

*Madhavan Nair, J.*—In this case the plaintiff, a subscriber to a chit fund conducted by the first defendant and the father of defendants 2 and 3, sued for the recovery of money subscribed by him to the chit fund. A decree was given in his favour as against the first defendant but the suit was dismissed as against defendants 2 and 3, the sons of the deceased stake-holder. The decree as against the first defendant was based upon the Full Bench decision reported in *Sesha Aiyar* v. *Krishna Aiyar*[1]. In that case it was held that the stake-holders were personally responsible for the refund of the money to the subscriber and that they in conducting the chit fund committed offence under S. 294-A of the Indian Penal Code.

In this revision petition it is argued that the lower Court should have given a decree against defendants 2 and 3 also. The question whether the sons of a deceased stake-holder are liable to pay their father's debt out of joint family properties in their hands in a case precisely like the present was raised in C. R. P. No. 303 of 1936 decided by Horwill, J. The decision is reported in *Muthusami Servai* v. *Mytheen Pichai Rowther*[2]. The learned Judge held that the sons were not liable because

1. (1935) 70 M.L.J. 36: I.L.R. 59 Mad. 562 (F.B.).
2. (1937) 1 M.L.J. 231.

Muniyandia Pillai v. Muthusami Servai.

Madhavan Nair, J.

he was of opinion that the debt was in the nature of an avyavaharika debt, that is, it was founded upon a criminal offence committed by the father. In support of that conclusion he relied upon a decision of this Court in *Muthammal* v. *Sivakami Ammal*[1]. In that case it was pointed out that the sons were not liable for the father's debt if the debt of the father arose out of conduct on his part which is utterly repugnant to good morals, or is grossly unjust, or flagrantly dishonest (*see* judgment of Venkatasubba Rao, J.), at p. 627. I, who was a party to that decision, pointed out that a liability which arose out of the commission of an offence by the father has always been held to be immoral and that such a liability need not be discharged by the sons. Since the liability of the father in the present case arose out of a transaction which was held in *Sesha Aiyar* v. *Krishna Aiyar*[2] to be illegal we must hold that defendants 2 and 3 are not liable for the debt of their deceased father. In our opinion the present case falls exactly within the decision of Horwill, J., in *Muthusami Servai* v. *Mytheen Pichai Rowther*[3]. We may also in this connection refer to a recent decision of the Privy Council in *Toshanpal Singh* v. *District Judge of Agra*[4]. In that case the Secretary of a School Committee who was in charge of a fund deposited with the bank was authorised to draw upon it for certain specific purposes connected with the school. After his death the Committee sued the sons to recover from them out of property left them by their father or out of the property of their joint Hindu family an alleged deficiency in the fund. The deficiency amounted to Rs. 42,993 and according to the father's own admission Rs. 30,916 of it was due to drawings by him for purposes other than those authorised. It was held by the Privy Council that the drawings in question were criminal breach of trust within S. 405, Indian Penal Code, and that under Hindu Law the sons to that extent were not liable but that they were liable for the balance of the deficiency as they had not shown that they were not under a pious obligation in respect of it. This decision lends additional support to the conclusion arrived at by Horwill, J., in *Muthusami Servai* v.

1. (1925) 21 L.W. 606.
2. (1935) 70 M.L.J. 36: I.L.R. 59 Mad. 562 (F.B.).
3. (1937) 1 M.L.J. 231.
4. (1934) 68 M.L.J. 1: L.R. 61 I.A. 350: I.L.R. 56 All. 548 (P.C.).

Muniyandia Pillai *v.* Muthusami Servai.

Madhavan Nair, J.

*Mytheen Pichai Rowther*[1]. In our opinion the decision of Horwill, J., is correct and the decree of the lower Court exempting defendants 2 and 3 from liability is right.

The Civil Revision Petition is dismissed with costs.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Vedakannu Nadar .. *Petitioner** (*Defendant*)

*v.*

Gnanayya Nadar .. *Respondent* (*1st Plaintiff*).

Vedakannu Nadar *v.* Gnanayya Nadar.

*Provincial Small Cause Courts Act (IX of 1887), Art. 28, Sch. II—No dispute as to succession—Whether article applicable.*

Where a plaintiff sued for the recovery of certain jewels as the heir of his deceased wife and there was no question of disputed succession,

*Held,* on a proper construction of Art. 28 of Second Schedule of Provincial Small Cause Courts Act, there should be a claim made by an heir as such which claim must be resisted by another advancing a similar claim; otherwise that article would be inapplicable.

*Chhedi* v. *Gulabo,* (1905) I.L.R. 27 All. 622 and *Tika Sahu* v. *Chirkat Sahu,* (1914) 19 C.W.N. 614, followed.

*Samu Asari* v. *Anachi Ammal,* (1925) 49 M.L.J. 554 and *Rethinaswami* v. *Natarajan,* A.I.R. 1933 Mad. 346, dissented from.

*Chinnayya* v. *Achamma,* (1912) 23 M.L.J. 282: I.L.R. 37 Mad. 538, explained and distinguished.

The object of the relevant part of the article seems to be to remove from the cognizance of a Small Cause Court matters involving disputed succession, for, they may raise complicated questions. A suit for legacy or residue, as is evident from the provisions of the Succession Act, may raise intricate questions of law and a Small Cause Court is not expected to deal with such questions.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Tinnevelly in S. C. S. No. 1185 of 1932.

*M. C. Sridharan* for Petitioner.

*J. S. Vedamanikkam* for Respondent.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

*Venkatasubba Rao, J.*—This Civil Revision Petition has been referred to a Bench on the ground that it raises an impor-

1. (1937) 1 M.L.J. 231.

* C. R. P. No. 1004 of 1934. 2nd May, 1938.

Vedakannu Nadar v. Gnanayya Nadar.

Venkatasubba Rao, J.

tant question of law. The question turns upon the construction of Art. 28 of the Second Schedule to the Provincial Small Cause Courts Act. Under that article "a suit for a legacy, or for the whole or a share of a residue bequeathed by a testator, or for the whole or a share of the property of an intestate" is excepted from the cognisance of a Provincial Small Cause Court. The plaintiff sues for the recovery of certain jewels as the heir of the deceased wife. He alleges that upon her death in the house of her brother the defendant, the latter wrongfully took possession of her jewels. That the plaintiff has succeeded to his wife's property is not disputed by the defendant; in other words, the case raises no question of a disputed succession. In our opinion, on a proper construction of the relevant words, there must be a claim made by an heir as such, which claim is resisted by another person advancing a similar claim; otherwise the article does not apply. This follows, as the various decisions on the point have held, from the very use of the word 'intestate' in the section. The matter has been put clearly by Banerji and Richards, JJ., who observe that the article contemplates a suit between rival claimants to the property of an intestate (*Chhedi* v. *Gulabo*)[1]. The authorities on the point have been fully considered by a Bench of the Calcutta High Court which has adopted the same view (*Tika Sahu* v. *Chirkat Sahu*[2]) and it is unnecessary to refer to the same authorities again. As pointed out in that decision, in no previous case has a different view prevailed. The lower Court in holding that the article in question does not apply to the present suit, has thus come to a correct conclusion.

But Mr. Sridharan, the learned Counsel for the defendant-petitioner, contends that the lower Court's view is wrong and relies in support of his contention, upon two cases of our Court (*Samu Asari* v. *Anachi Ammal*[3] and *Rethinaswami* v. *Natarajan*[4]). The first of them was decided by Ramesam, J., and the second is also a decision of a single Judge (Pakenham Walsh, J.) who follows the earlier decision. We are unable to follow these cases, for, as a question of construction, we are inclined to agree that the view taken by the Calcutta and the Allahabad High Courts is right. As to *Chinnayya* v. *Achamma*[5], the

1. (1905) I.L.R. 27 All. 622. 2. (1914) 19 C.W.N. 614.
3. (1925) 49 M.L.J. 554. 4. A.I.R. 1933 Mad. 346.
5. (1912) 23 M.L.J. 282: I.L.R. 37 Mad. 538.

Vedakannu Nadar v. Gnanayya Nadar. — Venkatasubba Rao, J.

present question did not arise there and there is no more than a passing observation on which the petitioner can rely.

The object of the relevant part of the article seems to be to remove from the cognisance of a Small Cause Court, matters involving disputed succession, for, they may raise complicated questions. A reference to the earlier part of the section strengthens this view. A suit for legacy or a residue, as is evident from the provisions of the Succession Act, may raise intricate questions of law and a Small Cause Court is not expected to deal with such questions.

In the result, the Civil Revision Petition is dismissed, but we make no order as to costs.

K. C. —— *Petition dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

G. Meenakshisundaram Aiyar .. *Appellant (Appellant).*

*v.*

Swaminatha Aiyar .. *Respondent (Respondent)*

Meenakshisundaram Aiyar v. Swaminatha Aiyar.

*Execution—Agreement relating to—Passing of preliminary decree in mortgage suit—Agreement entered into before final decree—Undertaking to exonerate certain items of property—Whether can be pleaded in execution.*

Any agreement which merely relates to the execution of the decree and does not attack the decree itself can be pleaded in bar of execution of the decree. Thus it is permissible to plead in bar of execution of the final decree in a mortgage suit an unregistered agreement alleged to have been executed by the decree-holder after the passing of the preliminary decree and before the final decree whereby the decree-holder has agreed in writing to exclude two out of four items of the hypotheca from execution and to take out execution only as against the remaining two items.

*Chidambaram Chettiar* v. *Krishna Vathiyar,* (1916) 32 M.L.J. 13: I.L.R. 40 Mad. 233 (F.B.) and *Papamma* v. *Venkayya,* (1935) 69 M.L.J. 451: I.L.R. 58 Mad. 994 (F.B.), relied on.

Appeal under cl. 15 of the Letters Patent preferred against the judgment of Wadsworth, J., dated 29th November, 1935 and made in appeal against Appellate Order No. 65 of 1932 against the order of the Court of the Subordinate Judge of Tanjore, dated 8th December, 1931 and made in Appeal Suit No. 126 of 1931 (Appeal Suit No. 18 of 1931, District Court, West Tanjore) (Execution Petition No. 137 of 1930 in

*Letters Patent Appeal No. 11 of 1936. 11th November, 1937.

Meenakshi-sundaram Aiyar *v.* Swami-natha Aiyar.

Original Suit No. 51 of 1914, District Munsif's Court, Tiruvadi).

*K. P. Ramakrishna Aiyar* for Appellant.

*K. S. Champakesa Aiyangar* for Respondent.

The Court delivered the following

Pandrang Row, J.

JUDGMENTS. *Pandrang Row, J.*—In this appeal the only question for determination is, as stated by Wadsworth, J., whether it is permissible to plead in bar of execution of the final decree in a mortgage suit an unregistered agreement alleged to have been executed by the decree-holder after the passing of the preliminary decree and before the final decree whereby the decree-holder agreed not to execute the decree against two out of four items of the hypotheca which were in the enjoyment and possession of the appellant. The learned Judge appears to have thought that the agreement was drafted with a view to avoid the application of Ss. 17 and 49 of the Registration Act and of O. 21, r. 2 of the Code of Civil Procedure. This view does not seem to be correct, because if, as contended by the appellant, it is an agreement relating to the execution of the final decree arrived at before the final decree was passed, none of these provisions of law would come into operation or affect the agreement in question and there would have been no need to attempt any evasion of such provisions. The general principle was laid down so long ago as 1916 in *Chidambaram Chettiar* v. *Krishna Vathiyar*[1], which itself recognised the general rule followed for many previous years. This Full Bench decision was again considered comparatively recently in 1935 in *Papamma* v. *Venkayya*[2], and the judgment of the Full Bench in that case, which was delivered by me, stated that the Full Bench ruling in *Chidambaram Chettiar* v. *Krishna Vathiyar*[1] covers agreements which relate to the execution of the decree but not agreements which attack the decree itself. In other words, it has been made clear by this Full Bench decision that any agreement which merely relates to the execution of the decree and does not attack the decree itself can be pleaded in bar of execution of the decree. The simple question therefore for decision in this appeal is whether the agreement in this case whereby after the preliminary decree but before the final decree

1. (1916) 32 M.L.J. 13: I.L.R. 40 Mad. 233 (F.B.).
2. (1935) 69 M.L.J. 451: I.L.R. 58 Mad. 994 (F.B.).

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the decree-holder agreed in writing to exclude two items of the hypotheca from execution and to take out execution only as against the remaining two items is an agreement which relates to the execution of the decree or is an agreement which attacks the decree itself. There is nothing in the agreement to show that it was intended to attack the decree sought to be executed, for it cannot be said that it was intended to attack the final decree which had not yet been passed. There is no doubt that where there is a decree against more than one defendant, an agreement prior to the decree whereby the plaintiff agreed not to execute the decree against one of the defendants can be pleaded in bar of execution of the decree as against him. The present case is more or less similar, for the decree in this case is one for sale and some items otherwise liable to be sold in execution were agreed to be released from such liability to be sold in execution. I do not see how in view of the general rule prevailing in this Presidency an agreement of the kind pleaded in this case can be said to be one which cannot be pleaded. This is not a case in which any money has been paid outside Court when the preliminary decree directs that the money should be paid into Court, in which case it may be said that the payment pleaded is one which is contrary to the preliminary decree. To my mind the point seems to be fairly clear, namely, that the agreement that is pleaded in this case is one that can be pleaded and is not one which the appellant is debarred from pleading in bar of execution of the decree against the items agreed to be released.

The appeal must therefore be allowed with costs. It follows therefore that the order of the first Court allowing execution to proceed without determining the truth of the agreement pleaded must be set aside as well as all proceedings in execution taken thereafter. The first Court must now restore execution petition No. 137 of 1930 to its original number on the file and dispose of it according to law after determining, in particular, whether the agreement pleaded by the appellant is true. The appellant is entitled to have his costs in all the Courts from the respondent decree-holder.

Abdur Rahman, J.

*Abdur Rahman, J.*—Whatever may be my personal view in the matter, I agree that in view of the Full Bench decisions of this Court it is impossible to come to any other conclusion.

B. V. V. —— *Appeal allowed.*

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Kista Pillai .. *Petitioner** (*Accused*)

*v.*

Amirthammal .. *Respondent* (*Complainant*).

Kista Pillai *v.* Amirth-ammal.

*Criminal Procedure Code (V of 1898), S. 488—Construction of—'Living in adultery'—Living in the house of adulterer—If essential to bar the claim of wife to maintenance—Defence of adultery put forward by husband—Duty of Court—Procedure.*

It is not correct to say that, unless a married woman lives with the adulterer in the latter's own house and is maintained by him as a wife, the husband will be liable to pay maintenance under S.488, Criminal Procedure Code. The expression 'living in adultery' means continued adulterous conduct.

Occasional lapses from virtue are not a sufficient reason for refusing maintenance. Living in adultery need not be in the house of the adulterer. In re *Fulchand Maganlal*, (1927) I.L.R. 52 Bom. 160, relied on.

When a husband puts forward the defence of the adultery of the wife to an application for maintenance by her, the Court has to decide whether there has been such adulterous conduct on the part of the wife at or about the time of the application, that is to say, shortly before or shortly after the application is made, interpreting the word 'shortly' in a reasonable manner. In such a case, where the charge of 'living in adultery' is the only defence by the husband to the claim for maintenance, the husband ought to begin the case, and the petitioner (the wife) against whom the charge is made ought to have an opportunity of adducing rebutting evidence.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Ranipet dated 12th October, 1937 and made in M.C. No. 18 of 1937.

*V. T. Rangaswami Aiyangar* and *K. A. Chakravarthi Aiyangar* for Petitioner.

*N. Somasundaram* for Respondent.

*The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioner in this case is the husband of the respondent who has obtained an order of maintenance in her favour from the Sub-Divisional Magistrate of Ranipet under S. 488, Criminal Procedure Code. The main defence to the application for maintenance was that the petitioner was living in adultery. The learned Sub-Divisional Magistrate observes on this part of the case merely that there is ample evidence that the petitioner was having illicit intercourse with Chinnappa

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* Crl. R.C. No. 883 of 1937.
Crl. R.P. No. 827 of 1937. 20th July, 1938.

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and he then goes on to quote certain observations of Newsam, J., in *Lakshmi Ambalam* v. *Andi Ammal*[1] on the file of the High Court to the effect:

"Living in adultery is something quite different from leading an unchaste life. The principle it seems to me is that a husband is absolved from the obligation to maintain his wife when his wife has a *de facto* protector with whom she lives and by whom she is being maintained as if she were his wife."

The learned Magistrate then comes to the conclusion that "under this interpretation the sometime immoral character of the petitioner would not constitute 'living in adultery'." The facts elicited in evidence are not merely that there was only one individual lapse or even occasional lapses from virtue but that the petitioner actually eloped with Chinnappa and lived with him in another place, namely, Wallajah, for some days, that when discovered by her husband's relations and pressed to return, she refused to return, and that she had to be taken by force from her paramour to her parents' house. There is also certain evidence adduced, no doubt at a late stage of the case without giving an opportunity to the petitioner to rebut, to the effect that the petitioner, even when the case was pending before the Sub-Divisional Magistrate, was continuing her intrigue with Chinnappa. The learned Sub-Divisional Magistrate makes no reference to this evidence, and he appears to have thought that the only evidence against the petitioner was in respect of her immoral character in the past, that is to say, before the application. I am unable to say that this is a satisfactory way of disposing of a claim for maintenance either from the point of view of the petitioner or of the counter-petitioner. I am not prepared to go to the length of saying that, unless a married woman lives with the adulterer in the latter's own house and is maintained by him as a wife, the husband will be liable to pay maintenance under S. 488, Criminal Procedure Code. Emphasis is no doubt laid on the words "is living in adultery". In other words, as was pointed out by the Bombay High Court, in *Fulchand Maganlal, In re*[2], the clear implication from the words used by the legislature in this section is that, unless the wife is actually living in adultery at or about the time of the application, she is not

1. (1937) 2 M. L. J. 885.
2. (1927) I.L.R. 52 Bom. 160.

Kista Pillai *v.* Amirthammal.

disentitled to obtain maintenance. It is nowhere said in the section, and there is no need to introduce additional words therein, that living in adultery must be in the house of the adulterer. The words 'living in adultery' are, in my opinion, merely indicative of the principle that occasional lapses from virtue are not a sufficient reason for refusing maintenance. Continued adulterous conduct is what is meant by 'living in adultery'. The question therefore for the Magistrate to decide in this case was whether there had been such adulterous conduct on the part of the petitioner at or about the time of the application, that is to say, shortly before or shortly after the application was made, interpreting the word 'shortly' in a reasonable manner. This case has not at all been approached from this standpoint. The learned Magistrate has decided the case in a way which appears hardly to do justice to the parties. In particular the serious allegation of subsequent adultery made in the evidence given by the last witness examined for the respondent in the Magistrate's Court should have been allowed to be contradicted or rebutted on the petitioner's side by the petitioner giving evidence on the point if she was so inclined to do or by letting in other evidence. But it does not appear that any opportunity was given to her for giving evidence on the point. My opinion is that in a case of claim for maintenance like this the respondent who puts forward a charge of 'living in adultery' against the petitioner as his only defence to the claim for maintenance, ought to begin his case, and the petitioner against whom this charge is made ought to have an opportunity of adducing rebutting evidence. This procedure has not been followed in this case and in my opinion the inquiry must have done prejudice to the petitioning wife.

In these circumstances, I am of opinion that the interests of justice require that the order of the Magistrate should be set aside, and the Magistrate directed to rehear the petition after giving an opportunity to both parties to adduce additional evidence and in particular, to let the petitioning wife have the last word and to dispose of the petition afresh in the light of the observations contained in this judgment.

*Order set aside and case remanded.*

K. C.

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## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Bengal Coal Company, Limited .. *Appellants**

*v.*

Sri Sri Janardan Kishore Lal Singh Deo and another .. *Respondents.*

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Bengal Coal Company, Limited *v.* Sri Sri Janardan Kishore Lal Singh.

*Lease—Construction—Mining lease—Covenant by lessor to pay taxes, rates, etc., charged on mines—Public demands—Road and Public Works Cess—Payments due from persons entitled to royalties, etc., from mine—Income-tax on royalties—Whether within covenant—Bengal Cess Act (IX of 1880)—Bengal Mining Settlements Act (II of (1912), S. 10.*

By a lease of coal mines, the lessees covenanted to pay to the lessors royalties reserved by the lease, and to "pay and discharge all taxes, rates, assessments and impositions whatsoever being in the nature of public demands . . . . . charged, assessed or imposed upon the said mines by authority of the Government of India or the Local Government except demand for land revenue . . . ." On a claim by the lessors against the lessees for reimbursement of sums paid by them in respect of road and public works cess under the Bengal Cess Act, 1880, expenses charged to the lessors under S. 10 (1) (*b*) of the Bengal Mining Settlements Act, 1912, and income-tax on royalties reserved by the lease,

*Held,* that the defendants were liable for the cess and the charge under the Mining Settlements Act inasmuch as they were public demands in respect of the land, but that they were not liable for the income-tax as it was not a tax imposed on the mines in any sense relevant to the covenants in the mining lease.

*Allum* v. *Dickinson,* (1882) 9 Q.B.D. 632; *Foulger* v. *Arding,* (1902) 1 K.B. 700 at 711; *Maharajah Manindra Chandra Nandi* v. *Secretary of State for India in Council,* (1910) 21 M.L.J. 365: L.R. 38 I.A. 31: I.L.R. 38 Cal. 372 (P. C.) and *Payne* v. *Esdaile,* (1888) 13 App. Cas. 613, referred to.

Decision of the Calcutta High Court affirmed.

Appeals from two decrees dated 24th March, 1936, of the High Court, Fort William, Bengal (Syed Hasim Ali and N. G. A. Edgley, JJ.) affirming a decree dated 7th December, 1932, of the District Judge, Burdwan, modifying a decree dated 17th July, 1930, of the Subordinate Judge, Asansol.

The plaintiffs brought an action in the Court of the Subordinate Judge, Asansol, claiming to be entitled to be reimbursed by the defendants, the Bengal Coal Company, Ltd., in respect of certain payments made by them for which they contended that the defendant company were liable under a mining lease into which the parties had entered. The payments in question were made by the

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*P.C. Appeal No. 69 of 1937. 28th June, 1938.
Bengal Appeals Nos. 30 and 35 of 1936.

P.C.

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plaintiff lessors in respect of road and public works cess under the Cess Act, 1880, expenses charged to the lessors under S. 10 (1) (*b*) of the Bengal Mining Settlements Act, 1912, and income-tax on royalties reserved on the lease. The Subordinate Judge held that the plaintiffs were entitled to recover in respect of payments under all three heads. The District Judge upheld the plaintiffs' claim except as to income-tax. The High Court having affirmed that decision, the plaintiffs and the defendants both appealed to His Majesty in Council.

*J. M. Parikh* and *Ralph Parikh* for Appellants.

*Cyril Radcliffe, K.C.* and *L. M. Jopling* for Respondents.

28th June, 1938. Their Lordships' judgment was delivered by

Sir George Rankin.

Sir George Rankin.—By a mining lease dated 4th March, 1915, the plaintiffs demised to the Bengal Coal Company, Ltd. (defendants) therein called "the lessees," the mines, beds, veins and seams of coal in Mousa Poidih in the district of Burdwan for 30 years from the 1st April, 1915. The first of the lessees' covenants contained in Part VII of the schedule to the lease was in the following terms:—

"The lessees shall pay the royalty and royalties reserved by this lease at the time and in the manner above appointed in that behalf and shall also pay and discharge all taxes, rates, assessments and impositions whatsoever being in the nature of public demands which shall from time to time be charged, assessed or imposed upon the said mines or any part thereof by authority of the Government of India or the said Local Government or otherwise except demand for land revenue and shall also pay interest at the rate of 12 per cent. per annum on all arrears of such royalty or royalties from the due date thereof."

By their plaint filed in the Court of the Subordinate Judge at Asansol on the 21st June, 1929, the plaintiffs claimed to be entitled under this covenant to decree against the defendants for a sum of Rs. 2,095-8-0 together with certain interest. The claim is for re-imbursement in respect of certain cesses or taxes for which the plaintiffs became liable between the years 1923-1929 (inclusive) and which they have paid. These public demands are three in number—namely, (1) Road and Public Works Cess under the Cess Act, 1880 (Bengal Act IX of 1880); (2) expenses charged to the plaintiffs under clause (*b*) of sub-S. (1) of S. 10 of the Bengal Mining Settlements Act, 1912 (Bengal Act II of 1912); (3) Income-tax upon royalties reserved by the lease.

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The Subordinate Judge gave the plaintiffs a decree in respect of all three heads of claim but disallowed the claim for interest. On appeal by the defendants the District Judge of Burdwan (7th December, 1932) disallowed the claim in respect of income-tax but upheld the Trial Court's decision as to the other two heads of claim. Both sides having appealed to the High Court, Nasim Ali and Edgley, JJ., affirmed the decision of the District Judge by decrees dated the 24th March, 1936. Two appeals to His Majesty have been brought pursuant to certificates granted by the High Court under clause (*c*) of S. 109, Civil Procedure Code, and they have been consolidated. The defendants by their appeal dispute that they are liable in respect of Road and Public Works Cess or the charge under the Mining Settlements Act. The plaintiffs appeal against the disallowance of their claim in respect of income-tax. No question as to interest arises; nor is it contended that there is any reason why the covenant should not have effect according to its tenor.

Learned counsel for the defendants have drawn attention to the fact that the words of the covenant—"charged, assessed or imposed upon the said mines or any part thereof"—are not accompanined by phrases (to be found in books of conveyancing precedents) designed to enlarge their scope by making express mention of demands imposed in respect of the demised premises or in respect of the royalties reserved by the lease. *Allum* v. *Dickinson*[1] has been cited to show that the fact that a charge can be enforced against the premises does not in all circumstances make it a charge imposed on the premises; and the observations of Mathew, L.J., in *Foulger* v. *Arding*[2] have been referred to as showing that unless there be express mention of demands imposed on the owner in respect of the premises, such a demand is not within the covenant.

As regards the claim for monies paid under the Cess Act, 1880, their Lordships are of opinion that the terms of that enactment deprive the defendants' contention of its force:—

"5. From and after the commencement of this Act in any district or part of a district, all immovable property situate therein, except as otherwise in Ss. 2 and 8 provided, shall be liable to the payment of a road cess and public works cess.

"6. The road cess and the public works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries,

1. (1882) 9 Q.B.D. 632. 2. (1902) 1 K.B. 700 at 711.

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tramways, railways and other immovable property ascertained respectively as in this Act prescribed. . . ."

These words, together with the preamble and other sections (for example, S. 80), are to the effect that the cess is levied on the immovable property and that the immovable property is liable to pay it. It is assessed differently as regards lands and mines—in the case of lands it is assessed on the annual value and in the case of mines on the annual net profits. The judgment of the Board delivered by Mr. Ameer Ali in *Maharajah Manindra Chandra Nandi* v. *Secretary of State for India in Council*[1] has been referred to, but their Lordships are unable to find that it casts any doubt upon the character of the cess as one imposed upon the immovable property by the plain terms of the Act.

The nature of the payment to be made under S. 10 (1) of Bengal Act II of 1912 by the persons mentioned in clause (*b*)—"all persons who receive any royalty, rent or fine from such mines" is not so clear. The word "owner" in this Act points in such a case as the present to the lessees and not to the lessors. Expenses incurred by the Mines Board of Health in respect of any area declared to be a "mining settlement" are to be "charged to" the persons mentioned in clause (*b*) and to the lessees in such proportions as the Local Government may direct; the total burden of the lessees is to be divided among them on the basis of output, while the total burden of the receivers of royalties, etc., is to be divided among them on the basis of the Road Cess payable by each. There is a provision [sub-section (4)] that "all expenses chargeable under this section shall be recoverable as if they were arrears of land-revenue." This would subject the defaulter not merely to "certificate procedure" under the Public Demands Recovery Act, but also to a sale of his estate or interest under the Land Revenue Sales Acts [Act XI of 1859, Bengal Act VII of 1868]. Their Lordships think that the effect of the Act is to distribute the burden of the expenses among the interests (superior and inferior) in the mine. They say nothing upon the question whether a revenue-sale for the zemindar's default would affect the interest of his lessees [*cf.* Act XI of 1859, S. 37] because they are not of opinion that the words "upon the said mines or any part thereof" refer to the interest

1. (1910) 21 M.L.J. 365: L.R. 38 I. A. 31: I.L.R. 38 Cal. 372 (P.C.).

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of the lessees as distinct from that of the lessors. Nor are the plaintiffs concerned in the present case to demonstrate that for default by the lessees there is a remedy against the leasehold interest. Land revenue is certainly a burden "charged, assessed or imposed upon" the land. If the remedy against the land be what makes it so, or be sufficient to make it so, then the payment now in question is related in like manner to the lessors' interest. This conclusion cannot be avoided by contending that the persons referred to in clause (*b*) of S. 10 of the Act of 1912 need not necessarily have any interest in the mine at all. Receipt of "royalty, rent or fine from such mines" *prima facie* imports such an interest, and in the absence of such interest Road Cess would not be chargeable under the Cess Act of 1880.

The words "taxes, rates, assessments and impositions whatsoever" are followed by the words "charged, assessed or imposed upon the said mines"—a variety of phrase which is intended to avoid restricting the covenant to cases in which the demand is in the strictest sense "charged upon the land." The phrases are to be taken in their ordinary and natural meaning. In *Payne* v. *Esdaile*[1], the House of Lords had to interpret the phrase in a Statute of Limitations "periodical sums of money charged upon or payable out of any land except moduses or compositions belonging to a spiritual or eleemosynary corporation sole." As moduses were incapable of being charged on land in the sense of being payable out of land or realisable by remedy against the land itself, the phrase "charged upon" was interpreted in a wider sense and as having no technical meaning. It was considered by Lord Herschell that the *prima facie* and most common meaning would make it applicable only to those cases in which there was some remedy against the land itself, but that it might well be used to describe a burden imposed upon land if a payment has to be made in respect of land and the land can only be enjoyed subject to the liability for that payment. Lord Macnaghten observed at pp. 626-7:

"The liability to the payment falls upon the occupier or taker for the time being by reason of his occupation. The land carries the liability as a burthen from taker to taker. Beyond all doubt that liability subtracts something from the profitable enjoyment of the land; it must be taken into account on the occasion of a sale, a mortgage, or a lease. An intending purchaser would give so much less purchase-money; an intending mortgagee would strike the

1. (1888) 13 App. Cas. 613.

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amount off the rental in calculating the value of the proposed security, and an intending lessee would offer so much less rent. It seems to me that according to the ordinary understanding of mankind that is a charge upon land which cannot be dissociated from the land and which charges the occupier in respect of the land."

The particular illustration of an intending lessee does not here apply owing to the special nature of the demand in question, but the other illustrations (intending purchaser, intending mortgagee) are applicable, and add point to the circumstance that a remedy is given against the land itself. Their Lordships see no features in the present case rendering these considerations insufficient to attract the operation of the covenant, and are of opinion that the High Court was right in holding that this part of the plaintiffs' claim is well-founded.

Income-tax is in a very different position, as intending purchasers or mortgagees of the lessors' interest would appreciate. It is not a tax imposed upon the mines in any sense relevant to the lessees' covenants in a mining lease. Indeed, express words referring to public demands imposed upon the proprietors in respect of the mine would not have brought income-tax within the covenant. It may be true that the suggestion that the covenant extends to income-tax in respect of the plaintiffs' royalties would not in 1915 seem so unreasonable as it would after the Indian Income-tax Acts of 1918 and 1922 had graduated the tax according to the amount of the assessee's total income. But a general tax on the income of all persons with exceptions for smaller incomes is plainly outside the scope of the covenant.

The result is that, in their Lordships' opinion, both appeals should be dismissed. They will humbly advise His Majesty accordingly. There will be no order for costs.

Solicitors for Appellants: *Stanley, Johnson and Allen.*

Solicitors for Respondents: *Sanderson, Lee & Co.*

R. C. C. *Appeals dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

S. S. Batliwala .. *Appellant** (*Accused*).

Batliwala, *In re.*

*Government of India Act, 1935, Ss. 49 (1) and 50 (3)—Sanction for prosecution under S. 196, Criminal Procedure Code, by Governor—Governor acting in individual judgment—Whether he acts unlawfully—Consultation with ministers—If a legal requirement—Order requiring D. I. G. of Police to depute an officer—Letter authorising an Inspector to prefer a complaint signed by the Superintendent for D. I. G.—Validity of complaint—Authentication of order of prosecution by the Chief Secretary—S. 114, Illustration (e) of the Evidence Act—Penal Code, S. 124-A—Object of—Sedition—Criterion—Principles of political party—Consideration of—Attacks on Magistrates and Police—Seditious nature of.*

An order sanctioning the prosecution of the accused under S. 196, Criminal Procedure Code, for sedition purported to be an order of the Provincial Government and to have been issued by order of His Excellency the Governor, who under S. 49 (1) of the Government of India Act, 1935, exercised the executive authority of the Provincial Government. It was assumed that His Excellency had acted without consulting his ministers. The order was authenticated by the Chief Secretary in accordance with the rules. By that order the Deputy Inspector-General of Police, C.I.D., was requested to depute an officer of the Special Branch of C.I.D. of the rank not lower than that of Inspector of Police to prefer a complaint. The letter authorising an Inspector of Police to prefer a complaint was signed by the Superintendent, Special Branch, C.I.D., for Deputy Inspector-General of Police.

*Held*, that (1) the complaint was properly filed, *Reg.* v. *Vinayak Divakar*, (1871) 8 Bom.H.C.R. 32 (Crown Cases) distinguished.

(2) S. 114, illustration (*e*) of the Evidence Act applied and the sanction was in order.

(3) There is no provision in the Government of India Act, 1935, which imposes a legal obligation on His Excellency the Governor to consult his ministers before sanctioning the prosecution of the accused nor is he legally required to do so under the Instrument of Instructions.

(4) S. 50 (3) of the Government of India Act does not relate only to cases in which the question arises whether any matter is or is not a matter as respects which the Governor is required to act in his discretion or to exercise his individual judgment.

(5) In the case of a sanction to prosecute under S. 196 of the Criminal Procedure Code, the Governor is certainly not required to exercise his individual judgment, but in exercising his individual judgment he is not acting unlawfully and his act cannot be called in question in a Court of law.

(6) A Court cannot take account of the principles of a political party and declare that an offence which is punishable under Penal Code is not an offence because it does not contravene the principles of that party. Moreover, it is not the advocacy of certain principles—however extreme they may be—that the law punishes; but the adoption of methods and modes of address intended to cause disaffection towards the Government established by law or to bring that Government into hatred or contempt. The speech

* Crl. Appeal No. 645 of 1937. 14th March, 1938.

will have to be judged not by the political views of the accused or his party but by the purpose of the accused in expressing those opinions in the way he did. Fair criticism of the Government is no offence but the question the Court has to decide is whether the speech of the accused indicated an intention to promote hostility and ill-will towards the Government.

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(7) S. 124-A of the Penal Code is intended as much to protect the people against agitators as it is to maintain the stability of the Government.

(8) Attacks on Government employees which bring into hatred and contempt the Magistracy and the police tend to endanger the public peace and are seditious.

Appeal against the order of the Court of Session of the Nellore Division in Case No. 34 of the Calendar for 1937.

*B. Jagannadha Das* for *S. Suryaprakasan* for Appellant.

*The Public Prosecutor* for the Crown.

The Court delivered the following

JUDGMENT.—The appellant, a member of the All-India Congress Socialist Party, has been convicted by the Sessions Judge of Nellore of the offence of having delivered a seditious speech punishable under S. 124-A, Indian Penal Code. The accused had toured throughout the Andhra Desa doing propaganda work on behalf of his party; and the speech in question was delivered at Venkatagiri at the end of his tour.

Two preliminary objections have been raised with regard to the validity of the prosecution. The first point taken is that there was no proper sanction, in that His Excellency the Governor did not consult his Ministers as he was bound to do before sanctioning the prosecution and, secondly, that the prosecution was not filed in accordance with the order sanctioning the prosecution, in that the Circle Inspector who filed the complaint was not deputed by the Deputy Inspector-General of Police, C. I. D., as required by the sanction order, but by the Superintendent, Special Branch, C. I. D. The second point can be briefly disposed of. The second paragraph of the order of the Government is:

"The Deputy Inspector-General of Police, Railways and C. I. D., is requested to depute an officer of the Special Branch, C. I. D., of the rank not lower than that of Inspector of Police, to prefer a complaint in the Court of the District Magistrate of Nellore."

The letter issued in consequence of this order, Ex. A, is from A. F. Bulkley, Esq., Deputy Inspector-General of Police, Railways and C. I. D., Madras, to M.R.Ry. V. Ayyasami Naidu Avergal, Inspector of Police, Special Branch, C. I. D., Madras. The letter authorises the officer to whom the letter

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was addressed to prefer a complaint in the Court of the District Magistrate, Nellore, against the accused in respect of the speech delivered by him at Venkatagiri on the 3rd September, 1937. The letter was signed by Mr. Colebrook, the Superintendent, Special Branch, C. I. D., not as such but " for Deputy Inspector-General of Police, Railways and C. I. D." The body of the letter and the words at the bottom, "Deputy Inspector-General of Police, Railways and C. I. D." were typed. The signature of Mr. Colebrook and the word "for" were in ink, which is clear proof that Mr. Colebrook signed not on his own account but as one authorised to sign on behalf of the Deputy Inspector-General of Police, Railways and C. I. D. Mr. Bulkley, Deputy Inspector-General of Police, is a touring officer and Mr. Colebrook was the senior officer working in his office. There is therefore no reason to doubt that Mr. Colebrook was authorised to sign such orders.

Even if it was Mr. Colebrook and not Mr. Bulkley who deputed Mr. Ayyasami Naidu to file the complaint, I should still be of opinion that the complaint was properly filed. The order of the Government contained merely a request to depute a certain officer of the Special Branch, C. I. D., not below the rank of Inspector, to file the complaint. It is clear from the order that the Government had no intention that only an Inspector of Mr. Bulkley's choice should file the complaint. He was ordered to depute the Inspector because he was the head of the C. I. D. Mr. Colebrook was in charge of the Special Branch of the C. I. D., of which Mr. Ayyasami Naidu was an Inspector. Mr. Jagannadha Das has placed reliance on *Reg.* v. *Vinayak Divakar*[1], in which an order sanctioning prosecution of a highly placed Magistrate directed that the complaint should be filed by a responsible I.C.S. Magistrate specifically named; and it was held in that case that it was clear that the Government intended that that particular I.C.S. genleman should file the complaint and no other, that the Government clearly thought it advisable that this particular gentleman should consider the case against the accused and select such acts of his as he deemed suitable and proper for the subject of a charge, and that it was not the intention of the Government that this power of discrimination

1. (1871) 8 Bom. H.C.R. 32 (Crown Cases).

should be delegated to some other person of a lower rank. As already pointed out, the Government clearly had no intention in the present case that any particular officer should file the complaint.

The order sanctioning the prosecution, Ex. B, purports to be the order of the Provincial Government and to have been issued by the order of His Excellency the Governor who, under S. 49 (1) of the Government of India Act, 1935, exercises the executive authority of the Provincial Government. The order was authenticated by Mr. Brackenbury, the Chief Secretary, in accordance with certain rules framed by His Excellency the Governor in consultation with the then Ministers. The sanction therefore seems to be in order and there is nothing in it which would prevent the Court from applying the principle enunciated in S. 114, illustration (*e*) of the Indian Evidence Act that public acts are regularly done. However, Mr. Jagannadha Das states that a speech delivered by the Hon'ble Minister for Courts and Prisons, reported in a local paper, contained a statement that he (the Honourable Minister for Courts and Prisons) had not been consulted with regard to the prosecution. This statement raised some doubt in the minds of the counsel for the accused whether His Excellency the Governor had consulted his Ministers; and in order to ascertain whether that was done, the Court was requested to summon the Hon'ble the Prime Minister and the Hon'ble Minister for Courts and Prisons. Had these Ministers pleaded privilege, the Court would undoubtedly have upheld their claim and the trial would have proceeded on the assumption that the sanction was properly accorded. Probably, it could also have been successfully contended that the Court was not at liberty to probe into the acts and conversations of the Governor and his Ministers which had led up to the passing of the order and that the Court was bound to assume that the order was regularly passed. The learned Public Prosecutor, in order to avoid any unpleasantness that might arise with regard to the summoning of Ministers as defence witnesses, was prepared to assume, although he had no reason to believe that such was the case, that His Excellency the Governor had acted without consulting his Ministers. The learned Sessions Judge was therefore bound to consider whether the failure of His Excellency the Governor to consult

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his Ministers invalidated the sanction: and a very learned and lengthy argument has been addressed to me by Mr. Jagannadha Das on this question. The Government of India Act of 1935, in so far as it relates to the administration of Provincial affairs, contemplates that in certain cases the Governor should act in his discretion, and so do what he thinks to be right independently of any opinions that may be held by his Ministers. In certain cases, too, he has to exercise his own independent judgment; in other cases, it is clearly presumed that he will consult his Ministers; and the Instrument of Instructions issued to the Governor requires him to be guided by his Ministers in those matters in which he is not required to act in his discretion or to exercise his individual judgment. Admittedly, by virtue of S. 53 (2) of the Act, the Courts cannot question any act done by the Governor on the ground that he has not followed the Instrument of Instructions; but it is contended by Mr. Jagannadha Das that the Governor is legally bound to consult his Ministers even though his acts cannot be called in question on the ground that he was not guided by the advice tendered. Except in S. 59 (5), however, I find no reference in the Government of India Act to any legal duty cast upon the Governor to consult his Ministers. S. 59, cls. (2) and (3), relate to the drawing up of certain rules and the making of certain orders and instruments and their authentication; and S. 59 (5) requires the Governor to consult his Ministers with regard to the discharge of his functions under these sub-rules. There is no provision in the Act which requires the Governor to consult his Ministers before performing executive acts. The Instrument of Instructions implies that he should consult his Ministers; for without consulting them he would not be able to be guided by their advice; but he is not legally required to do so. The remedy for any unconstitutional act on the part of the Governor is not legal action but constitutional action—the resignation of the Ministers if they consider that the unconstitutional act of the Governor is of sufficient importance to warrant their resignation, and a request that the Governor be recalled. S. 50 (3) is to the effect that the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion or ought or ought not to have exercised his individual judgment; but it is

argued that these words cannot be severed from the first part of sub-S. (3) of S. 50 and relate only to cases in which the question arises whether any matter is or is not a matter, as respects which the Governor is required to act in his discretion or to exercise his individual judgment. But if the latter part of this sub-section had this very limited meaning, all these words set out above would be unnecessary and all that would be required would be to add after the words "the decision of the Governor in his discretion shall be final" the words "and shall not be called in question." | Batliwala, *In re.*

It has been pointed out that S. 271 (2-b) requires that with respect to the sanctioning of prosecutions of public servants, which would be under S. 197 of the Criminal Procedure Code, the Governor shall exercise his individual judgment. It is therefore argued that as nothing is said about S. 196, it must be assumed, by implication, that the Governor is bound to consult his Ministers before sanctioning a prosecution. S. 271 was drawn up for the protection of public servants, who are under the special protection of the Governor, and it is in order that public servants should not be victimised that the Governor is required to exercise his own individual judgment in sanctioning or withholding sanction to prosecute them. In the case of a sanction to prosecute under S. 196 of the Criminal Procedure Code the Governor is certainly not required to exercise his individual judgment; but that does not mean that in exercising his individual judgment he is acting unlawfully and that his Act can be called in question in a Court of law. It is pointed out that in matters where the Governor is required to exercise his individual judgment or to act in his discretion, his acts are subject to supervision by the Governor-General but in matters where he should be guided by his Ministers there is no such right of interference by the Governor-General. It is therefore argued that the Government of India Act could not be so anomalous as to permit the Governor to act autocratically in a matter in which he should be guided by his Ministers and yet should be under the control of the Governor-General in matters in which he is required to exercise his individual judgment or to act in his discretion. This argument ignores the constitutional remedy of the Ministers and the people, to which reference has already been made. Very much the same criticism might be made of

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the argument that as the Government of India Act is meant to give more power into the hands of the elected representatives of the people and contains many provisions which are almost identical with provisions in the constitution of the great self-governing dominions, it could not be meant to give the governor such autocratic powers. This argument moreover is based on the fallacy that the more advanced the constitution the less the powers of the Governor. The contrary is true. The Governor of a small colony inhabited by primitive and backward people has very much less power than the Governor-General of a self-governing dominion, the reason being that in the former the Government is carried out personally by the Governor and the officials subordinate to him; but in the case of a self-governing dominion where the Government is, in practice, in the hands of the people, the Governor needs extraordinary powers to interfere when a grave crisis arises; but these extraordinary powers he rarely uses. Even in the self-governing dominions the Governor-General has not infrequently resisted the legislature and the Ministers by withholding and reserving bills. I am therefore satisfied that there is nothing in the Government of India Act which imposed a legal obligation upon His Excellency the Governor to consult his Ministers before sanctioning the prosecution of the accused. It would perhaps be as well before leaving this question to again point out that the learned Public Prosecutor does not admit that there was no consultation.

On the question whether the accused was actually guilty of sedition, a further preliminary objection has been taken that it is not safe to rely on the reported speech which was recorded by a shorthand writer and later transcribed. No doubt every shorthand writer is fallible and undoubtedly a few mistakes were made both in the recording of the subject-matter of the speech and in transcribing the shorthand notes; but it cannot be doubted, upon a reading of the whole of the reported speech, that the shorthand writer has neither missed nor misunderstood very much. Emphasis was laid on certain grammatical mistakes in the speech and it was pointed out that one sentence contained no predicate; but it cannot be doubted for a moment that even the best and the most renowned speakers make frequent grammatical mistakes and—where the sentence is involved sometimes forget how the

sentence began—with the result that a sentence which may have conveyed a clear meaning to the hearers is not, grammatically speaking, complete and correct (in reading through the judgment after the stenographer had transcribed it, I found one such unfinished sentence of my own). While therefore it would be unsafe to rely on any chance word or to attach undue significance to any particular sentence, there can be no doubt that what the shorthand writer has sent to the Government and which has been filed in this case does very accurately reproduce in substance and in word what the accused actually said in the speech delivered by him at Venkatagiri on the 3rd September last. It may be noted that no objection to the correctness of the report was taken in the Magistrate's Court; and it was only in the Sessions Court that this point was thought of. The interpreter of the accused, who was examined as a defence witness, said that it was only after getting into the witness-box that he read it carefully and noted the incorrect portions.

Mr. Jagannadha Das has further tried to divert attention from the actual speech made by pointing out that the accused made many other speeches in Andhra Desa which were delivered during a propaganda tour on behalf of his party; and that with respect to none of those other speeches has a similar charge been made against him. From this I have been asked to conclude that the accused could not have had a seditious intention when he delivered this particular speech at Venkatagiri. I am unable to accept this argument; for a man may make ninety-nine non-seditious speeches and yet his hundredth speech might be full of sedition. Moreover, we know very little about the speeches made by the accused in other places. Only one witness speaks on this subject and he heard only one speech. He was a highly educated gentleman, of 58 years of age, and not likely to be roused to violence against his better judgment by a young man like the accused. Another reason why I have been asked not to attach too much importance to the spoken word is that the opinions expressed in the speech were in accordance with the principles of the Congress party, whose members now govern in the majority of the provinces of India; but clearly a Court cannot take account of the principles of a political party and declare that an offence which is punishable under the Penal Code, is not an

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offence because it does not contravene the principles of that party. Moreover, it is not the advocacy of certain principles—however extreme they may be—that the law punishes; but the adoption of methods and modes of address intended to cause disaffection towards the Government established by law or to bring that Government into hatred or contempt. It is quite possible to express dissatisfaction with the Government without exciting disaffection; and this speech will have to be judged not by the political views of the accused or his party; but by the purpose of the accused in expressing those opinions in the way he did. Fair criticism of the Government is no offence; but the question the Court had to decide was whether the speech of the accused indicated an intention to promote hostility and ill-will towards the Government. If a person attempts to bring the Government into hatred or contempt or to excite disaffection towards it, force and violence is encouraged which may lead to a conflict with the authorities, with the certainty that there will be grievous loss of life. S. 124-A is intended as much to protect the people against agitators as it is to maintain the stability of the Government.

Mr. Jagannadha Das has stated that it was part of the instructions of persons going on propaganda tours that they should exploit local grievances and that it was in accordance with this principle that when the accused went to Venkatagiri, he began his speech by a slanderous diatribe against the Zamindar of Venkatagiri. One of the local grievances appears to have been that certain persons who had been in the habit of cutting fuel in the local forests were not allowed to do so; and the accused dilates on the poverty of the people and the way they were being ground down by the Zamindar and says:

"Do you know what happens if there is a terrific tyranny and there is nobody to succour the poor? Do you remember a man called Alluri Sitharamaraju (a man who similarly exploited local grievances and brought about a rebellion)? Have you heard about his history? And do you know what he did?"

He then expatiates on the wretched state of the people in Venkatagiri and refers to a certain criminal case against a man for killing a boar, and this gave the accused an opportunity to attack the Magistracy. He says:

"He brought him (the boar) down to earth and this British Government, whose Magistrates are supposed to be doyens of justice and equity and are the most corrupt officials I have ever seen in the world, these people. . . ."

Then he says:

"The peasantry is being ground down in poverty and even a dog will turn if you go on beating too much. I ask you once again, do you remember the history of Alluri Sitharamaraju?"

The accused does not however give the story of Sitharamaraju at once but returns to another attack on the Zamindar. He then gives what purports to be a history of the British occupation of India and compares the British to a guest with a snake in his heart and the Zamindar's ancestor to a traitorous brother who helped to impoverish his brethren. This guest with a snake's heart is referred to in the first person and we find these words:

"There is poverty. Will you allow me to have a small corner of your house? I shall sit down and sell a small little thing like tobacco and send the money to my country. Will you allow it? You with a magnanimous heart said 'alright'. Get this corner and then I got some persons in your family supposing your blood brother, to come with me and conspire with me so that I can make everybody quarrel and take charge of the whole house. Your wife will not be your wife. She will be my wife. Your brothers and sisters shall be slaving away for me and with what aim? That I may carry the whole wealth of your household to my own land."

Then, after a few more remarks in the same vein—chiefly directed towards the Zamindar's ancestor, he says with respect to that ancestor:

"He has turned everybody in the family to a slave to this foreigner. He has gone and sold his country to me. What are your feelings for the man though he is your brother, flesh of your flesh and blood of your blood? I ask you what are your feelings first towards your brother and then towards the marauder, the dacoit, the man with the serpent's heart who came as a guest to your house? What are your feelings towards these two? I want to talk to you about Alluri Sitharamaraju."

Then begins a highly coloured story of Sitharamaraju, in which he is painted as a hero who enabled the people to rise against oppression, the story containing contemptuous references to the police. He says of Sitharamaraju:

"He is a man who came from Andhra Desa and when there was terrific repression of this British Government, its police, guns, and arms, he said, 'I do not care for my future or what happens to me. I shall make a band of followers and I shall see that in this land of West Godavari or East Godavari or Kistna these Britishers shall lead a life as brothers and did it. Do you know how he did it? He was not like the British officials who came with lathies and bullets and shoot on innocent people who are not ready or who have no guns. No, no. He used to give notice . . . . . . . . . . If you care to be present, be present and hand over the keys (of the Treasury); but if you want to test me, remember I shall shoot you down like a dog and what used to happen. The Police Officers are certainly very brave when you have not got arms in your hand . . . . . . . . . . . . and these officers and

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these militaries and these police officers who are very brave in shooting down the people and tyrannising over them, they used to throw down their guns and run for their lives."

The speech continues in much the same strain, with an accusation that the police officers are paid to shoot down the people. Then he says;

"But to-day in this country there are thousands of people like Alluri who have come out and said they will not rest until all the exploiters in the land shall be thrown out, until this foreign marauder, dacoit, who has got in under false pretences is thrown out of this land with the poison that is sitting in his heart, with the snake that is sitting in his heart . . . . . . . . . . . . these Alluris in this conntry have determined that not only will they drive out the Britisher, hand over the wealth, take charge of treasuries in this country; but also have determined that the poisonous snake which is sitting in the heart of British Imperialism shall be killed and not allowed to poison our life breath every minute and allow our Harijans to die of starvation, our poor peasants to go in poverty and misery and have no hopes of civilisation at any time, no future for their children, no education, no cloths."

He then goes on to discuss the present political situation and says that the present Prime Minister has gone to jail in order that this British Governor and this British Government shall pack out of this country; and he points out that now the Congress are in power, that even the soldiers and police and Government servants want to be free from British Imperialism, and that they also know that this country is a slave country because British Imperialism is here. He exhorts the people either to force the Zamindar to give them fuel or to march out and take the fuel themselves and concludes:

"All India is organising. Everybody is organising so that when the final fight comes we shall kick these Britishers out."

There can be no doubt from a reading of the whole of this speech, of which extracts have been given above, that it is a direct incitement of the people to violence against the Government as now established, which the accused has described as the British Government. That by the 'British Government' he means the Government as now established is particularly clear where he compares the kist payable on Government lands with the rates payable on Zamindari lands, where he describes the charge on Government lands as being levied by the 'British Government'. It is of course true that any speaker is entitled to abuse the British and nobody has ever said that such abuse amounts to sedition. On the contrary, it is commonly counted as patriotism. But the accused is not here concerned with ancient history and with individuals of British nationality;

but with the Government as now established, which in his speech he has identified with the Government that was established in the early stages of the British occupation and which is responsible, jointly with the Zamindar, for the poverty and distress now existing. Alluri, the hero, relieved distress by looting the treasuries; and there are thousands of Alluris to-day. The accused clearly did not, as his learned advocate would have me believe, identify the existing Government with the Congress Ministry. The Government means much more than the Ministers; and includes the machinery with which the Ministers have to work. The accused was always aware of this distinction between the Government and the Ministry; and it was against the Government that the accused intended to cause disaffection. Even if this distinction was not present in his mind, the speech would still be seditious; for the Harijans and others to whom the accused addressed his remarks were clearly exhorted to resist the tyrannous authority then existing—the authority which in practice was being exercised by the Ministers then in power and the officials who were carrying out their policy.

The sedition does not end with the denunciation of the Government and an exhortation to the people to follow the thousands of Alluris of to-day; but includes the bringing into hatred and contempt the magistracy and the police. Attacks of this kind on Government employees scandalise the Government by casting a reflection on those who are entrusted with the administration of public affairs and naturally tend to endanger the public peace; and this, undoubtedly, as can be seen from the passages extracted above, is what the accused intended.

The learned Counsel for the accused has pointed out a few (for there are only very few) passages which read more peacefully, as where, after inviting the people to shout with him 'long live revolution' he described revolution as meaning that:

"We (the people of India) shall change the structure of society so that man will not exploit man, one man shall not be rich and thousands poor."

And so on, which the Public Prosecutor has aptly compared with the interjections of Mark Antony in his funeral oration over Julius Caesar when, in a clever speech urging the people to rebellion, he added at frequent intervals, "For Brutus is an honourable man".

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The conviction is therefore right. The sentence is a moderate one. The conviction and sentence are therefore confirmed and the appeal dismissed.

S. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Sivanmalai Goundan .. .. .. *Appellant** (*Plaintiff*)

*v.*

Arunachala Goundan and others .. *Respondents* (*Defendants 2 to 11*).

Sivanmalai Goundan *v.* Arunachala Goundan.

*Guardians and Wards Act (VIII of 1890), Ss. 29 and 30—Guardian making assignment of minor's property without Court's sanction—Order appointing guardian embodying S. 29—Repudiation by minor—Transaction voidable.*

Because the prohibition under S. 29 of the Guardians and Wards Act has been incorporated in an order appointing a guardian, it does not follow that an assignment by a guardian of the minor's property in violation of the prohibition imposed is void, but the order must be taken to have done nothing more than embody the rule laid down in the section. When S. 30 of the Act says that the transaction shall be voidable, it is difficult to hold that merely because the rule is copied in the order of the Court it can have the effect of producing a different legal result. Hence the transaction is voidable and not void.

It is far from correct to say that a minor cannot repudiate a transfer except by filing a suit under Art. 44 of the Limitation Act.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 271 of 1936, preferred against the decree of the Court of the District Munsiff of Udumalpet in O.S. No. 675 of 1933.

*N. Sivaramakrishna Aiyar* for Appellant.

*M. Krishna Barathi, T. K. Subramania Pillai, M. Chockalingam* and *S. Murugesa Mudaliar* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

*Venkatasubba Rao, J.*—The suit has been brought by the assignee of a mortgage bond. The assignment was made by the guardian appointed under the Guardians and Wards Act of the minor who became entitled to the mortgage. The question raised in the appeal is whether the assignment is void or voidable. S. 29 of the Act, which imposes a limitation on the powers of a guardian of the property, enacts *inter alia* that he shall not transfer any immovable property of his ward without the previous sanction of the Court. Then S. 30 goes

* S. A. No. 591 of 1937. 7th April, 1938.

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on to say that a disposal by the guardian in contravention of this provision is voidable "at the instance of any other person affected thereby". This section renders the transaction voidable and not void *ab initio*. Does the fact that the statutory prohibition has been incorporated in the order appointing the guardian, clothe the prohibition with a quality which it does not otherwise possess? In other words, is the lower appellate Court right in holding that though the statute says that the transaction shall be voidable, it is nevertheless void as what has been infringed is the prohibition specially imposed by the order? The order must be taken to have done nothing more than embody the rule laid down in the section, for, that is the most effective way of bringing the rule to the notice of the guardian. When the statute says that the transaction shall be voidable, it is difficult to hold that merely because the rule is copied in the order of the Court, it can have the effect of producing a different legal result. We must therefore hold, differing from the lower Court, that the transaction is voidable and not void.

But does this advance the plaintiff's case? It is unnecessary to decide whether the words of S. 30 quoted above contemplate the avoiding of the transaction *by a person other than the minor*. There are certain matters which have since transpired, of which we think we are bound to take notice. The ward in question has attained majority and has avoided the transaction in the most inequitable way; he has repudiated his Guardian's Act and has filed a suit himself for the recovery of the mortgage money. Art. 44 of the Limitation Act provides that a suit to set aside a transfer of this sort by a ward who has attained majority, should be brought within a certain period. If the ward should allow this period to elapse without bringing the suit, what would be the legal consequence? Taking the present case, would the plaintiff acquire, after the expiry of the period mentioned, an indefeasible right to the mortgage in virtue of S. 28 of the Limitation Act? In the circumstances that have happened, this question does not arise for decision. Here, that the transaction has been repudiated, is beyond controversy. It is far from correct to say that a minor cannot repudiate a transfer except by filing a suit under Art. 44 (*Trevelyan on Minors*, 5th Edition, p. 202; *Muthukumara*

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*Chetty* v. *Anthony Udayar*[1]). It will be noticed that the statute makes the transaction voidable, it being unnecessary to enquire whether it was beneficial to the minor or not.

What then is the position? There are two suits filed to enforce the mortgage; one by the assignee, that is, the present action and the other by the quondam minor. It is perfectly clear that both the suits cannot be decreed and it seems to us equally plain that the plaintiff cannot ask us to recognise his transfer when in fact the minor, at whose instance it is voidable, has in fact avoided it. It is said that if the minor's estate has been benefited, the benefit must be restored to the assignee before the transaction can be set aside. This is a question which arises, if at all, in the suit which has since been brought. In this connection we cannot help remarking that the plaintiff's conduct has been most obstructive. In the present action there were two attempts made to bring the ward on the record, one of them having been after he had attained majority. Owing to the plaintiff's opposition which we must characterise as most unwise, both the attempts failed.

In the result, the second appeal is dismissed with the costs of the mortgagors or their legal representatives (one set).

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Sreeman Nallanchakravarthula Sampath Kumara Venkata Rangacharyulu Ayyavarlam Garu (deceased) and others .. *Appellants** (*Plaintiff and L. Rs.*)

*v.*

Jammi Turanga Rao and another .. *Respondents* (*Defendant and nil*).

Venkata Rangacharyulu Ayyavarlam Garu *v.* Jammi Turanga Rao.

*Civil Procedure Code, (V of 1908), O. 21, r. 63—Claim suit under Adverse possession—Plea of—Whether sustainable.*

Where the property concerned in the claim was one half share in two vacant sites and a house, and the appellant alleged that he had purchased the whole of them on 15th April, 1918, the date of the sale deed in his favour, by the sons of the previous holder, but in 1921 the respondent filed a small cause suit against one of the members of another branch of the undivided family of

1. (1914) 29 M.L.J. 617: I.L.R. 38 Mad. 867 at 877.

*S. A. No. 552 of 1933. 10th May, 1938.

Venkata-Ranga-charyulu Ayyavarlam Garu *v.* Jammi Turanga Rao.

the previous holder in which was attached a half share in the properties on 31st October, 1929, whereupon the appellant put in a claim petition under O. 21, r. 63 on 6th January, 1930, and upon dismissal of his petition, filed the present suit in about June, 1930, basing his claim on adverse possession against the judgment-debtor of the attaching creditor,

*Held*, in the circumstances, that on the date of the attachment 31st October, 1929, twelve years had not elapsed from the date of sale in favour of the appellant, the title by adverse possession was not perfected. Therefore, the effect of the order of the District Munsif who dismissed the appellants' claim petition was to declare that, in so far as the half share in the properties attached was concerned, the appellant was holding it not on his own behalf but on behalf of the judgment-debtor.

*Pandiyan Pillai* v. *Vellayappa Rowther*, (1917) 33 M.L.J. 316, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada in Appeal Suit No. 119 of 1931 preferred against the decree of the Court of the District Munsiff of Peddapur in O. S. No. 166 of 1930.

*P. V. Rajamannar* for Appellants.

*Y. Suryanarayana* and *B. V. Ramanarasu* for Respondents.

The judgment of the Court was delivered by

Burn, J.

*Burn, J.*—This is an appeal from the decision of the learned Subordinate Judge of Cocanada in appeal No. 119 of 1931. The appellant was the plaintiff in O. S. No. 166 of 1930 on the file of the District Munsiff of Peddapuram in which he sued under the provisions of O. 21, r. 63 of the Code of Civil Procedure to set aside the order made on a claim petition. The facts are comparatively simple. The property concerned in the claim was one half share in two vacant sites and a house. The appellant thought that he had purchased the whole of these properties on 15th April, 1918, when a sale deed Ex. A was executed in his favour by Venkatasubba Rao and Ramadoss, the sons of one J. Chikka Rao. In 1921 the respondent filed a small cause suit, against one Venkataseshagiri Rao who was a son of a first cousin of J. Chikka Rao and in execution of his decree he attached what he alleged to be the undivided half share in these properties belonging to Venkataseshagiri Rao. Now it is not disputed that at the time of the sale in 1918, Venkataseshagiri Rao's branch of the family to which he and J. Chikka Rao belonged was entitled to one half of the joint family properties. It is therefore not disputed that on the 15th April, 1918, the two sons of J. Chikka Rao were not in a position to sell to the appellant any more than the one half share which belonged to

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their branch of the family. The sale-deed Ex. A therefore conveyed to the appellant title to one half share only. The other half share which had belonged to Venkataseshagiri Rao was attached by the respondent on 31st October, 1929. The appellant put in a claim petition which was dismissed on 6th January, 1930. The order of the learned District Munsiff dismissing this petition is Ex. F. On 23rd June, 1930, the plaintiff filed O.S. No. 166 of 1930 to set aside the claim order and to establish his own title.

The appellant bases his claim on adverse possession as against Venkataseshagiri Rao, the Judgment-debtor in the small cause suit. It is clear that on the date of the attachment 31st October, 1929, twelve years had not elapsed from the date of the sale-deed, Ex. A, that being the date on which it is assumed that the appellant's adverse possession began; twelve years had not elapsed on 6th January, 1930, when the learned District Muntiff dismissed the claim petition. But on 23rd June, 1930, when this suit was instituted by the appellant more than twelve years had elapsed since 15th April, 1918. Now the appellant's contention is that by reason of this fact his title by adverse possession has been completed. The learned Subordinate Judge disagreeing with the learned District Munsiff who tried the suit has held that what was to be decided was the rights of the parties on the date of the attachment, 31st October, 1929, or at the latest on the date on which the claim petition was dismissed. The learned counsel for the appellant has referred us to *Seetharami Reddi* v. *Venku Reddi*[1] and *Ranganatha Aiyar* v. *Srinivasa Aiyangar*[2]. In those cases, it was held that the attachment of a judgment-debtor's interest in immovable property did not stop the running of adverse possession by the trespasser. The learned Subordinate Judge preferred to follow the case of *Pandiyan Pillai* v. *Vellayappa Rowther*[3], which is a very similar case to this. It has been suggested that we should have this case referred to a Full Bench since the decisions of this Court are conflicting. The case however is a very old one; it is now nearly nine years, since the attachment took place and we do not think that the matter is of sufficient difficulty or importance to be referred to a Full Bench. The

1. (1901) 11 M.L.J. 344. 2. (1925) 49 M.L.J. 656.
3. (1917) 33 M.L.J. 316.

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learned Subordinate Judge has pointed out that if the appellant had filed his suit to set aside the claim order on the day after the claim order was passed or on any day before 14th April, 1930, he would have had no hope of success. The learned Subordinate Judge thinks that it is impossible for the plaintiff by waiting a few months more till 23rd June, 1930, to clothe himself with additional rights and to compel the rightful owner, namely, the judgment-debtor to lose his right to the property. We agree with the learned Subordinate Judge in this view; and we agree with him that the decision in *Ranganatha Aiyar* v. *Srinivasa Aiyangar*[1] is not really in conflict with this principle. In a suit like this to set aside the claim order it is clear that the rights of the parties on the date of the attachment or on the date of the order are the rights which have to be taken into consideration. On 6th January, 1930, the appellant (assuming him to be in adverse possession as against Venkataseshagiri Rao) had not been in possession for twelve years, and therefore he had not perfected his title by prescription. Therefore on that date the real owner of the one half share which was attached was Venkataseshagiri Rao. The effect therefore of the order passed by the learned District Munsiff on the claim petition was to declare that in so far as Venkataseshagiri Rao's half share was concerned the appellant was holding it not on his own behalf but on behalf of the judgment-debtor. To succeed in the suit the appellant was therefore bound to show that this finding was incorrect. We think it is too obvious that he cannot do this by waiting for five months more and then saying that even though he had no title in January he has got a title in June and therefore the claim order was wrong. In this view we find ourselves in agreement with the learned Subordinate Judge and we dismiss this appeal with costs.

K. C. —— *Appeal dismissed.*

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1. (1925) 49 M.L.J. 656.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Pothukutchi Appa Rao and others .. *Appellants** *(Plaintiffs)*

*v.*

Secretary of State for India in Council represented by the Collector of Guntur ... *Respondent in both (Defendant).*

*Grant—Inam title-deed—Confirmation of rights under pre-British grant —Construction—Right to tank-beds—Long possession of tank-bed lands by agraharamdars—Inference as to grant—Successive denials of title—Suit for declaration of right—Limitation—Evidence Act (I of 1872), S. 110—Madras Land Encroachment Act (III of 1905), S. 2.*

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Where the pre-British grant is unqualified and is of the entire village inclusive of tank-beds and the inam title-deed does not curtail or limit the right conferred by its terms the original grant remains the best evidence of what has been granted by the Crown as the result of the Inam Enquiry. The true position in regard to irrigation tanks situated within an inam is that they do not belong to the community as such, the rights of irrigation appertaining to the lands irrigated, and they may be taken to pass under the wide terms of an inam grant under which the only exception is "communal porombokes".

S. 110 of the Evidence Act no doubt enacts that title is to be presumed from lawful possession. This is a rebuttable presumption and like all rebuttable presumptions must yield to proof. Thus where title is proved, or has to be assumed by virtue of a declaration under S. 2 of the Madras Land Encroachment Act, the presumption created by S. 110 the Evidence Act can no longer apply. A party, however can, even as against the Crown, rely on his long possession as evidence of a grant made by the original owner.

It cannot be said that a bare repudiation of a person's title without even an overt act would make it incumbent on him to bring a declaratory suit. A party has a right to elect as to when he can bring a suit for vindicating his right when there are successive denials of his title, and when he chooses to do so, it is with reference to the particular infringement he alleges that the limitation should be reckoned.

Appeals respectively against the decrees of the Court of the Subordinate Judge of Guntur in O. S. No. 54 of 1929 and in O. S. No. 13 of 1931 (O. S. No. 702 of 1930 on the file of the District Munsif of Narasaraopet).

*P. Satyanarayana Rao* and *S. Venugopala Rao* for Appellants.

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* Appeal No. 327 of 1931 and Appeal No. 421 of 1931. 28th September, 1937.

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*N. Srinivasa Aiyangar* for *The Government Pleader* (*K.S. Krishnaswami Aiyangar*) for Respondent.

The judgment of the Court was delivered by

*Venkatasubba Rao, J.*—The question raised in this appeal is whether the tank-bed lands in question are the property of the Agraharamdars (the plaintiffs) or the Government (the defendant). The suit has been filed with a view to get a declaration that the lands belong to the Agraharamdars, and to get a refund of the penal assessment, alleged to have been wrongly levied from them. The plaintiffs trace their title to a confirmatory grant in their favour of 1797, made by the then Zemindar of Narasaraopet (Ex. A). This refers to a yet earlier grant of an unknown date (not forthcoming) and the plaintiffs rely upon the recital in Ex. A, wide and unqualified, to the effect that the whole village is granted "inclusive of the hills, channels, saline lands, donkas, tank-bed lands" within the boundaries specified. It will be seen that there is in this grant a specific mention of the tank-bed lands, which are expressly conveyed. The Agraharamdars next rely upon a conveyance of 1844, under which they acquired a portion of this agraharam from certain third parties. There again, the *tanks* are in terms mentioned among the rights appertaining to the property conveyed. This agraharam came within the purview of the inam enquiry instituted by the Government and in 1860 it was both confirmed and enfranchised and an inam title deed was issued to the agraharamdars (Ex. G). What was granted and confirmed "as freehold in perpetuity" was the entire village, nothing having been excluded. In the title deed issued by the Government, it was the title of the plaintiffs' ancestors "the agraharam village" that was acknowledged on behalf of the Governor in Council. In the Inam Fair Register (Ex. F) there is a recital on which the plaintiffs strongly rely. It refers to the sanad of 1797, and goes on to say, that it appears therefrom, that the original grant comprised the entire village, excluding only the common village site, and certain minor inams, which had already been carved out. The plaintiffs take their stand upon these documents and ask: If the pre-British grant was unqualified and was of the entire village, inclusive of the tank-beds, and that grant was duly confirmed by the Governor in Council, how can the Government sustain their present claim? The plaintiffs complain that the Judge in the

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Court below, who has negatived their claim, has misunderstood the issue to be tried and has misconceived the law to be applied.

In our opinion, the learned Judge has not given due effect to the completeness of the grant evidenced by the original sanad and the inam title deed. At the inam enquiry there was an express reference, as already observed, to the comprehensiveness of the original grant and when the proceedings culminated in the issue of the title deed, the tank-beds, which had been specifically conveyed by the sanad, were not excluded. What is even more significant is, that certain items were particularised as having been excepted, and neither the tanks nor the tank-bed lands were among those so excluded. The law undoubtedly is, that after a cession of territory, the only enforcible rights in respect of lands ceded, are those subsequently conferred by the Crown by express or implied agreement, or by legislation (*Secretary of State for India in Council* v. *Bai Rajbai*[1]). The British Government, as observed in *Sam* v. *Ramalinga Mudaliar*[2] were not bound to recognise the revenue-free grants of the previous Governments, though in practice they did recognise them. But when the original sanad is produced and the inam title deed does not curtail or limit the right conferred by its terms, the original grant remains the best evidence of what has been granted by the Crown as the result of the inam enquiry. This is the effect of the pronouncement of the Judicial Committee in *Secretary of State for India in Council* v. *Srinivasachariar*[3]. That case is also valuable as showing, that their Lordships recognise the existence of Indian documents, where apt words occur intended to create a complete interest in land, including even the right to minerals (*see* page 65). "In the clearer light afforded" (to use the language of their Lordships—*vide* page 66) by the original grant produced here, which expressly conveys the tank-beds, no inference can be drawn against the agraharamdars, from the non-mention of those items in the inam title-deed more especially, in view of the exclusion of certain specified items other than the tank-beds, in the Inam Register. This being so, it remains to consider whether the Government have made out their claim, in the face

1. (1915) 29 M.L.J. 242 : L.R. 42 I.A. 229 : I.L.R. 39 Bom. 625 (P.C.).
2. (1916) 30 M.L.J. 600 ; I.L.R. 40 Mad. 664 at 667.
3. (1920) 40 M.L.J. 262 : L.R. 48 I.A. 56 ; I.L.R. 44 Mad. 421 (P.C.).

of these documents, that they are the owners of the lands in question.

It is contended by the Government that there is a finding in a former suit, which constitutes the question *res judicata*. How the lower Court was persuaded to accept this contention, is inconceivable. The Agraharamdars filed the previous suit O.S. No. 7 of 1905, for a declaration that the whole village was granted to them and not merely certain specified portions thereof, as then contended by the Government. A decree was made by Mr. Rice, the District Judge who heard the suit, upholding the Agraharamdars' claim in its entirety. Though the plaint in the previous suit has not been filed, the schedule thereto containing the particulars of the property claimed, has been exhibited. From that schedule, it appears that the Agraharamdars claimed the entire village *less* certain minor inams with which we are not concerned, *and communal porombokes*. The decree that was passed, granted to the Agraharamdars all that they had asked for in the plaint. In the course of his judgment, Mr. Rice refers to the inam proceedings and says that the Inam Fair Register granted what was exactly claimed in the inam statement neither more nor less. The formal decree that was drawn up, follows the terms of this judgment and declares the right of the Agraharamdars to the entire village, "exclusive of the porombokes and the minor inams not claimed at the Inam settlement."

From what has been said above, it becomes clear, that what were excluded by the decree were (besides the minor inams) communal porombokes alone. It further appears that to those items no claim was ever put forward, not even at the inam enquiry, by the Agraharamdars. The effect of the previous decree then is, to declare merely that the plaintiffs are not entitled to the communal porombokes and it does nothing more. Whether the tanks and the tank-beds were communal porombokes or not, was not a question that was raised and the decree does not profess to decide it. It is impossible to hold, as the lower Court has done, that this decree has made the title to the tank-beds *res judicata*.

The learned Judge, ignoring the scope of the previous suit, and brushing aside the express wording of the decree, seizes upon some passage in Mr. Rice's judgment—which both sides have had to confess is obscure—and infers therefrom that the

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plea of *res judicata* has been made out. The obscurity has arisen from the fact that the Government, whose duty it was to file the pleadings in the previous suit, have not done so, and strictly speaking, the plea of *res judicata* ought not to have been entertained at all. Before Mr. Rice, some contest seems to have been raised, in regard to the ownership of some 120 odd acres of land, in the village. The Government claimed that that land was liable to be assessed and the Agraharamdars asserted the contrary. At the inam enquiry, this extent was apparently not taken into account in fixing the quit-rent and the Government seem to have urged that it should accordingly be deemed as comprised in the excluded poromboke. By way of answer, the Agraharamdars appear to have contended that the reason for its exclusion was not that it was poromboke, but because it was then thought not worth cultivating. Mr. Rice, after accepting the Agraharamdars' version, observes towards the end of his judgment:

"The actual result appears to be to deprive Government of the power of assessing about 120 acres of valueless land."

On this unsatisfactory and tenuous foundation the lower Court bases its finding of *res judicata.* It must be remembered that at that time the tanks were functioning as irrigation sources and no question of the Government's "power of assessing" could possibly have arisen in regard to them. The lower Court's treatment of this question has been perfunctory and its conclusion cannot be accepted.

In this connection, we must own to some surprise, at the remark made by the Judge, that every presumption should be drawn against the Agraharamdars, who failed to produce the inam statement. In the course of the inam proceedings they produced a copy of this statement, which they say has since been lost. The inam statement is a part of the Government records and the Agraharamdars applied to Government, for the purpose of this suit, for copies both of the inam statement and of the inam Register. A copy of the Register was furnished, but the Government failed to grant a copy of the statement, presumably on the ground that they were unable to do so. How in the circumstances any blame attaches to the Agraharamdars, is incomprehensible.

The question then arises, as already stated, are the suit lands communal porombokes. This question is relevant for

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two purposes: first, on account of the previous judgment already referred to, and secondly, because of the sound rule of construction that the Government cannot be presumed, in making a grant, to include in it communal property, that is what the villagers own in common (*Narayanaswami Naidu* v. *Secretary of State for India*[1]). That these tanks were primarily intended for irrigation purposes and were used as irrigation sources, is not seriously denied. The learned Judge assumes this, though he does not find so, in various places in his judgment. The mere fact that the villagers sometimes used the water for other purposes, such as for drinking, for bathing or for washing cattle, does not suffice to create any rights of ownership in them. Usually in a village, interference with such acts is not called for, until some question of title is raised and no importance therefore attaches to such user. When the inam title deed was issued, and the quit-rent computed, some cultivated area was treated as wet land and there can be no doubt that the wet cultivation became possible by reason of the existence of these tanks. The true position in regard to irrigation tanks is, that they do not belong to the community as such, the rights of irrigation, appertaining as they do, to the lands irrigated; such rights therefore as the owners of these lands possess, are in the nature of easements (*Kannayiram Pillai* v. *Virudupatti Gins, Ltd.*[2]). It is an admitted fact here, that besides the Agraharamdars, the only proprietor that used the water for irrigation, was the Karnam, in respect of his minor inam. The tanks became useless as irrigation sources in 1915 owing to heavy rains and breaches, and since then the Agraharamdars have been using the tank-beds as cultivable land. It is a question that does not arise here and nobody raises it, whether or not the minor inamdar's easement has become extinguished, granting that he once possessed such a right. At any rate, even by the date of the suit (and it is now seven years since it was filed) the easement had not been exercised for about fourteen years. However that be, the point is clear beyond doubt that the tanks were not public or communal tanks and therefore there was nothing to prevent their passing under the wide terms of the grant.

Some cases have been cited at the Bar relating to tanks or channels. The principle underlying those decisions seems to be

1. (1912) 24 M.L.J. 36 at 40.
2. (1924) 20 L.W. 185.

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this: where the tank or channel is wholly within the limits of the inam, as in the present case, it must be held to pass under the grant. The question was not considered whether or not it was communal property, but presumably it was assumed that it was not (*Secretary of State* v. *Kannepalli Venkataratnammah*[1]). But where from the source, lands other than those of the inamdar are also irrigated, it being the function of the Government to conserve and control works of irrigation, it would be right to presume, in the absence of an express grant, that the tank or channel was not intended to be conveyed, the reason being that it would be injurious to introduce divided responsibility and divided control (*Ambalavana Pandara Sannadhi* v. *Secretary of State for India*[2] and *Narayanaswami Naidu* v. *Secretary of State for India*[3]), although this principle was departed from and the inamdar's right was recognised in *Secretary of State for India* v. *Ambalavana Pandara Sannadhi*[4]. It is sufficient to say here that judged by any test, the tanks in question passed under the grant to the plaintiffs.

This finding as to the title based upon the grant would be sufficient to dispose of the case, apart from the question of limitation which we shall presently consider; but we have been referred to acts of possession and enjoyment on the part of the Agraharamdars, as furnishing independent evidence of their title. Mr. N. Srinivasa Aiyangar for the Government Pleader broadly contends, however, that as against the Crown, when the question is one under the Land Encroachment Act, possession can never be relied upon as evidence of ownership. There is a fallacy underlying this argument, as we shall show. S. 110 of the Evidence Act no doubt enacts that title is to be presumed from lawful possession. This is a rebuttable presumption and, like all rebuttable presumptions, must yield to proof. Where therefore title is proved or assumed, the presumption created by S. 110 can no longer apply. Now turning to the Land Encroachment Act, S. 2 declares, subject to a saving clause, that the Government is the owner of certain kinds of property, including the beds of tanks. There is no conflict between the section of the Evidence Act and this

1. (1912) 23 M.L.J. 109: I.L.R. 37 Mad. 364 N.
2. (1905) 15 M.L.J. 251: I.L.R. 28 Mad. 539.
3. (1912) 24 M.L.J. 36.
4. (1914) I.L.R. 37 Mad. 369 N.

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provision. The title of the Government being statutorily declared, the rule of presumption enacted by S. 110 is not brought into play. But is there anything to prevent long possession being relied upon as evidence of a grant made by the original owner? The very argument based on grant presupposes title in the party said to have made the grant. Therefore, it is one thing to say that you cannot use the fact of possession as evidence of title, but it is quite a different thing to argue therefrom, that you cannot rely upon it in support of a grant. Where there was evidence of exclusive possession for a long period of a few annexed to a dwelling house in the parish, it was held—upon the principle that a legal origin ought to be presumed if a legal origin be possible—that the grant of a faculty ought to be presumed. (*Philipps* v. *Halliday*[1].) That this principle extends to cases where the Government was the original owner, has been established by very authoritative decisions. In *Mahomed Ali Haidar Khan* v. *Secretary of State for India*[2], the Judicial Committee, after finding that the plaintiff otherwise failed to establish his title, held upon the proof afforded by his long possession and enjoyment, that his title was made out. Again, in *Secretary of State for India* v. *Durbijoy Singh*[3], their Lordships point out that if the question were one of limitation, the defendant was bound to fail; but if the possession was used for making out a title, there was sufficient evidence in support of it (see also *Syed Mahammad Mazaffar-al-Musavi* v. *Bibi Jabeda Khatun*[4], decided by the Judicial Committee and the observation of Varadachariar, J., in *Subramania Desikar* v. *Secretary of State for India*[5]).

Now looking at the evidence in this aspect, it seems to us that there is sufficiently long possession on the part of the plaintiffs, in assertion of a title, attributable to a grant in their favour. The inam title deed, as already stated, was issued to them in 1860. Since then the plaintiffs have been constantly exercising acts of ownership. There is a lease of the same year (Ex. D) executed by the Agraharamdars, which shows their possession. Again in 1876 (by D-1) in 1883 and 1897

1. (1891) A.C. 228 (H.L.).
2. (1908) 18 M.L.J. 549: L.R. 35 I.A. 195: I.L.R. 36 Cal. 1 (P.C.).
3. (1892) L.R. 19 I.A. 69: I.L.R. 19 Cal. 312 (P.C.).
4. (1930) 58 M.L.J. 641: L.R. 57 I.A. 125: I.L.R. 57 Cal. 1293 (P.C.).
5. (1936) M.W.N. 1315 at 1326.

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(by E series) they leased out various portions of the tank bunds. Further they effected repairs to the tanks in 1887 (*j*), 1898 (*k*), and (1907) (J-1, GG and GG-1) and incurred expenses in that connection. That they were in possession without question previous to the suit of 1905, is a fact which cannot be disputed. Indeed, the Government seems to have assumed before the decree in that case, that the plaintiffs were lawfully in possession and that its own right commenced from the date of, and in virtue of, that decree. On the 5th August, 1907, the Board of Revenue passed a proceeding (Ex. XXIII) stating that the finding of the District Court *over-rides the general law that "porombokes in whole inam villages belong to the inamdars"* and that the latter should accordingly be *prevented* from leasing the tank porombokes in future. This shows beyond doubt that the inamdars were till then in possession without their right being challenged. Orders similar to this were in the year 1907 and 1908 issued by the Government, but the plaintiffs' possession was never interfered with or disturbed. One such order was that issued by the Collector on the 2nd August, 1908 (Ex. XXIII-*c*) to which we shall refer later, when considering the question of limitation. Then from 1915, as already observed, the tanks ceased to be useful as such and the tank-beds were openly cultivated. And what did the Government do? It started levying about the year 1920 (and went on doing so) not assessment as one might expect, but cesses as the Local Board's agent (*see* the Evidence of D. W. 3, p. 171). The evidence on this point has been completely misread and misunderstood by the trial Judge. Numerous exhibits bearing on this have been filed, and a scrutiny of one of them Ex. I-*e*, by way of example, will show that the amounts collected were cesses and do not represent the assessment. The evidence of P.W. 6 (at pages 146 and 148) which remains uncontradicted, proves this conclusively. The lower Court observes, almost casually, that the wet assessment was collected, which statement is clearly wrong and the learned Counsel for the Government was unable to support it. Collecting the cesses and forbearing from collecting the assessment, almost amounts to an admission on the Government's part of the Agraharamdar's title, whether the Government so intended it or not. We merely refer to this and do not propose to use it against the Government. Then for the first time in 1929 the

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Government levied assessment and this suit was immediately brought. Thus, our finding as to the title receives support, if support were necessary, from the evidence of possession and enjoyment to which we have referred.

The next question that arises is, whether the lower Court's view that the suit is barred by limitation is right. There are two reliefs claimed (*i*) for a declaration of the plaintiff's title and (*ii*) for the refund of the penal assessment levied. The amount was collected on the 27th March, 1928, and the suit was filed within six months from that date. How in the teeth of S. 14 of the Land Encroachment Act the learned Judge has held that the suit for the refund is barred, we are unable to follow. That section expressly provides that in respect of any assessment or penalty the cause of action arises on the date on which it is levied. Even where there has been more than one levy, it has been held that a suit for refund, brought within six months of the last of the levies (the previous levy not having been challenged) is not barred in respect of such last levy, under S. 14, the question, however, being left open as to the limitation applicable to a suit for declaration (*Secretary of State for India* v. *Hussain Sheriff Saheb*[1]). The question in the present case is much simpler, there having been no previous levy and there is thus not even the semblance of an excuse for holding that the suit is barred in respect of the relief for refund. It must be observed that the learned Government Pleader has not sought to justify the lower Court's decision on this point.

Then as to the relief praying for a declaration the learned Judge's view is also wrong. He seems to think that the suit ought to have been brought within six years of the Collector's order dated 2nd August, 1908, Ex. XXIII-C, to which we have already referred. There is nothing in law which says that the moment a person's right is denied, he is bound at his peril to bring a suit for declaration. The Government beyond passing the order did nothing to disturb the plaintiff's possession. It would be most unreasonable to hold that a bare repudiation of a person's title, without even an overt act, would make it incumbent on him to bring a declaratory suit. A party surely has a right to elect, as to when he

1. (1922) 16 L.W. 197.

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may bring a suit, for vindicating his right, when there are several or successive denials. If a person's right is called in question, he may ignore that particular attack or challenge, but that does not mean that a fresh attack does not give rise to a fresh cause of action. There may be an ineffectual threat, a *brutum fulmen* (*see* the judgment of Coutts-Trotter, C.J., in *Koyasan Koya Haji* v. *Secretary of State for India*[1]), which a person may ignore, without his right to bring a suit in respect of a subsequent invasion, being impaired. When an attachment was followed by an execution sale, it was held that there was a fresh invasion of the owner's right and that the sale gave rise to a fresh cause of action; his forbearance to sue on the first occasion did not debar him from suing, when by reason of the sale, there was a greater invasion of his right (*Anantaraju* v. *Narayanaraju*[2]). True, a mere continuation of a prior cause of action does not give rise to a fresh right—for instance, where property is attached, the procuring of the attachment is the wrongful denial and the cause of action arises when the attachment is effected; in such a case it is wrong to hold that there has been a "continuing wrong" so as to give a fresh starting point during the whole period the attachment subsists (*Rajah of Venkatagiri* v. *Isakapalli Subbiah*[3]). But from this, it does not follow that an owner can never ignore an attack against his title, however, casual or trivial, without his right to sue being imperilled in respect of a subsequent invasion. There is no inconsistency between the two cases cited above (*Anantaraju* v. *Narayanaraju*[2] and *Rajah of Venkatagiri* v. *Isakapalli Subbiah*[3]) as seems to have been assumed with great respect wrongly in *Thirumala Rao* v. *Jungammal*[4]. The facts of the last mentioned case do not appear sufficiently from the report; but if the effect of the decision is, that where there are several acts, the earliest of them alone furnishes the starting point, we must express our dissent from that view. (See also *Koyasan Koya Haji* v. *Secretary of State for India*[1] where Ramesam, J., also disagrees with this opinion, though no case is particularized.) It is for the plaintiff to decide at his option, on which act he chooses to found his cause of action, and when he does so, it is with

1. (1924) 47 M.L.J. 379: I.L.R. 47 Mad. 927 at 932.
2. (1911) 22 M.L.J. 108: I.L.R. 36 Mad. 383.
3. (1902) I.L.R. 26 Mad. 410.
4. (1914) M.W.N. 197.

reference to the particular infringement he alleges, that the limitation should be reckoned (cf. *Govinda Narayan Singh* v. *Sham Lal Singh*[1]). It is a more difficult question, what is the extent of the injury or infringement that gives rise to, what may be termed, a compulsory cause of action? In *Koyasan Koya Haji* v. *Secretary of State for India*[2] already referred to, Ramesam, J., indicates that where a penal assessment has been levied, the person affected cannot be allowed to ignore the payment and rely on a later proceeding, the reason being that the levy of the assessment amounts to a virtual loss of his right. On the facts of the present case a question of this sort does not arise. Then turning to the lower Court's judgment, it is difficult to see how *Kodoth Ambu Nayar* v. *Secretary of State for India*[3] relied on by the Subordinate Judge, is applicable. The plaintiff there preferred objections, to the exclusion of the lands in suit, from the rough pattah granted to him, by the Government. His objections were definitely rejected in 1905. The suit that was brought to set aside the order of rejection and to obtain a declaration of his right, was not instituted until 1913. The Judicial Committee held that the claim was barred under Art. 120. In that case there was an overt act, namely, the issue of the pattah and moreover, the invasion of the right complained against, was the order passed in 1905, which on the plaintiff's own showing, furnished the starting point. In the present case, as already observed, no effect was given to the proceeding that was passed and such possession or enjoyment as the plaintiff had, was never disturbed; nor is the cause of action here based on that proceeding. The suit therefore even in respect of the relief of declaration is not barred.

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The appellants do not press their claim in regard to item No. 3. The result therefore is that the lower court's decree, in so far as it relates to items 1 and 2, is set aside, and the appeal to that extent is allowed with full costs throughout. We understand that the decree should be for the amount claimed in the plaint less Rs. 3-7-0.

*Appeal No. 421 of 1931.*—From the judgment just delivered by us in the connected case, it follows that this appeal also to the extent indicated there should succeed and it

1. (1931) 61 M.L.J. 9: L.R. 58 I.A. 125 at 140: I.L.R. 58 Cal. 1187 (P.C.).
2. (1924) 47 M.L.J. 379: I.L.R. 47 Mad. 927.
3. (1924) 47 M.L.J. 35: L.R. 51 I.A. 257: I.L.R. 47 Mad. 572 (P.C.).

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is accordingly so allowed with full costs throughout. Deduct from the amount claimed Rs. 3-7-0. Under S. 82, Civil Procedure Code, we fix three months' time for compliance with the decrees.

These appeals having been set down "to be spoken to" this day, the Court delivered the following

JUDGMENT.—This matter is posted before us for being spoken to, at the request of the Government Pleader. He says in his letter that the terms of our injunction may appear too wide in view of the recent amendment of the Madras Estates Land Act. Our judgment proceeds upon the footing that the suit lands are non-communal property; apart from that, we could not have intended by our judgment to deal with matters which were not raised in the pleadings or with the supposed rights that came into existence subsequent to the suit.

B. V. V. *Appeals partly allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Kandan Padayachi and others .. *Petitioners**.

Kandan Padayachi, *In re.*

*Counsel cited as witness by prosecution—Acceptance by the same counsel of brief for accused in criminal proceedings—Mere citation of counsel as witness not a disqualification.*

The mere fact that a lawyer is cited as a witness by the prosecution will not disqualify him from appearing as counsel for the accused. No doubt it is not in accordance with professional etiquette for a lawyer who has given evidence as a witness for the prosecution to accept or to continue to hold a brief from the accused.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Second Class Magistrate of Ariyalur dated 12th March, 1938, and made in P. R. C. No. 1 of 1938.

*R. Sundaralingam* for Petitioners.

*The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—Both these cases arise out of the same matter, namely, disallowance by the Second Class Magistrate of Ariya-

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*Crl. R. C. Nos. 230 and 232 of 1938. 29th July, 1938.
Crl. R. P. Nos. 223 and 225 of 1938.

Kandan Padayachi, *In re.*

lur of Mr. T. S. Arumugam Pillai, an Advocate, from appearing as counsel for the accused in a case of murder pending enquiry before the Magistrate. The disallowance was entirely on the ground that he had been cited as a witness by the police in the charge-sheet. It would appear that there were three charge-sheets filed in this case and the Advocate's name appears as a witness only in the last charge-sheet. But this is a minor matter. The reason given for the disallowance is obviously unsound. The mere fact that a lawyer is cited as a witness by the prosecution will not disqualify him from appearing as counsel for the accused in the case. No doubt it is not in accordance with professional etiquette for a lawyer who has given evidence as a witness for the prosecution to accept or to continue to hold a brief from the accused. That is not the case here. The mere citing of an advocate as a witness by the police does not operate as a disqualification. It is easy to imagine the extraordinary results which might follow otherwise. The unfortunate effect of the order of the Magistrate has been that the accused have been continuing in custody for four months and more. The order is therefore set aside and he is directed to allow the advocate to appear for the accused.

K. C. —— *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Pandarathil Abdulla of Androth Island, Laccadives .. *Petitioner*

*v.*

Komalath Thanga Koya of Androth Island, Laccadives and others .. *Respondents.*

Abdulla *v.* Thanga Koya.

*Laccadive Islands and Minicoy Regulation (I of* 1912), *Ss.* 15, 24, 26 *and* 31—*Jurisdiction of High Court to hear appeals from the Collector exercising appellate jurisdiction—Revision whether maintainable—Government of India Acts of* 1919 *and* 1935—*Discretion vested for transfer in Collector and Inspecting Officer—Whether should be interfered with by High Court.*

Under S. 26 (3) of Regulation (I of 1912) an appeal is provided to the High Court from any decision of the Collector in the exercise of his original jurisdiction. It is not possible to regard the Collector exercising original jurisdiction as a different tribunal from the Collector exercising his appellate jurisdiction. The Collector is a judicial tribunal constituted under the Regulation and merely because appeals are not permitted by the Regulation from his appellate orders on the general principle enunciated in S. 15 of the

* C. R. P. No. 437 of 1934. 28th March, 1938.

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Regulation that no second appeal shall lie in any case whatever, it does not necessarily lead to the conclusion that the appellate orders of the Collector cannot be revised by the High Court. Under S. 107 of the Government of India Act the petition for revision was maintainable, and it does not cease to be competent because that section has been repealed by the Government of India Act, 1935, which came into force on 1st April, 1937. The effect of the repeal is not to destroy or take away jurisdiction which existed at the time when proceedings were initiated (*vide* S. 38 of the English Interpretation Act).

There is no reason why the High Court should interfere with the discretion given by S. 24 of the Regulation, as regards transfer, to the Collector and the Inspecting Officer.

Petition under Ss. 115 and 151 of Act V of 1908 and 107 of the Government of India Act and 32 of Regulation I of 1912 praying the High Court to revise the order of the Collector of Malabar dated 20th May, 1933, in D. Dis. No. 3663 of 1933 (Amin's Order dated 12th March, 1933).

*K. N. Kumaran* for Petitioner.

*B. Pocker* for Respondents.

The Government Pleader, as *amicus curiae*.

The Court made the following

ORDER.—This is a petition to revise the order of the Collector of Malabar dated 20th May, 1933, dismissing the appeal from the order of the Amin of Androth Island dated 12th March, 1933.

It appears there was a petition filed by the Koyas of the Island against the petitioner and another person on the 12th March, 1933, bringing to the notice of the Amin that the petitioner, who is a Melacheri, had agreed to hire a boat and register the agreement of hire contrary to the long prevailing custom in the Island. The Koyas alleged that the new departure threatened by the petitioner was likely to cause great hardship to them and would give rise to grave disturbances. The prayer in the petition was:

"We therefore request that the Court may be pleased to cancel the agreement regarding the chartering of the odam and order that the Melacheries should not sail with odams as owners of goods."

It appears therefore that the application was made to the Court of the Amin with a view to invoke his civil jurisdiction, though it is not quite clear, in view of the reference to the likelihood of grave disturbance, that it was not intended to invoke his criminal jurisdiction also. The Amin appears to have passed an order

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on the same day, apparently without hearing the other side, and without proceeding in the manner indicated in S. 22 of the Laccadive Islands and Minicoy Regulation I of 1912, which requires that the Amin sitting with four or more assessors shall be the Civil Court for the island and shall have jurisdiction over all civil claims arising therein. The order passed does not purport to have been made by the Amin after sitting with four or more assessors, and the fact that the order was passed on the same date as the date of the petition appears to show that the order passed by the Amin was a kind of interlocutory order on his own authority in view of the urgency of the matter. The order of the Amin was to the effect that in his opinion it was contrary to law and custom for Melacheries to own goods and take them in odams and that if such things were permitted, there would be great trouble in the island and disturbances between the Melacheries and the Koyas. He expressed the opinion that the petition should be brought to the notice of the superior Court in order that it might be heard and that it must be heard and decided according to the directions of the higher authorities. The order wound up with the following sentence:

"Therefore I hereby order and direct that the abovenamed Abdulla should not act according to the Karar and sail as owner of goods to the main land thereby breaking the long-established custom till final orders are passed."

The petitioner's advocate is not able to say whether the matter has been taken up by the Amin once more for the purpose of passing final orders. The appeal preferred from this order of the Amin to the Collector of Malabar was dismissed by the Collector who apparently thought that the order appealed from was a final order. The Collector stated that the practice referred to by the Amin in his order is an established custom of the island and an integral part of the system of land tenure and that any interference with that custom would upset the economic arrangements of the island. Accordingly he confirmed the Amin's order and dismissed the appeal.

A preliminary objection was raised to the competency of the revision petition by Mr. Pocker who appeared for the respondents and as the matter was of some importance, notice of the petition was given to the Government Pleader so that his assistance may be available in deciding the question of jurisdiction as was done some years ago in a similar case—see

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*Ahmed Koya* v. *Aisamma*[1]. The learned Government Pleader has not put forward any new notifications which have a bearing on the subject and the point has to be decided more or less in the light of the Regulation I of 1912. Under S. 26 of the Regulation, an appeal is provided to the High Court from any decision of the Collector in the exercise of his original jurisdiction and this shows that the Collector while exercising his original jurisdiction under the Regulation is subject to the appellate jurisdiction of the High Court. It is however contended by Mr. Pocker that this does not make the Collector when acting in his appellate jurisdiction subject to the jurisdiction of the High Court. I am unable to accept this contention. It is not possible in my opinion to regard the Collector exercising original jurisdiction as a different tribunal from the Collector exercising his appellate jurisdiction. The Collector is a judicial tribunal constituted under the Regulation and merely because appeals are not permitted by the Regulation from his appellate orders on the general principle enunciated in S. 15 of the Regulation that no second appeal shall be in any case whatever, it does not necessarily lead to the conclusion that the appellate orders of the Collector cannot be revised by the High Court. The appellate jurisdiction must be deemed to have been exercised by a tribunal subject to the appellate jurisdiction of the High Court even though no appeals are permitted from orders passed by the Collector in his appellate jurisdiction. Under S. 107 of the Government of India Act the petition for revision was maintainable, and in my opinion it does not cease to be competent because that section has been repealed by the new Government of India Act of 1935 which came into force on the 1st April, 1937. The effect of the repeal is not to destroy or take away the jurisdiction which existed at the time when proceedings were initiated, *vide* S. 38 of the English Interpretation Act. I therefore overrule the preliminary objection and find that the petition is competent and that this Court has jurisdiction to entertain and dispose of the revision petition.

On the merits it is really impossible to deal with the question finally in view of the utter absence of material in the record. The order of the Amin appears to have been passed,

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1. (1925) I.L.R. 49 Mad. 419.

as I have already observed, as an urgent order without hearing the other side and mainly to prevent a disturbance of the public tranquillity. It is obvious that, whether the Amin had authority to make such an order or not, at this distance of time no useful purpose will be served by investigating the question whether there was sufficient ground for making such an order. The Collector in dealing with the matter in appeal appears to have thought that the Amin had finally decided that the custom pleaded by the Koyas was a long-established custom which could be enforced and the Collector appears to have agreed with the view of the Amin. It is obvious that a matter of this importance cannot be decided in this manner without some semblance of a trial and without some regard to rules of natural justice and in particular without hearing what the other side has to say before pronouncing a decision, which does not appear to have been done by the Amin. In these circumstances, all that can be done is to point out that the order of the Amin is only an interlocutory order and that it does not finally determine the rights of any party and that the Collector's order in appeal also does not decide finally the rights of the parties. It is perhaps necessary to add that the petition should be treated as a civil suit by the Amin and disposed of according to law. The learned Advocate for the petitioner has brought to my notice that the Amin is himself a Koya and is biassed and prayed that the suit should be transferred from the Amin to the file of the Inspecting Officer or of the Collector. This is not a matter to be decided by the High Court but only by the Collector or Inspecting Officer who are empowered to transfer civil suits from the Amin's file to their own file under S. 24 of the Regulation. It will be open to the petitioner to make an application for transfer under this section and there is no reason why the High Court should interfere with the discretion given by S. 24 of the Regulation as regards transfer to the Collector and the Inspecting Officer. In the circumstances of the case, I direct the parties to bear their own costs in this Court.

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K. C. —— *Petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Sree Batchu Venkataratnam and another .. *Appellants** *(Plaintiffs)*

*v.*

The Secretary of State for India in Council, represented by the Collector of East Godavari, Cocanada and others .. *Respondents (Defendants 2, 1 and Nil).*

Sree Batchu Venkataratnam *v.* Secretary of State for India in Council.

*Grant—Zamindari land—Right to irrigation tank—Whether passes to grantee—Tank found not to be communal property—Description as poromboke —Effect.*

An irrigation tank which is found not to be communal property can be taken to pass to the grantee under a Zamindari grant unless there is clear evidence of its reservation by the Government. And the mere fact that the tank is referred to as poromboke in some of the village accounts will not necessarily lead to the inference that it belongs to the Government.

*Kandukuri Balasurya Rao* v. *Secretary of State for India,* (1917) 33 M.L.J. 144: L.R. 44 I.A. 166 at 185: I.L.R. 40 Mad. 886 (P.C.), relied on.

*Secretary of State* v. *Sri Rajah Vasireddi,* (1929) 30 L.W. 129 and *Appa Rao* v. *Secretary of State,* A.I.R. 1938 Mad. 193, referred to.

Appeal under cl. 15 of the Letters Patent preferred against the judgment of the Hon'ble Mr. Justice Cornish dated 25th August, 1936 and passed in S. A. No. 1217 of 1931, preferred against the decree of the Court of the Subordinate Judge of Amalapuram in A. S. No. 35 of 1929 (O. S. No. 413 of 1926, District Munsiff's Court, Amalapuram).

*B. Somayya* and *A. Satyanarayana* for Appellants.

*The Government Pleader (K. S. Krishnaswami Aiyangar)* for 1st Respondent.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

*Venkatasubba Rao, J.*—The question raised in this Letters Patent Appeal is whether the suit tank belongs to the Zamindar or to the Government. The immediate cause of this litigation, as pointed out by Cornish, J., was the action of the Local Taluk Board in auctioning in the year 1926 the right to fish in the tank. Both the Taluk Board and the Government were made defendants and their contentions were rejected by the District Munsiff as well as the Subordinate Judge. A second appeal was filed in this Court, only by the Government whose plea

* L. P. A. No. 104 of 1936. 25th January, 1938.

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was that the tank was communal property. Cornish, J., reversing the concurrent decision of the lower Courts, has held that the title of the Government has been proved.

Should the tank be held to be communal property as pleaded, it stands to reason that the Government cannot be presumed to have included in the grant property which belonged to the villagers in common (*see* the judgment of this Bench in *Appa Rao* v. *Secretary of State*[1]). But both the lower Courts have concurrently given *first*, a negative finding that the tank is not communal property and *secondly*, a positive finding that it is an irrigation tank. If the tank is an irrigation tank as has been found, "it would be meaningless" in the words of the Subordinate Judge:

> "To hold that the Government had given the lands forming the ayacut of this tank to the Zamindar but reserved to themselves the tank itself."

The lower Courts advert to two further circumstances to show that the tank is the property of the Zamindar; (*i*) that it is within the territorial boundaries of the Zamindari; and (*ii*) that the Government during a period of over a century never exercised any acts of ownership over the tank. For the first time in 1926 the Taluk Board, as already mentioned, purported to sell the fishing in the tank; but that the Zamindar considered himself entitled to the right to fish, is evident from two prior transactions of the years 1904 and 1909 (Exs. C and D).

Cornish, J., in dissenting from the lower Courts, has relied upon three circumstances. The first is that in what is known as "Bhubandhu Account" (Ex. II), the tanks in the village including the suit tank were shown under the heading 'Minaha' which means deductions. Of the many statements and accounts prepared at the permanent settlement, the Government have chosen to file this paper alone, and as the District Munsiff pertinently points out, it would not be proper to draw any inference in favour of the Government, who have refrained from producing the other records which should undoubtedly be in their possession. Apart from that, does the "Bhubandhu Account" lend the slightest support to Cornish, J.'s inference? The utmost that can be inferred from the exclusion of the tanks is, that they were not taken into account in fixing the assessment payable by the Zamindar. As their Lordships observe in the Urlam case,

1. A.I.R. 1938 Mad. 193.

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"It does not follow that all which is not brought into account in fixing the Jamma or peishkush is excluded from the grant. On this finding many things of great importance to the enjoyment of a zamindari would not pass by a zamindari grant, for example, waste land, farm buildings, tanks or, in the present case, irrigation channels." (*Kandukuri Balasurya Rao* v. *Secretary of State for India*[1].)

To assert that all which is not brought into account in fixing the peishkush is excluded from the grant, is to state the proposition too broadly. That certain land had been exempted from revenue wholly or partially and was on that ground not brought into account is one thing; but it is quite a different thing that some portion was not yielding revenue and its income was not therefore brought into account. To the former category belong what are known as lakhraj lands and the following passage from the judgment of one of us in *Secretary of State* v. *Sri Rajah Vasireddi*[2], affirmed by the Privy Council in *Vasireddi Chandra Mouleswara Prasada* v. *Secretary of State for India*[3] may be usefully quoted here:

"It has been broadly contended by the Advocate-General for the plaintiff that the term lakhraj lands in Regulation XXV of 1802 does not comprise village service inams. As they were not lakhraj he argues, the revenue from them would be *prima facie* included in the assets of the zamindari when its peishkush was fixed at the permanent settlements. S. 4 of that Regulation provides that the permanent settlement of the land tax shall be made exclusive *inter alia* (1) of lakhraj lands (or lands exempt from payment of public revenue) and (2) all other lands paying only favourable quit-rents. Without doubt absolute grants in inam are included in the expression 'lakhraj lands'. Then, on what footing do (1) private service inams and (2) village service inams stand? So far as the former are concerned, it has been consistently held that they are not lakhraj. But the reasons adduced in support of that view furnish a clue to the right understanding, of the nature of village service inams. In the case of personal service inams, was there any reason at the time of the permanent settlement for treating them "as lands exempt from the payment of public revenue?" The Zamindar was receiving income from such lands, though not of course in the shape of cash rent but in the shape of services; for the rendering of services was one mode of paying the rent. It was reasonable therefore to treat them at the settlement as revenue-paying lands. . . . . . ."

"Private service inams not being held to be lakhraj on the ground that they were a source of profit to the Zamindar, if the same principle be applied in the case of village service inams what would be the result? It follows as a corollary that if the services are of a public nature, that is, if it is not the Zamindar, that is benefited but the estate or the community at large, the lands would in that case be regarded as lakhraj or exempt from public revenue

1. (1917) 33 M.L.J. 144: L.R. 44 I.A. 166 at 185: I.L.R. 40 Mad. 886 (P.C.).
2. (1929) 30 L.W. 129.
3. (1935) 69 M.L.J. 123: L.R. 62 I.A. 166: I.L.R. 58 Mad. 711 (P.C.).

and the income from them excluded from the assets . . . . . . . . The result of the cases then is, that while in regard to private service inams the Zamindar has the right of resumption, in regard to the village service inams, they are resumable by the Government. My brother Ramesam, J., sitting with Oldfield, J., in a case dealing with Sarvadumbala Grant (an absolute grant in inam) classified the lands excluded from the assessment under S. 4 of the Regulation thus :—

(1) Lands granted on condition of rendering service (that is, public service inams),

(2) Sarvadumbala inams,

(3) Inams granted on favourable quit-rent the first two groups together forming the lakhraj lands mentioned in the section.

This seems to embody the correct principle and I am prepared with all respect to accept the classification as correct." (Pages 141 to 143.)

The principle referred to above does obviously not apply to things (including *tanks*) such as those mentioned by the Judicial Committee in the Urlam case. It follows accordingly that the first ground mentioned by Cornish, J., is untenable.

Secondly, the learned Judge says that in the Survey and Settlement Register (Ex. III), the tank is referred to as 'poromboke' and from that he infers that it belongs to the Government. That the word 'poromboke' is used in several senses is well settled by authority. Granting that poromboke includes communal property it cannot be seriously maintained that it connotes no other kind of property.

Lastly Cornish, J., thinks that from the description of the tank as 'village tank', it should be inferred that it belongs to the villagers. This view, it need hardly be said, is clearly untenable. This is the largest tank in the village (being over 9 acres in extent) and it is known variously as (*a*) *Pedda Cheruvu*; (*b*) *Vooru Cheruvu* or tank of the place; (*c*) *Grama Cheruvu* or village tank. It would be far fetched to hold that because a tank is called a village tank, the villagers necessarily own it. It may not be without interest to point out that one of the three tanks is called the "Dogs tank." In the result, we are satisfied that the conclusion of the lower Court is correct. The judgment of Cornish, J., is set aside and that of the lower appellate Court is restored. The Government will pay the appellants' costs both of the second appeal and of the Letters Patent Appeal. Time for payment of costs two months.

B. V. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

The Public Prosecutor .. *Appellant**

*v.*

B. V. Sabapathy Chetty .. *Respondent (Accused).*

Public Prosecutor *v.* Sabapathy Chetty.

*Madras Local Boards Act (XIV of 1920), Ss. 159 (1) and 207 (1)—Notice to remove an encroachment under S. 159 (1)—Prosecution for failure to comply with—Acquittal—Second notice in respect of same encroachment—Trial for the disobedience of—If barred.*

A person was prosecuted under S. 207 (1) of the Madras Local Boards Act for disobedience of a requisition to remove an encroachment issued in 1936 under S. 159 (1) of the Act and was acquitted. He was again served with a notice in 1937 by the President of the District Board requiring him to remove the same encroachment. He again failed to remove the encroachment and was prosecuted for an offence under S. 207 (1) of the Act.

*Held,* that the prior acquittal could not be a bar to his being tried for disobedience of the latter notice. The offence under S. 207 (1) of the Madras Local Boards Act is failure to comply with any direction lawfully given or any requisition lawfully made. But it does not consist in failure to remove an encroachment. The disobedience of the later notice is not the same offence as the disobedience of the earlier notice. but a different and distinct offence. If the encroachment is really an encroachment, the encroacher is liable at any time to receive a notice to remove it, and acquittal or conviction on a charge of disobedience of any one of such notices cannot be a bar to his being tried for disobedience of any other.

*Rangachariar* v. *Venkatasami Chetty,* (1934) 67 M.L.J. 873: I.L.R. 58 Mad. 513 and *Ramanujachariar* v. *Kailasam Aiyar,* (1925) 49 M.L.J. 386: I.L.R. 48 Mad. 870, disapproved.

*Narayana Aiyar* v. *Rakkupayal,* (1927) M.W.N. 645; *Moidi Beary* v. *President. Taluk Board* Mangalore, A.I.R. 1932 Mad. 535 and *President, Panchayat Board, Velgode* v. *Chinna Venkata Reddi,* A.I.R. 1932 Mad. 537, approved.

*Ramachandra Chetti* v. *Chairman, Municipal Council, Salem,* (1926) 50 M.L.J. 557: I.L.R. 49 Mad. 880, relied on.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the order of the Court of the Sub-Magistrate of Orathanad dated 5th June, 1937 and made in C. C. No. 118 of 1937 on his file.

*The Public Prosecutor* for Appellant.

*S. Parthasarathy* and *V. K. Tiruvenkatachari* for Respondent.

The judgment of the Court was delivered by

Burn, J.

*Burn, J.*—This appeal raises a question of some importance, and of rather frequent recurrence, on which there are conflicting rulings of this Court.

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* Crl. Appeal No. 712 of 1937. 7th April, 1938.

Public Prosecutor *v.* Sabapathy Chetty.
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The respondent is a resident in Orathanad in the District of West Tanjore. He is the owner of a shop by the side of a District Board road passing through the village, and he is alleged to have made an encroachment on the road by putting up in front of his shop a tin sunshade 11 feet long and 2 feet broad. On the 6th of February, 1937, he was served with a notice, dated the 21st of January, 1937, issued by the President of West Tanjore District Board under S. 159 (1) of the Madras Local Boards Act, requiring him to remove the encroachment, before the 21st of February, 1937. Alleging that the respondent had failed to remove the encroachment, the District Board overseer, duly authorised by the President, prosecuted him in C. C. No. 118 of 1937 on the file of the Sub-Magistrate of Orathanad for an offence under S. 207 (1) of the Local Boards Act. When the case came on for trial, the respondent pleaded that he had already been prosecuted in the matter of the same encroachment in C. C. No. 295 of 1936 in the same Court, that the prosecution had been withdrawn by the *ex officio* President, that he had thereupon been acquitted under S. 248 of the Criminal Procedure Code, and that the previous acquittal was a bar to any further proceedings on the same facts. The learned Sub-Magistrate, relying on the decision of Pandrang Row, J., in *Rangachariar* v. *Venkatasami Chetty*[1], acquitted the respondent under S. 403 of the Criminal Procedure Code. The learned Public Prosecutor has preferred this appeal.

It is quite clear that the order of acquittal is wrong. If S. 403 of the Criminal Procedure Code is applicable, the respondent could not have been put on his trial at all in C. C. No. 118 of 1937. S. 403 does not say that a person who has been tried and convicted or acquitted shall be acquitted if an attempt is made to prosecute him again for the same offence. It says that he shall not be tried at all.

That however is a minor matter; the important question is whether the previous acquittal in C. C. No. 295 of 1936 was a bar to the prosecution in C. C. No. 118 of 1937.

The learned Sub-Magistrate is supported by the ruling of Pandrang Row, J., on which he relied. He is supported also by the decision in *Ramanujachariar* v. *Kailasam Aiyar*[2], in which

1. (1934) 67 M.L.J. 873: I.L.R. 58 Mad. 513.
2. (1925) 49 M.L.J. 386: I.L.R. 48 Mad. 870.

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the facts seem to have been exactly the same as in this case. On the other hand, as the learned Public Prosecutor points out, there are three decisions of single judges against this view, and one decision of a Bench of two Judges expressly disagreeing with one of the reasons for the decision of Srinivasa Aiyangar, J., in *Ramanujachariar* v. *Kailasam Aiyar*[1]. Srinivasa Aiyangar, J., held that a prosecution under S. 207 (1) must be launched within three months after the disobedience of the notice under S. 159 (1), and that if this had not been done, the Local Board could not extend that period of three months by the device of issuing a fresh notice in respect of the same encroachment. This view was overruled by Devadoss and Waller, JJ., in *Ramachandra Chetti* v. *Chairman, Municipal Council, Salem*[2], where the learned Judges (dealing with the precisely similar provisions of the District Municipalities Act) pointed out that the offence under S. 207 (1) "consists in the failure to obey a requisition issued by the competent authority". This was followed by Wallace, J., in *Narayana Aiyar* v. *Rakkupayal*[3] and referred to by Walsh, J., in *Moidi Beary* v. *President, Taluk Board, Mangalore*[4] and in *President, Panchayat Board, Velgode* v. *Chinna Venkata Reddi*[5]. In both these cases Walsh, J., held that a previous acquittal or conviction does not bar a prosecution for disobedience of a fresh notice under S. 159 (1) even if the encroacher and the encroachment remain the same. As Pandrang Row, J., observes in *Rangachariar* v. *Venkatasami Chetty*[6], this point was not decided by Devadoss and Waller, JJ., who expressly reserved it, saying:

"If a prosecution had been instituted on the first requisition and had failed or not been pressed, other considerations might come in, but the question does not arise here."

With great respect to Pandrang Row, J., we think that the correct view is that taken by Wallace and Walsh, JJ., in the case quoted: The offence is failure to comply with any direction lawfully given or any requisition lawfully made; it is not strictly speaking correct to say that the offence consists in failure to remove the encroachment. Nobody commits an offence under the Local Boards Act by mere failure to remove

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1. (1925) 49 M.L.J. 386: I.L.R. 48 Mad. 870.
2. (1926) 50 M.L.J. 557: I.L.R. 49 Mad. 880.
3. (1927) M.W.N. 645.
4. A.I.R. 1932 Mad. 535.
5. A.I.R. 1932 Mad. 537.
6. (1934) 67 M.L.J. 873: I.L.R. 58 Mad. 513.

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an encroachment. He only commits an offence under S. 207 (1) when he fails to comply with a direction lawfully given. As Waller, J., observed in *Ramachandra Chetti* v. *Chairman, Municipal Council, Salem*[1], if a particular direction or requisition is not enforced, there is nothing in the Act that prevents the President from issuing another, and if a prosecution is then launched, it is for failure to comply with the second requisition and not for failure to comply with the first. If this is borne in mind, it follows, as Walsh, J., held, that it makes no difference whether there has or has not been any previous prosecution. Pandrang Row, J., fears that there is grave risk of persons being repeatedly harassed for the same offence, but this is we think not so. The respondent when he was prosecuted for failure to obey the requisition issued in 1937, was not in fact or in law being again harassed for the offence which he was alleged to have committed in 1936. He was being prosecuted for disobedience of the 1937 requisition, and it was no answer to that charge to say that he had been acquitted of the charge of disobedience of a requisition issued in 1936. We do not know why the prosecution in the case of 1936 was withdrawn; it might have been for any one of many conceivable reasons having nothing to do with the merits of the case. The learned Public Prosecutor says that according to his instructions it was withdrawn because the Collector, as *ex-officio* President had given a licence for the encroachment. If that is correct, and if the Board as at present constituted has decided that the encroachment must be removed, it is obvious that the respondent ought not to be able to avoid a prosecution merely because he was acquitted in the earlier case. If on the other hand the former prosecution was withdrawn because the District Board could not prove that an encroachment had been made, the Magistrate could have dealt with the matter under S. 250 of the Criminal Procedure Code. The view of Srinivasa Aiyangar, J., that the real offence in such cases is the encroachment (*Ramanujachariar* v. *Kailasam Aiyar*[2]) was expressly dissented from in *Ramachandra Chetti* v. *Chairman, Municipal Council, Salem*[1] and we are of opinion that the reasoning in the latter case is against the view of Pandrang

1. (1926) 50 M.L.J. 557 : I.L.R. 49 Mad. 880.
2. (1925) 49 M.L.J. 386 : I.L.R. 48 Mad. 870 at 873.

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Row, J., in *Rangachariar* v. *Venkatasami Chetti*[1]. If it were correct to say that the offence is complete once there is failure to disobey the notice and that:

> "another separate and distinct offence is not brought into being by the issue of a subsequent notice when that notice is by the same authority to the same person and relates to the same encroachment":

the learned Judges who decided *Ramachandra Chetti* v. *Chairman, Municipal Council, Salem*[2], could hardly have held, as they did, that the Municipal Council was entitled to issue a second notice, more than three months after the disobedience of the first. Their decision is clearly based on the point that the offence consists in the failure to obey the requisition. All difficulties vanish, we think, if this is kept in mind. The disobedience of the later notice is not the same offence as the disobedience of the earlier notice, but a different and distinct offence. If the encroachment is really an encroachment the encroacher is liable at any time to receive a notice to remove it, and acquittal or conviction on a charge of disobedience of any one of such notices cannot be a bar to his being tried for disobedience of any other. The Magistrate to whom such a complaint is made must take the evidence and ascertain whether the direction or requisition has been lawfully given or made, and whether it has been disobeyed. If he finds that the direction has not been lawfully given, the fact that there has been a previous prosecution and acquittal in respect of the same encroachment will be of great assistance to him in deciding whether he will or will not use his powers under S. 250 of the Criminal Procedure Code.

We set aside the order of acquittal and direct the Sub-Magistrate to dispose of the case according to law.

K. C. —— *Order set aside.*

1. (1934) 67 M.L.J. 873: I.L.R. 58 Mad. 513.
2. (1926) 50 M.L.J. 557: I.L.R. 49 Mad. 880.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE VARADACHARIAR.

Patelkhana Venkataramaswami and another .. *Appellants** (*Defendants 3 and 4*)

*v.*

The Imperial Bank of India at Rajahmundry and others .. *Respondents* (*Plaintiff and Defendants 1, 2 and 5*).

F.B.

Venkataramaswami *v.* Imperial Bank of India at Rajahmundry.

*Hindu Law—Debt—Loan in pursuance of an agreement to execute a security bond if and when required by lender—Later mortgage in pursuance thereof—If mortgage invalid—Prior debt if an antecedent debt to support the mortgage.*

Where money is advanced to a Hindu father on the strength of an agreement to execute a mortgage as and when required by the lender in future, the debt will constitute an antecedent debt so as to make the mortgage executed in pursuance of the agreement binding on the shares of the sons as well. But the agreement must be a genuine agreement and not a device for evading the law. There is a real distinction between cases where the lender and the borrower contemplate the giving of security only as a future possibility and cases in which from the outset the parties contemplate only a mortgage loan.

*Rajayya* v. *Satyanarayanamurthi*, (1934) M.W.N. 812, discussed and explained.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in O. S. No. 18 of 1932.

*M. S. Ramachandra Rao* for Appellants.

*O. T. G. Nambiar* instructed by *Messrs. King and Partridge* for Respondents.

The Court (*Varadachariar* and *Pandrang Row, JJ.*) made the following

ORDER OF REFERENCE TO A FULL BENCH.

*Varadachariar, J.*—This appeal arises out of a suit to enforce specific performance of an agreement entered into by defendants 1 and 2 to execute a mortgage in favour of the plaintiff bank, to secure repayment of moneys advanced to them in pursuance of that agreement. Moneys were advanced on more than one occasion and sometime in December, 1930, the plaintiffs say that they asked for the execution of the security in pursuance of the agreement. The bank has obtained a simple money decree against defendants 1 to 4 for the amount due.

* Appeal No. 251 of 1933. 11th April, 1938.

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Defendants 1 and 2 are father and son and defendants 3 and 4 are the minor sons of the second defendant. All the four defendants are members of an undivided family. The fifth defendant is the Official Receiver in the insolvency of the first and second defendants. Defendants 1 and 2 seem to have carried on a joint business and they purported to borrow money from the plaintiff bank in connection with that business, but the question has not been raised or decided whether that was an "ancestral" business in respect of which defendants 1 and 2 can create a mortgage so as to bind the shares of defendants 3 and 4 in the family property. Defendants 3 and 4 contend that according to the test laid down in the Privy Council decisions, the suit debts are not "antecedent debts" in relation to the mortgage because they were lent on the strength of the agreement to create a mortgage and that therefore any mortgage executed by defendants 1 and 2 on foot of such agreement cannot bind their shares in the family property.

If these defendants had not been impleaded in this suit, specific performance might have been decreed in the usual course as against the parties to the agreement, leaving the question of the binding character of the mortgage to be agitated in appropriate proceedings. But as they have been impleaded in this suit and the question has been raised and dealt with in the Court below, we do not think it proper to ignore that contention. The learned Subordinate Judge was of opinion that the mortgage now to be executed by defendants 1 and 2 must be deemed to be one in respect of an antecedent debt, because the debts have already been advanced. The appellants' learned Counsel relies on the decision of a Division Bench of this Court in *Rajayya* v. *Satyanarayanamurthi*[1], in support of his contention that where money has been advanced on the strength of an agreement to create a security on the family property, the fact that the mortgage comes to be executed only after the advance has been made will not make the mortgage valid as one created to secure repayment of an antecedent debt. This is a direct authority on the point; but we have felt some difficulty in reconciling it with the principle of the Full Bench decision in *Arumugham*

1. (1934) M.W.N. 812.

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*Chetty* v. *Muthu Koundan*[1], which was approved by the Judicial Committee in *Brij Narain* v. *Mangla Prasad*[2]. If money which had been advanced on a mortgage of joint family property can be regarded as an antecedent debt validating a later mortgage securing repayment of the same sum, it is not easy to see why money which has been advanced on the strength of an agreement to execute a mortgage should be regarded as standing on a different footing. The principle of the decision in *Arumugham Chetty* v. *Muthu Koundan*[1] has also been applied by the Privy Council in *Lal Bahadur* v. *Ambika Prasad*[3]. But for the judgment in *Rajayya* v. *Satyanarayanamurthi*[4], we should have been prepared to concur in the decision of the lower Court. In view however of that decision, we refer to the decision of a Full Bench the question:

"Whether money advanced to the father, in a joint Hindu family in pursuance of an agreement to create a mortgage as and when required by the lender will constitute an antecedent debt so as to make the mortgage (when it comes to be executed) binding even on the shares of the sons of the borrower."

This appeal coming on for hearing before Sir Alfred Henry Lionel Leach, Chief Justice, Madhavan Nair and Varadachariar, JJ., in pursuance of the aforesaid Order of Reference to a Full Bench

The Court expressed the following

Leach, C.J.

OPINION. *The Chief Justice.*—The suit which has given rise to this reference was instituted in the Court of the Subordinate Judge of Rajahmundry by the Imperial Bank of India, the 1st respondent. The bank sued to enforce specific performance of an agreement entered into by the 2nd and 3rd respondents with the bank to secure repayment of moneys advanced to them. The 2nd respondent is the father of the 3rd respondent. They and the appellants, who are the minor sons of the 3rd respondent, constitute an undivided family. In 1923 the 2nd and 3rd respondents started a business, and for this purpose opened an account with the bank. On the 14th August, 1923, in pursuance of an arrangement with the bank, which was willing to finance them, they executed a document in the following terms:—

"In consideration of the Imperial Bank of India advancing us sums of money from time to time we hereby undertake not to alienate or in any way

1. (1918) 37 M.L.J. 166: I.L.R. 42 Mad. 711 (F.B.).
2. (1923) 46 M.L.J 23: L.R. 51 I.A. 129: I.L.R. 46 All. 95 (P.C.).
3. (1925) L.R. 52 I.A. 443: I.L.R. 47 All. 795 (P.C.).
4. (1934) M.W.N. 812.

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transfer or mortgage any of our immovable property as per schedule attached and which at present is not mortgaged to any one.

"We hereby agree when called upon to do so to execute legal mortgage of these properties, with or without possession or conveyance to the said bank as the bank may require, so long as we are indebted to the bank.

"This agreement to be in force till cancelled by us by a registered letter."

From time to time the bank lent money to the 2nd and 3rd respondents without calling upon them to execute any mortgage in its favour. By 1931 the 2nd and 3rd respondents had become heavily indebted to the bank and in that year the bank obtained two decrees against them in respect of advances. The first decree was for a total sum of Rs. 25,482-11-0, made up of Rs. 5,070-1-0, due on a promissory note dated 19th December, 1930, and Rs. 20,412-10-0 due on three hundies dated respectively, the 30th March, 1930, the 5th November, 1930 and the 29th November, 1930. The second decree was for Rs. 5,099-3-0, due on a hundi dated 30th October, 1930. In December, 1930, the bank demanded that the 2nd and 3rd respondents should execute a mortgage to secure their indebtedness, but this demand was not complied with, and on the 5th April, 1932, the bank sued for specific performance of the agreement which I have just quoted. The suit was decreed and the sons of the 3rd respondent were held to be liable to the extent of their interests in the family properties. They have appealed, and contend that there can be no decree for specific performance so far as they are concerned, because the mortgage which the Court ordered to be executed was not in law a mortgage for an antecedent debt. As this question is of importance and as the decision in *Rajayya* v. *Satyanarayanamurthi*[1] would appear to be in conflict with certain decisions of the Privy Council the following question has been referred to us:—

"Whether money advanced to the father, in a joint Hindu family in pursuance of an agreement to create a mortgage as when required by the lender will constitute an antecedent debt so as to make the mortgage (when it comes to be executed) binding even on the shares of the sons of the borrower."

In delivering the judgment of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh*[2], Lord Shaw said that the issue of the father could only be bound where the sale or charge has

1. (1934) M.W.N. 812.

2. (1917) 33 M.L.J. 14: L.R. 44 I.A. 126: I.L.R. 39 All. 437 (P.C.).

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been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by the joint estate. The judgment concluded with the following statement:—

"In truth in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact. The Courts in India, wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust, will not be slow to deny effect to a mortgage so brought into existence."

This judgment was considered by a Full Bench of five Judges of this Court in *Arumugham Chetty* v. *Muthu Koundan*[1] and there Wallis, C.J., expressed the opinion that their Lordships only meant,

" that if the so-called antecedent debt was incurred so shortly before the execution of the mortgage, say two hours or two days, as to establish that it was incurred on the credit, or security available by the joint family immovable assets, such a debt is not an antecedent debt and therefore the mortgage which is executed for such a so-called antecedent debt will not affect the sons' shares."

Viewing the decision of the Privy Council in this light the Court held that if a Hindu father borrows money on the security of the family estate and later gives another mortgage the first debt constitutes an antecedent debt, notwithstanding that it was secured on the family estate. In *Brij Narain* v. *Mangla Prasad*[2], the Judicial Committee expressed their entire agreement with the views of Wallis, C.J., in *Arumugham Chetty* v. *Muthu Koundan*[1], and in order to prevent misconception in future on this and connected questions stated the following propositions of law:—

"1. The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity; but

"2. If he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

"3. If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate.

"4. Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

1. (1918) 37 M.L.J. 166: I.L.R. 42 Mad. 711 (F.B.).
2. (1923) 46 M.L.J. 23: L. R. 51 I.A. 129: I.L.R. 46 All. 95 (P.C.).

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"5. There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

The fourth proposition would appear to be an embodiment of the concluding portion of Lord Shaw's judgment, where he expressed the opinion that the transaction must be one which cannot be regarded as a cloak for a breach of trust. If the debt and the mortgage are not part of the same transaction, but are independent of one another the mortgage will be binding on the issue of the mortgagor.

In *Rajayya* v. *Satyanarayanamurthi*[1], Krishnan Pandalai, J., sitting with Curgenven, J., observed that if a man advanced a loan to a father in a joint Hindu family and agreed with him to take a mortgage for the loan and subsequently in pursuance of that agreement does take the mortgage, the mortgage cannot be said to be for a debt antecedent to the original loan. This statement of the law is very wide and may give rise to misconception. The mortgage may be independent of the debt despite the fact that the agreement between the parties contemplated the furnishing of security, if called for. If the money is lent on the express condition that a mortgage will be executed later and a mortgage follows, the debt cannot be said to be independent of the mortgage, but if the arrangement is merely that the debtor shall give security, if and when required, the position is very different. It may never be required and probably will not be called for, if the creditor remains satisfied with the debtor's personal liability. If it is required because the creditor at a later date has his suspicions of the debtor's stability or for some other reason it cannot be said that the advancing of the money and the subsequent mortgage are part and parcel of the same transaction.

Now, what is the position in the present case? The bank did advance moneys to the 2nd and 3rd respondents and continued to lend moneys entirely without any security. For several years the bank was satisfied with the undertaking given by the 2nd and 3rd respondents not to alienate their properties. It is true that the 2nd and 3rd respondents had undertaken to provide security when called upon to do so, but this does not alter the fact that moneys were advanced without security. When security was called for there was a debt really

1. (1934) M.W.N. 812.

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in existence. In our opinion it cannot be said that there was here a breach of trust on the part of the 2nd and 3rd respondents or that the bank was a party to a colourable transaction. In other words it cannot be said that the debt was any part of the mortgage or, to use the words of Lord Dunedin in *Brij Narain* v. *Mangla Prasad*[1], "Part of the transaction impeached." In this country an agreement to mortgage creates no charge, and this is of importance in this connection.

For the reasons stated we would answer the reference in this sense. If the agreement is merely to execute a mortgage, if and when called upon, and the money is lent on this understanding the fact that subsequently a mortgage is called for and executed will not make the debt and the mortgage part of the same transaction within the meaning of *Arumugham Chetty* v. *Muthu Koundan*[2], but the debt will constitute an antecedent debt within the meaning of Hindu Law. The agreement must be a genuine agreement and not a device for evading the law.

Madhavan Nair, J.

*Madhavan Nair, J.*—I agree.

Varadachariar, J.

*Varadachariar, J.*—I agree. There is a real distinction between cases in which the lender and the borrower contemplate the giving of security only as a future possibility and cases in which from the outset the parties contemplate only a mortgage loan. In the former case, the lender is prepared to start with only the personal liability of the borrower and conceivably may never call for the execution of a mortgage at all. Security is, in such cases, ordinarily called for only when in course of time it is found that the borrower has not been repaying his dues with the promptness with which he was expected to repay or is getting into financial difficulties. When, for such reasons, the creditor calls for the execution of a mortgage, there will be in existence an indebtedness which has for some time been outstanding merely on the personal liability of the borrower. This debt can at that very moment be recovered from the *whole* of the joint family property of the debtor—including the shares of his sons—and it is to avert proceedings to that end that the debtor will be called upon to give a security. It does not seem reasonable in such a case to speak of the 'antecedency' of the debt as *illusory*; nor can it be said that there was no '*bona fide* debt' or that it was

1. (1923) 46 M.L.J. 23: L.R. 51 I.A. 129: I.L.R. 46 All. 95 (P.C.).
2. (1918) 37 M.L.J. 166: I.L.R. 42 Mad. 711 (F.B.).

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'colourably incurred for the purpose of forming a basis' for the mortgage (*per* Stanley, C. J., in *Chandradeo Singh* v. *Mata Prasad*[1]).

If, as observed by Lord Shaw in *Sahu Ram Chandra* v. *Bhup Singh*[2], a further condition should be insisted on, before binding the son's share by the father's mortgage, namely, that at the time of advancing money the lender should not have had in view the 'credit obtainable from immovable assets belonging to the joint family', the position might be different; but this condition can no longer be insisted on, in view of the Full Bench decision in *Arumugham Chetty* v. *Muthu Goundan*[3] and of the decision of the Judicial Committee in *Brij Narain* v. *Mangla Prasad*[4]. It is true that in *Brij Narain* v. *Mangla Prasad*[4], their Lordships speak (in proposition No. 4) of the debt being 'not part of the transaction impeached'; the transaction referred to in this passage is the mortgage itself. The proposition has evidently been so worded with a view to give effect to the observations of Lord Shaw at the end of the judgment in *Sahu Ram Chandra* v. *Bhup Singh*[2], when referring to a father 'at the end of his personal resources', his Lordship instanced the case of a money-lender advancing money to him 'relying upon an understanding express or implied' to give security.

Apart from attempts to evade the law, it may, even in cases where *only* a mortgage loan was contemplated, happen that there is some interval of time—long or short—between the advance of the money and the execution of the mortgage bond, for example, because the requisite stamp papers are not immediately available or details as to survey numbers, etc., relating to the property to be mortgaged have to be obtained or one of the persons who has to join in executing the mortgage is not available or the mortgagee is able to find only a portion of the money required and the execution of the document is postponed till he is able to find the balance. In these cases, it may well be said that notwithstanding the interval, the loan and the mortgage are part of one and the same transaction. *Rajayya* v. *Satyanarayanamurthi*[5] will, on its facts, be

1. (1909) I.L.R. 31 All. 176 at 190 (F.B.).
2. (1917) 33 M.L.J. 14: L.R. 44 I.A. 126: I.L.R. 39 All. 437 at 440 (P.C.).
3. (1918) 37 M.L.J. 166: I.L.R. 42 Mad. 711 (F.B.).
4. (1923) 46 M.L.J. 23: L.R. 51 I.A. 129: I.L.R. 46 All. 95 at 104 (P.C.).
5. (1934) M.W.N. 812.

found to fall in this group; because in that case, the original arrangement itself was for a mortgage loan of Rs. 5,000 but the lender was able to find only Rs. 3,000 immediately. The execution of the mortgage-deed was postponed pending the advance of the balance of Rs. 2,000 and in the meanwhile the first advance of Rs. 3,000 was acknowledged by the execution of a promissory note.

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This appeal coming on for final hearing after the expression of the opinion of the Full Bench, the Court delivered the following

JUDGMENT.—The question of the binding character of the mortgage has been decided by the Full Bench against the appellants. No other question arises for decision in the appeal which is accordingly dismissed with costs of the first respondent. The appellants will pay to the Government the court-fee payable on the Memorandum of Appeal.

S. V. V. ——— *Appeal dismissed.*

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT:—LORD WRIGHT, SIR SHADI LAL AND SIR GEORGE RANKIN.

Rowland Ady and others .. *Appellants**

*v.*

The Administrator-General of Burma, Administrator to the Estate of Hosain Hamadanee, deceased .. *Respondent.*

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Rowland Ady *v.* Administrator-General of Burma.

*Promissory note—Collateral agreement—Letter imposing condition to attaching of obligation on note—Admissibility in evidence—Evidence Act (I of 1872), S. 92, Proviso (iii).*

Where a person executed a promissory note subject to the condition contained in an accompanying letter that no liability was to attach thereto until the executant received certain assets and the evidence showed that the promisee agreed to the condition,

*Held*, that the accompanying agreement which was the condition of the execution of the promissory note was a written agreement and therefore outside the scope of S. 92 of the Evidence Act, and that it could be pleaded in bar of a suit instituted on the promissory note before the condition was fulfilled.

* P. C. Appeal No. 62 of 1937. 3rd May, 1938.

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*Held, further,* that even if the collateral agreement was an oral agreement so as to come within S. 92 it would fall within the third proviso of the section and would be admissible in evidence.

*New London Credit Syndicate, Limited* v. *Neale,* (1898) 2 Q.B.D. 487; *Free* v. *Hawkins,* (1817) 8 Taunt. 92: 129 E.R. 317; *Ramjibun Serowgy* v. *Oghore Nath Chatterjee,* (1897) I.L.R. 25 Cal. 401 and *Walter Mitchell* v. *Tennent,* (1925) I.L.R. 52 Cal. 677, referred to.

Appeal from a judgment and decree of the High Court of Judicature at Rangoon.

*A. M. Dunne, K.C.* and *A. Pennell* for Appellants.

*R. F. Roxburgh* and *Malore* for Respondent.

3rd May, 1938. Their Lordships' judgment was delivered by

Lord Wright.

Lord Wright.—The question in this appeal relates to a promissory note executed by the appellants dated the 12th September, 1933. This note was a renewal of an earlier promissory note executed in 1930, but as it is common ground that the considerations which would have applied to the original note, applied to the renewal, no distinction need be drawn between the two documents. The question to be determined is, what were the conditions on which the earlier promissory note was executed.

The appeal is by Rowland Ady, who will be referred to as the appellant, Rowland Ady & Co. being merely the firm name under which he carries on business so that it may be disregarded in this appeal. The respondent, the Administrator-General of Burma, is the administrator of the estate of one Hosain Hamadanee, deceased.

In 1927 the appellant, Hamadanee and one James Cyril Ashe, who was a mining engineer, formed a syndicate to operate certain mining rights, here referred to as Booth's Grant, for the purpose of dealing with these rights. Shortly afterwards on the 7th October, 1927, the syndicate registered a limited liability company under the name of Ashe's Minerals, Limited and under an agreement of the same date agreed to transfer all their assets to the company in consideration of Rs. 18,000 to be satisfied by the allotment to Hamadanee, the appellant, and Ashe of 600 shares each. These shares were duly allotted. The necessary finance was advanced by Hamadanee on the footing that he and the appellant were each to bear half the expenses and that they and Ashe were each to receive one-third of the profits.

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Hamadanee put up approximately Rs. 30,000. In addition to Booth's Grant, the company also acquired other properties, one of which was a bamboo reserve.

On Hamadanee's death in April, 1928, the respondent, the Administrator-General of Burma, who was then Mr. Hormasji, was appointed administrator of the estate and so continued at all material times. In the course of administering the estate, the respondent got into touch with the appellant and in his endeavours to settle up the complicated affairs of Hamadanee, discussed by conversation and correspondence the transactions in connection with Ashe's Minerals, Ltd., which was one of the numerous matters to be liquidated. That company had, shortly after Hamadanee's death, realised a profit and had distributed the proceeds by way of dividend.

In the course of the discussions between the appellant and respondent, the state of the accounts in respect of Ashe's Minerals, Ltd., was examined and as a result of an interview between these two parties a statement was prepared which showed a balance due by the appellant to the respondent as administrator of the estate amounting to Rs. 13,608-6-9. There are certain other items which it is not necessary to consider. The account was signed by an official in the respondent's office called Natarajan. At the foot of the account, there was a note signed by the appellant in the following terms:—

"This account is correct and I am willing to execute a pro-note for Rs. 13,608-6-9 on condition that payment is not demanded until as originally arranged, Booth's Grant deal goes through when the amount is to be paid by me without interest.

This account excludes the item of Rs. 1,500 due to me as ½ share in the marble quarries and Rs. 2,000 paid by me as H.H.'s share of Government rent for same also Rs. 150 due to the estate by me for cows. These matters to be settled later on as soon as proofs are adduced in support of my claim."

Under the appellant's signature there appears the date 17th September, 1930. Under Natarajan's signature there was inserted the date 18th September, 1930, but it has now been agreed that that had been originally 17th September, 1930 and that the 17 was altered to 18. It has not been explained when, how or why this alteration was made.

The next documents to be considered consist of a letter dated the 20th September, 1930, sent by the respondent to the appellant, and two documents which it enclosed. The letter

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requested the appellant to execute two promissory notes, one for Rs. 13,608-6-9 and one for Rs. 150. The latter promissory note may here be disregarded because it relates to the purchase of a cow or cows. The appellant was also requested to have the former promissory note signed by his firm. The two documents enclosed were described as being (1) an office report of the respondent's dated the 18th September, 1930, of the balance due from Rowland Ady & Co., Ashe and Ashe's Minerals, Limited and (2) the statement of account showing the balance due from Messrs. Rowland Ady & Co., Ashe and Ashe's Minerals, Ltd. That has been taken to be the account already referred to, but it is not clear whether this document included not only the account itself but also the endorsement made and signed by the appellant to which reference has been made. The document No. 1 is a copy of part of the actual office report which had been prepared and initialled by Natarajan. The greater part of this report deals with figures of account. It recites that the appellant was claiming that there should be certain adjustments in his favour and states that when he produced papers in support of his claim and the office was satisfied with the claim, the necessary credit would be given. But the report next contains a passage which is most material to the decision of this case, in the following terms:—

"In the meanwhile he has agreed to execute a P.N. for the sum of Rs. 13,608-6-9 found due from him on condition that the money is not demanded till he receives the next distribution from Ashe Minerals, Ltd. and that no interest is demanded. He will execute the pro-note to-morrow if A.G. approves of the account. He has already seen it and has signed at foot of the account."

Against this passage on the original office report there was a note in red pencil, "Appd.—let him sign on above terms." This note was made by the respondent and is initialled by him under the date 18th September.

The remainder of the office report consists of details of the account and there is a further note in red pencil made by the respondent, "Appd. I remember the transaction. Mr. Ady's statement to be accepted." Initialled "J. H." 18-9. There was also on the document a note initialled by Natarajan that a separate P.N. for Rs. 150 was taken from the appellant. What was described as the office report in the letter of the 20th September, 1930, to the appellant was a copy of the actual

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Report excluding the red pencil notes made by the respondent and also the note about the separate promissory note for Rs. 150, and also excluding the statement of account appended.

On receipt of these documents, the appellant executed the original promissory note in his own name and in his firm's name. The note was in the following terms:—

"On demand we, Rowland Ady and Rowland Ady & Co. of No. 55, Mogul Street, Rangoon, jointly and severally promise to pay to the Administrator-General of Burma and Administrator to the estate of Hoosain Hamadanee the sum of Rs. 13,608-6-9 being the amount due by us and by Mr. Ashe to the estate of Hoosain Hamadanee, deceased."

The action was brought on the renewal of this promissory note.

The claim was resisted and the defence set out in the written statement was as in the following terms:—

"The said promissory notes [that is to say, the original and the renewal], were executed subject to the condition precedent that no liability was to attach thereto until the defendants received the next distribution from Ashe's Minerals, Ltd. and until certain adjustments of account in the defendants' favour had been made to the extent of Rs. 3,350."

By an amendment the word "unless" was substituted for the word "until" in both places where it occurred.

The Trial Judge stated that he accepted the appellant's account and was satisfied that to the best of his ability he endeavoured to assist the Court by telling the truth as he understood it. The Judge held that the promissory note was made subject to the account of the 17th September, 1930, and the endorsements thereon signed by the appellant, and that the condition of the sale or disposal of the Booth's Grant had been fulfilled or at least that the appellant had failed to prove that it had not been satisfied. He accordingly made a decree against the appellants for Rs. 13,608-6-9 less such sum, if any, as might be found upon taking the account of the subject-matters referred to in the appellant's endorsement of the 17th September, 1930.

This decree, subject to a variation, now immaterial, was affirmed by the High Court on appeal, and the appeal was dismissed with costs.

It is, however, most unfortunate that the High Court on appeal in arriving at that conclusion fell into a curious misconception of fact because they dismissed from their consideration the copy of the office report which, as already stated was

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enclosed in the said letter of the 20th September, 1930. They held that the appellant or his legal advisers had concocted their defence from material improperly obtained from the inspection of the documents. They appear to have been of opinion that the copy of the office report had been improperly made by the appellant or his legal advisers on the inspection of documents during the action and had then been put forward as a relevant document. The respondent's Counsel has most properly disclaimed any reliance on this view of the Appellate Court. Their Lordships have seen the original letter of the 20th September, 1930, and the actual enclosures and have set out above what happened. There is no ground whatever for imputing any impropriety to the appellant or his legal advisers; any such imputation has been unreservedly withdrawn before their Lordships on this appeal. The Appellate Court may perhaps have been confused by the fact that the appellant's legal adviser or his clerk in comparing the copy of the office report sent with the letter of the 20th September, 1930, had written the various notes which appeared, as have already been explained, upon the office report itself and were naturally not reproduced in the copy sent to the appellant. The unfortunate result of this misconception on the appeal to the Appellate Court is that their Lordships have not got the benefit of the judgment which the High Court on appeal wovld have arrived at if they had not fallen into this misconception.

In their Lordships' opinion this appeal ought to be decided on the written documents referred to above but in view of the arguments addressed to them, they think it desirable that they should also discuss the oral evidence. There were two witnesses of importance, the appellant himself and the respondent, Mr. Hormasji. Their evidence deals with the circumstances when the promissory note was executed. The appellant deposed that he had several interviews with Hormasji in which the accounts were discussed. He stated that the statement of account on which he wrote his endorsement was the result of one of these interviews and that it was decided at that interview that no demand should be made on the note until Booth's Grant deal went through and the proceeds were derived from the Company; but he said that that arrangement was altered at the suggestion of Mr. Hormasji who on the next day sent an altered form of wording to the effect that no

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demand would be made on the note and no liability would attach until the assets of Ashe's Minerals, were next distributed. The appellant said that he agreed to the change and asked for an agreement to be sent and that on the following day he was sent a copy of the office report.

The respondent is not so clear in his evidence but eventually, according to the Judge's note he said, "I agree to what is written down on p. 2 of Exhibit 'C' and against which I have written down the word Appd." He is there referring to the passage quoted above from the office report. He further said that in his mind there was no difference between the two forms of the condition and that he had agreed not to make a demand on the pronote until one of these conditions was fulfilled. Natarajan's evidence is not of importance.

Taking the position as a whole, their Lordships are of opinion that the documents enclosed in the letter of the 20th September, 1930, were intended to embody the conditions under which the appellant was to execute the promissory note and they are of opinion that these conditions were substituted for the conditions contained in the endorsement which the appellant added to the statement of account and signed on the 17th September, 1930. The appellant, by executing the promissory note on the basis of the letter and enclosures of the 20th September, 1930, accepted these conditions so proposed by the respondent. Accordingly the complete transaction between the parties was embodied in these documents, namely, the promissory note on the one hand containing the promise to pay and on the other hand the conditions embodied in the letter of the 20th September, 1930, and its enclosures. The result of that position is that the respondent is not entitled to demand payment of the promissory note until the next distribution from Ashe's Minerals, Ltd. As this has not yet taken place, the action based on the promissory note was premature and cannot succeed on the present state of affairs since there had been no next distribution from Ashe's Minerals, Ltd., when the action was started, that is no distribution of profits subsequent to that referred to above before the date of the agreement. If, as it is suggested may happen, there never is any such distribution it will follow that no demand for payment can ever be made on the promissory note. That latter point is, however, immaterial in these proceedings.

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Mr. Roxburgh in his able argument for the respondent did not seriously contest that if this view of the documents was taken, that is to say, if their Lordships were of opinion that the letter of the 20th September with its enclosures constituted a written offer from the respondent to the appellant, capable of being accepted and, in fact, accepted by the appellant, by the execution of the promissory note, it would follow that the terms of the promissory note must be read along with and as qualified by the written agreement on the part of the respondent not to demand payment until the condition was fulfilled. He, however, strongly contended that that was not the true view and that the letter with its enclosures constituted merely a record of what was in truth before the date of the documents an oral agreement arrived at between the parties and that evidence of such an oral agreement was not admissible by reason of S. 92 of the Indian Evidence Act. Against this it was contended on behalf of the appellant that even if the agreement not to demand payment was merely a collateral oral agreement, it was still admissible in evidence as falling within the third proviso of S. 92 which provides that the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any written contract grant or disposition of property may be proved.

Their Lordships, as already stated, are of opinion that the accompanying or collateral agreement which was the condition of the execution of the promissory note was a written agreement and therefore outside S. 92. But even if the collateral agreement was an oral agreement so as to come within S. 92, they are of opinion that it would fall within the third proviso of the section which states the Indian law in terms which are in accordance with English law. It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or, to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note. In their Lordships' judgment this collateral agreement comes under the latter description and is within the proviso. As an illustration for example reference

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may be made to the *New London Credit Syndicate, Limited* v. *Neale*[1], where it was sought to prove an oral agreement to renew a promissory note payable at 3 months date, and that was held to be an agreement altering the terms of the written contract. In the earlier case of *Free* v. *Hawkins*[2], the evidence which was excluded was of a parol agreement said to have been made at the time of making a note. The note was expressed to be payable 8 months after the date. The evidence which was rejected was that payment should not be demanded until after the sale of certain assets.

The present case falls into the other category. The promissory note is, by its express terms, payable on demand, that is, at once. The obligation under the note attaches immediately. But the agreement not to make a demand until the specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the promissory note. Thus the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of proviso 3 of S. 92. A case like the present is to be distinguished from that dealt with in *Ramjibun Serowgy* v. *Oghore Nath Chatterjee*[3], in which the promissory note, though absolute in its terms, was said to be subject to an oral agreement, providing that it was not to be enforceable by suit until the happening of a particular event. Sale, J., in rejecting this evidence expressed his opinion that the proper meaning of proviso 3 was that the contemporaneous oral agreement to be admissible must be to the effect that a written contract was to be of no force at all and was to constitute no obligation until the happening of a certain event. This description in their Lordships' judgment applies to the present case. To the same effect Page, J., in *Walter Mitchell* v. *Tennent*[4] held that the collateral agreement alleged in that case constituted a condition precedent to the attachment of any obligation under the cheques in question so that they remained inoperative until the condition was fulfilled. The same view has been applied in other cases, which it is not necessary here to cite specifically.

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1. (1898) 2 Q. B. 487.
2. (1817) 8 Taunt. 92: 129 E.R. 317.
3. (1897) I.L.R. 25 Cal. 401.
4. (1925) I.L.R. 52 Cal. 677.

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In their Lordships' judgment if the collateral agreement in the present case were held to be an oral agreement, evidence of it would be admissible on the principles they have stated but they prefer to decide the case on the ground that the actual position of the parties depends on the written documents, namely, the promissory note and the letter and enclosures of the 20th September, 1930, and that accordingly no question of admissibility of evidence under S. 92 arises.

For these reasons, with all respect to the Courts below, their Lordships are unable to agree with them in the conclusions at which they have arrived; they are of opinion that the appeal should succeed; that the decrees appealed from should be set aside and that judgment should be entered for the appellants with costs before this Board and in the Courts below. They will humbly so advise His Majesty.

Solicitors for Appellants: *Lambert and White.*

Solicitors for Respondent: *Burton, Yeates and Hart.*

R. C. C. *Appeal allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Bopanna Prakasam .. *Petitioner* (Plaintiff)*

*v.*

Maganti Nagabhushanam .. *Respondent (Defendant).*

Bopanna Prakasam v. Nagabhushanam.

*Stamp Act (II of 1899), S. 36—"Admitted in evidence"—What constitutes—Insufficiently stamped promissory note—Endorsement on note—Court allowing promissory note to be admitted in evidence—Effect—Objection to admissibility—Whether can be raised at later stage.*

S. 36 of the Stamp Act does not say that there must be a judicial determination of the question whether a document has to be admitted in evidence. The words "admitted in evidence" in the section would seem to have been deliberately used to avoid complicated enquiries regarding the admission of documents, the policy of the law in such cases being to allow admission of documents which have been admitted under the Civil Procedure Code.

Where in spite of the fact that the suit promissory note bore the endorsement that it was insufficiently stamped the judge admitted it in evidence,

*Held,* that the promissory note should be taken to have been "admitted in evidence" within the meaning of S. 36 of the Stamp Act and that its admissibility could not be called in question subsequently.

*Venkateswara* v. *Ramanatha,* A.I.R. 1929 Mad. 622; *Abdul Wahab* v. *Kanaka Anjaneyalu,* A.I.R. 1935 Mad. 888 and *Satyavati* v. *Pallaya,* A.I.R. 1937 Mad. 431, relied on.

* C. R. P. No. 1115 of 1937. 12th May, 1938.

*Venkanna* v. *Parasuram Byas,* (1929) 56 M.L.J. 633: I.L.R. 53 Mad. 137, distinguished.

Bopanna Prakasam *v.* Naga-bhushanam.

Petition under S. 115 of Act V of 1908, and S. 224 of the Government of India Act, praying the High Court to revise the decree of the Court of the District Munsiff of Ellore in O. S. No. 587 of 1935.

*V. Rangachari* for Petitioner.

*A. Lakshmayya* for Respondent.

The Court delivered the following

JUDGMENT.—In this petition I am called upon to decide the question whether the suit promissory note is admissible in evidence. The lower Court held that it was inadmissible and this petition is to revise that order of the learned District Munsiff.

The question arose in the following circumstances. The plaintiff is the petitioner. He instituted a suit on a promissory note for Rs. 200. The defendant raised the contention that the suit note was a forgery. He also stated that the promissory note was insufficiently stamped and was therefore inadmissible in evidence under S. 35 of the Stamp Act. When the case came on for hearing the defendant did not appear. He asked for an adjournment which was refused. But he did not withdraw his appearance in the case. The learned District Munsiff admitted the promissory note in evidence and decreed the suit. An appeal was preferred against this decision, but the learned Judge in appeal thought that the case was one which should have been adjourned by the learned Munsif. He therefore remanded the suit to the District Munsif giving time for the defendant to produce his evidence. When the case came before the District Munsif, the defendant pressed his objection that the suit note was inadmissible and he contended that the suit should be dismissed. As stated in the beginning a ruling was given by the lower Court accepting his contention.

In this Civil Revision Petition it is argued by the petitioner that once the insufficiently stamped promissory note has been admitted in evidence it is not open to the party concerned to raise the objection at a later stage that it is inadmissible and so the ruling of the lower Court is wrong. S. 36 of the Indian Stamp Act says:

"When an instrument has been admitted in evidence, such admission shall not, except as provided in S. 61, be called in question at any stage of

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the same suit or proceeding on the ground that the instrument has not been duly stamped."

The question for decision in the present case therefore is whether the suit promissory note "has been admitted in evidence." This question has come before this Court on very many occasions and has been dealt with by various learned Judges. I do not propose to discuss these decisions in detail. In all these cases the principle which the learned Judges applied in deciding the question was whether there was a judicial determination on the question whether the document was admissible in evidence or not. In some cases objection is raised, issue is framed and a decision given. In such cases there can be no doubt that the judicial mind of the Judge has been applied to a consideration of the question. But in very many cases what happens is that no objection is raised, no issue is framed and the document is let in evidence. The difficulty in deciding the question arises in cases of this kind. Even in such cases, the weight of the authority in this Court is in my opinion in favour of the position that if a document is let in, whether after deciding the objection or not, it has been admitted in evidence within the meaning of S. 36 of the Stamp Act and the admissibility of it cannot therefore be called in question. The cases which support this position are *Venkateswara* v. *Ramanatha*[1], *Satyavati* v. *Pallaya*[2] and *Abdul Wahab* v. *Kanaka Anjaneyalu*[3]. The latter case is a decision of Pandrang Row, J., and it may be distinguishable on the facts, but the principle is stated by the learned Judge as I have stated it above.

In the present case what happened was this. On the back of the document it is endorsed by the District Munsiff that the promissory note is insufficiently stamped and it was allowed to go in. It bears a rubber stamp with the initials of the Judge. The learned Counsel for the respondent argues that unless the document has been initialled by the Judge it cannot be said to have been admitted in evidence and in support of that position, my attention has been invited to a decision in *Venkanna* v. *Parasuram Byas*[4]. In that case what happened was this. The District Munsiff on a consideration of the insufficiently

1. A.I.R. 1929 Mad. 622. 2. A.I.R. 1937 Mad. 431.
3. A.I.R. 1935 Mad. 888.
4. (1929) 56 M.L.J. 633 : I.L.R. 53 Mad. 137.

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stamped document held that it was not duly stamped and therefore inadmissible in evidence and rejected it. Yet the document was admitted. The District Munsiff's initials were affixed to the endorsement of admission by a rubber stamp. It was held by the learned Judges that if the trial Judge did not consider the admissibility of the document proved before him, the mere endorsement thereon under O. 13, r. 4, Civil Procedure Code, does not preclude him from considering its admissibility at a later stage of the case. It is clear from the facts stated that the document was rejected by the District Munsiff and yet it was allowed to go in. This feature distinguishes this case from the present one. In spite of the fact that the document bears the endorsement that it is insufficiently stamped, the learned District Munsiff in the present case admitted it and I do not think the decision in *Venkanna* v. *Parasuram Byas*[1] can apply to the present case. That, as already stated, was a case where the document was rejected. In this connection attention may be drawn to the decision in *Sugappa* v. *Govindappa*[2]. That was also a case of an insufficiently stamped promissory note. The District Judge rejected the document. Nevertheless it was admitted in evidence. That case strongly supports the contention of the petitioner in the present case. I do not think having regard to what has taken place in the present case, the decision in *Venkanna* v. *Parasuram Byas*[1] is applicable.

To my mind the question for decision is not whether the person who initialled the endorsement is the clerk or the District Munsiff but the question is whether the document has been admitted in evidence. The words of S. 36 are clear. It does not explicitly say that there must be a judicial determination of the question in the sense the expression has been explained in some of the judgments. What it says is simply it must be admitted in evidence and if it is admitted in evidence as laid down in the rules of the Civil Procedure Code, the plain meaning of the words is satisfied. It may be said that such admission would lead to this, that a mere mechanical act of admission would amount to an admission of a document within the meaning of S. 36. I can quite see the force of this

1. (1929) 56 M.L.J. 633: I.L.R. 53 Mad. 137.
2. (1902) 12 M.L.J. 351.

Bopanna Prakasam v. Naga-bhushanam.

argument. But I have no doubt that the legislation when it enacted the law in S. 36 was quite alive to this position and it seems to me that the words "admitted in evidence." were deliberately used in order to avoid complicated enquiries regarding the admission and the difficulties necessarily attendant upon such enquiries. One finds in one's experience that questions of this kind are raised in promissory note suits which admittedly should be disposed of as quickly as possible and the policy of law as indicated in the section is to allow admission of documents which have been admitted under the rules of the Civil Procedure Code.

Before concluding I might say that the decision in *Sadasivier* v. *Meenakshi Aiyar*[1], supports the contention of the respondent. But, as I have said, the long track of decisions of this Court is to the effect that the mere admission of the document as in this case will amount to admission within the meaning of the words in S. 36 of the Stamp Act. I would therefore hold that the ruling of the Court that it was open to the respondent to raise the question as regards the admissibility of the document is wrong and that he should not have been allowed to raise the question. The case will now be disposed of by the lower Court in the light of the above observations. Of course, I do not say anything about the other merits of the case. If the parties have evidence to adduce they will be at liberty to do so. The petitioner is entitled to his costs.

B. V. V. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Ayinan Chettiar and others .. *Appellants (Defendants 3, 4 and 2)*

*v.*

K. R. Ramaswami Aiyar and others .. *Respondents (Plaintiff and Defendants 1 and 5).*

Ayinan Chettiar v. Ramaswami Aiyar.

*Civil Procedure Code (V of 1908), O. 21, rr. 22 and 23—Execution proceeding—Impleading of legal representative after notice—Objection as to wrong person having been added—Validity of execution sale.*

It is the Court's duty to receive an application for execution against the legal representative of the deceased judgment-debtor and to issue notice to the person put forward as legal representative by the decree-holder and to

1. (1933) 65 M.L.J. 673.

* S.A. No. 1081 of 1933. 1st February, 1938.

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decide if necessary whether that person is the legal representative or not. If it decides that that person is the true legal representative when in fact he is not, that is merely a wrong decision and the execution sale held thereafter is good until set aside. The fact that the person sought to be added as legal representative remained *ex parte* after notice was served on him will not affect the jurisdiction of the Court to proceed in the matter.

*Malkarjun* v. *Narhari,* (1900) 10 M.L.J. 368: L.R. 27 I. A. 216: I.L.R. 25 Bom. 337 (P.C.), applied.

*Khiarajmal* v. *Daim,* (1904) L.R. 32 I.A. 23: I.L.R. 32 Cal. 296 (P.C.) and *Raghunath Das* v. *Sundar Das Khetri,* (1914) 27 M.L.J. 150: L.R. 41 I.A. 251: I.L.R. 42 Cal. 72 (P.C.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 13 of 1933 (A.S. No. 187 of 1932, District Court, Trichinopoly) preferred against the decree of the Court of the District Munsiff of Kulitalai in O.S. No. 89 of 1930.

*A. V. Narayanaswami Aiyar* for Appellants.

*S. Panchapakesa Sastri* and *K. R. Krishnaswami Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The subject-matter of this appeal is property which admittedly once belonged to one Ramachandra Aiyar. In O.S. No. 5 of 1905 a money decree was obtained against Ramachandra Aiyar. In 1910 Ramachandra Aiyar died. By 1915 the rights of the decree-holder had passed to the present 1st defendant. The suit property was sold in execution of the decree at defendant 1's instance on 11th July, 1917 and was purchased by one Venkatarama Aiyar who obtained delivery through Court on 3rd February, 1918. In June, 1918, Venkatarama Aiyar sold the property to defendant 2 from whom some years later defendants 3, 4 and 5 obtained mortgage rights. The present suit was brought by the plaintiff on 1st February, 1930, claiming to be the adopted son of Ramachandra Aiyar, for the recovery of the property on the ground that the sale in 1917 having been held in proceedings to which he was not a party did not bind him, and was null and void in that the estate of his father Ramachandra Aiyar was not properly represented in those proceedings.

The facts in regard to the representation of Ramachandra Aiyar's estate in the execution petition are as follows:—

"Defendant 1 first attempted to implead a person named as Subramania Aiyar and stated to be Ramachandra Aiyar's adopted son. Notice was not apparently served on any such person who admittedly did not exist with that name. Then he filed an affidavit in February 1916 in which he stated that the

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adopted son is 'said to have died about May 1915' and that Ramachandra Aiyar's only heir was 'his daughter-in-law' Lakshmi Ammal. Notice after notice was issued to Lakshmi Ammal and finally she was added by the Court as legal representative of Ramachandra Aiyar. She remained *ex parte* throughout. She was in fact the widow not of any adopted son, but of a predeceased natural son of Ramachandra Aiyar so that the statement that she was Ramachandra Aiyar's heir is not correct."

On these facts it was contended by the plaintiff that defendant 1 had deliberately and fraudulently kept the knowledge of the execution petition from him, but no attempt was made to prove this, and both Courts find that there is nothing at all to show that defendant 1's actions were not *bona fide*. The second appeal has accordingly been argued on the common ground that defendant 1 honestly attempted to implead the correct legal representative.

Plaintiff's name is Ramaswami Aiyar. His adoption was challenged in the suit, but both Courts found in favour of it, and that fact too is now common ground.

There can be little doubt that plaintiff has no practical grievance at all in this suit, and relies entirely on legal technicalities. His plaint gives no hint whatever of the reason for his 12 years of supposed ignorance except the bare statement. "I have been in Karur for a long time". He does not assert that if he *had* had notice of the execution petition he could have done anything to avert the sale or influence the price which it fetched. He has not ventured to give any evidence. The learned District Munsiff indeed shrewdly suspects that plaintiff was well aware of the execution petition and deliberately chose to take no action to save his property, and though there is no proof of this knowledge, I feel sure that the District Munsiff is right.

These equitable considerations cannot however prevent an examination of the legal position. The learned District Munsiff held that this case is governed by the principles laid down by the Privy Council in *Malkarjun* v. *Narhari*[1] and that it cannot be said that the sale was without jurisdiction. In appeal the learned Subordinate Judge held, without considering *Malkarjun* v. *Narhari*[1] that the true criterion was whether the person impleaded as legal representative had any present interest to defend the estate. In so holding he relied upon certain passages in *Chaturbujadoss Kushaldoss & Sons* v. *Rajamanicka*

1. (1900) 10 M.L.J. 368: L.R. 27 I.A. 216: I.L.R. 25 Bom. 337 (P.C.).

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*Mudali*[1]. Holding further that Lakshmi Ammal had no such interest (this finding cannot seriously be challenged) he reversed the decree of the learned District Munsiff and decreed the suit.

It is conceded by the learned Advocate for the plaintiff that unless the sale in 1917 can be shown to be without jurisdiction his client has no case. That in *all* cases in which a person without any interest to defend the estate is impleaded as legal representative there is want of jurisdiction cannot be put forward as a rule of law because in *Malkarjun* v. *Narhari*[2], the person actually impleaded was impleaded in spite of his own renunciation of all interest in the estate and yet the sale was held good until set aside. The true method of approach to this case therefore seems to me to be to analyse the reasoning of *Malkarjun* v. *Narhari*[2], and see whether it applies or not. That reasoning is this. It is the Court's duty to receive an application for execution against the legal representative of the deceased judgment-debtor and to issue notice to the person put forward as legal representative by the decree-holder and to decide, if necessary, whether that person is the legal representative or not. If it decides that that person *is* the true legal representative when in fact he is not, that is, merely a wrong decision, and a Court has jurisdiction to decide wrong as well as right. Now the only point which differentiates *Malkarjun* v. *Narhari*[2] from the present case is this. In *Malkarjun* v. *Narhari*[2], the proposed legal representative appeared in response to the notice served upon him and objected to his being impleaded and the Court overruled his objection. In the present case Lakshmi Ammal did not appear, and the Court accepted her as the legal representative in her absence. This difference, it is argued by the learned Advocate for the respondent is fundamental but I cannot see on what principle a Court which has jurisdiction to declare a man to be a legal representative after hearing from him, has no jurisdiction to make the same order if he remains *ex parte*.

It is contended for the respondent that in two later rulings the Privy Council has so interpreted *Malkarjun* v. *Narhari*[2], as to make it inapplicable to the facts of the present case. The

1. (1930) 60 M.L.J. 97.

2. (1900) 10 M.L.J. 368: L.R. 27 I.A. 216: I.L.R. 25 Bom. 337 (P.C.).

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first of these is *Khiarajmal* v. *Daim*[1]. There is no doubt (see p. 314) reference is made to the Judges, 'accepting without question' statements that Amirbaksh was legal representative of Naurez and that Alahnawaz was his guardian, but this was in a suit and not by an order in an execution petition and in fact Alahnawaz was *not* Amirbaksh's guardian. It was therefore a case in which whatever Amirbaksh's connection with Naurez's estate may have been, Naurez's estate could not possibly be represented by a minor for whom no guardian *ad litem* had been appointed and therefore the estate was in law represented not by a wrong legal representative but by no one. The other case is *Raghunath Das* v. *Sundar Das Khetri*[2]. There the distinguishing factors were (*i*) that no proper notice was served upon the legal representative and (*ii*) that the respondents were responsible for this irregularity, factors neither of which exist in ths present case.

It seems to me therefore that neither *Khiarajmal* v. *Daim*[1] nor *Raghunath Das* v. *Sundar Das Khetri*[2] is of any assistance to the respondent in the present appeal. They do not touch the fundamental requisites of jurisdiction, that the Court should issue notice to the proposed legal representative and that the Court should direct execution to proceed against him (O. 21, rr. 22 and 23). Incidentally also they are both instances where the opposite party cannot plead *bona fide* conduct.

I am therefore of opinion that the learned District Munsiff was right when he held that *Malkarjun* v. *Narhari*[3] applies to the facts of this case. I set aside the decree of the learned Subordinate Judge and allow this appeal dismissing plaintiff's suit with costs of the contesting defendants throughout.

Leave refused.

B. V. V. —— *Appeal allowed.*

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1. (1904) L.R. 32 I.A. 23: I.L.R. 32 Cal. 296 (P.C.).
2. (1914) 27 M.L.J. 150: L.R. 41 I.A. 251: I.L.R. 42 Cal. 72 (P.C.).
3. (1900) 10 M.L.J. 368: L.R. 27 I.A. 216: I.L.R. 25 Bom. 337 (P.C.).

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Pellur Venkatasubbamma and another .. *Appellants** (*Respondents 1 and 3*)

*v.*

Duvvur Narayana Reddi, by Power of Attorney Agent K. Pitchai Reddi and another.. *Respondents* (*Petitioner and 2nd Respondent*).

Venkatasubbamma *v.* Narayana Reddi.

*Civil Procedure Code (V of 1908), O. 38, r. 12 and Ss. 60 and 61—Agriculturist—Meaning of.*

The word "agriculturist" found in O. 38, r. 12 of the Civil Procedure Code must be interpreted in the same sense in which it is to be understood in Ss. 60 and 61 of the Code.

A person cannot be deemed to be an "agriculturist" within the meaning of O. 38, r. 12 if he possesses large extent of land most of which is cultivated by tenants.

Appeal against the order of the Court of the Subordinate Judge of Nellore, dated the 6th day of November, 1937, and made in I.A. No. 314 of 1937 in O.S. No. 28 of 1937.

*K. Subramanyam* for Appellants.

*P. Chandra Reddi* and *R. Ramalinga Reddi* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal from the order of the Subordinate Judge of Nellore attaching certain agricultural produce before judgment.

The only point urged in this appeal by the appellants whose crop was so attached is that the attachment is in contravention of the provisions of O. 38, r. 12, Civil Procedure Code, which is to the following effect:—

"Nothing in this order shall be deemed to authorise the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce."

It is contended by the appellants that they are agriculturists and that the attachment of agricultural produce which was in their possession was opposed to the provisions of O. 38, r. 12, Civil Procedure Code. This particular question does not

* Appeal Against Order No. 8 of 1938. 8th August, 1938.

Venkatasubbamma v. Narayana Reddi.

appear to have been argued before the Court below and in any case, the order appealed from contains no reference to it. The point is no doubt raised in the affidavits filed in the Court below. From these affidavits, I find it impossible to say that the appellants have succeeded in establishing their claim to be agriculturists. The same word is found in Ss. 60 and 61 of the Civil Procedure Code and the word "agriculturist" found therein has been interpreted by a recent Full Bench of this Court as meaning a tiller of the soil who is unable to maintain himself otherwise. Certainly, if this interpretation is applied to the appellants, they cannot be deemed to be agriculturists, because they possess large extents of land most of which is cultivated by tenants. It is, however, argued that the word 'agriculturist' found in O. 38, r. 12 must be interpreted in a sense different from the sense in which it is to be understood in Ss. 60 and 61 of the Code. I do not think there is any justification for making this difference in interpreting the same word found in different parts of the Code. It may be that certain words found in S. 60 were relied upon for the purpose of determining the meaning of the term 'agriculturist' but that does not mean that the same word 'agriculturist' found in O. 38, r. 12 must mean something different from the 'agriculturist' referred to in Ss. 60 and 61. I am of opinion that the word must be interpreted in the same way throughout and it follows therefore the appeal here must fail. The appeal is accordingly dismissed with costs.

K. C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

T. V. Srinivasa Aiyangar .. *Appellant** (*Plaintiff*)

*v.*

V. Jagannatha Aiyangar and another .. *Respondents* (*Defendants*).

Srinivasa Aiyangar v. Jagannatha Aiyangar.

*Madras Hereditary Village Offices Act (III of 1895), S. 13—Revisional powers of Collector—Jurisdiction of Revenue Divisional Officer—Effect of Madras Subordinate Collector's Regulation VII of 1828.*

There is no conflict between Madras Regulation VII of 1828 and the Madras Hereditary Village Offices Act of 1895. The right of suit which is given by S. 13 of the latter Act is not in any way inconsistent with the

* S. A. No. 1232 of 1932. 28th July, 1938.

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continuance of the power of superintendence, control and revision given to the District Collector by S. 3 third of Regulation VII of 1828. It is only by virtue of this Regulation that a Revenue Divisional Officer gets authority to exercise the powers of " Collector " under Act III of 1895. Consequently the District Collector's power of revision created by the same Regulation unless it is expressly taken away must be held to continue.

Appeal against the decree of the District Court of Madura in A. S. No. 179 of 1931 preferred against the decree of the Court of the District Munsiff of Tirumangalam in O. S. No. 155 of 1930.

The facts of the case as set out by the District Judge were as follows:—

There was a vacancy in the office of Village Munsif. The Revenue Divisional Officer at first registered the 1st defendant (then a minor) in the vacancy. This registration was cancelled as it offended against S. 10 (5) of Act III of 1895. Thereupon the Revenue Divisional Officer appointed the plaintiff-appellant permanently under S. 10 (3). The 1st defendant then filed before the District Collector what purported to be an appeal under S. 23. The Collector's office was apparently aware that there was no right of appeal and numbered the case as a revision case. The Collector himself was under an erroneous impression that there was a right of appeal and he proceeded to reverse the Revenue Divisional Officer's appointment and appoint the 1st defendant, referring to the latter throughout as the 'appellant'. The question was raised whether the said order which was certainly *ultra vires* as an appellate order could be treated as *intra vires* as an order in revision. Both the lower courts held that the Collector had full power under Regulation VII of 1828 to revise and annul the subordinate's orders and that consequently the Collector's order cancelling the Revenue Divisional Officer's order was not *ultra vires* in power. The plaintiff preferred a second appeal.

*K. Rajah Aiyar* and *U. S. Ramaswami Aiyar* for Appellant.

*K. V. Sesha Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—We agree with the learned District Judge that there is no conflict between Regulation VII of 1828 and Act III of 1895. The right of suit which is given by S. 13 of Act III of 1895 is not in any way inconsistent with the continuance of the power of "superintendence, control and revision" given to the District Collector by S. 3 third of Regulation VII of 1828. S. 3 first of the Regulation expressly

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states that it applies to "all the powers granted to Collectors by the Regulation now in force or *that may hereafter be enacted*".

It is only by virtue of this Regulation that a Revenue Divisional Officer gets authority to exercise the powers of "Collector" under Act III of 1895. Consequently the District Collector's power of revision created by the same Regulation, unless it is expressly taken away must be held to continue. This appeal is accordingly dismissed with costs.

B. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA RAO.

Raja Srimathu Muthu Vijiya Raghunatha Doraisingam *alias* Gowri Vallabha Thevar Avergal, Zamindar of Sivaganga, represented by the Estate Collector, Sivaganga .. *Appellant* (Plaintiff)*

*v.*

Karuthan Ambalam and others .. *Respondents (Defendants 1, 2, 4 to 14, 16 to 20 and 22 to 27).*

Zamindar of Sivaganga *v.* Karuthan Ambalam.

*Evidence—Construction of deed—Extent of land and boundaries of land conveyed—Conflict between—Evidence, of circumstances prior and subsequent to deed if admissible—Doctrine of* falsa demonstratio.

Where the question is as to the actual extent of land that was conveyed by a deed, whether the whole land included in the boundaries which are mentioned in the description of the property in the deed or only the particular area set out therein, it is not permissible, whatever the intention of the parties in fact may have been, to receive extraneous evidence in explanation of the terms of the deed, where the terms of the deed are clear and unambiguous. But where the terms are not clear and unambiguous and there is some inconsistency between different parts of the same document the only way of solving the ambiguity, if any, is to look at the surrounding circumstances, namely, the circumstances which led to the grant and the circumstances subsequent to the grant in order to discover whether any portion of the instrument amounts to a *falsa demonstratio*. In construing the terms of a document it is therefore permissible not only to look at the terms of the document but also to the surrounding circumstances with a view to discover the intention of the parties as expressed in the deed.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in O. S. No. 10 of 1928.

*K. Kuttikrishna Menon* for Appellant.

*K. S. Venkatarama Aiyar* for Respondents.

*Appeal No. 155 of 1932. 29th September, 1937.

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Pandrang Row, J.

The judgment of the Court was delivered by

*Pandrang Row, J.*—This is an appeal from the decree of the Subordinate Judge of Sivaganga dated 23rd October, 1931, in O. S. No. 10 of 1928. The plaintiff therein was the Zamindar of Sivaganga represented by the Estate Collector, Sivaganga, and he sued for a declaration that only plots I, II and III as marked and described in Sch. A to the plaint and shown in the plaint plan constitute the lands granted on cowle by him to the first defendant on 1st February, 1916, and that the lands described in Sch. B of the plaint are not so included and belong to the plaintiff and that they were wrongly demarcated by the survey authorities as part of the holding of the first defendant. The plaintiff therefore prayed for a correction of the survey register and for recovery of possession of such portions of the lands in Sch. B as had been encroached upon by the defendants after removal of the structures thereon, such portions being particularly marked and shown in Sch. C of the plaint. At all material times the Zamindari was under the management of the Court of Wards and negotiations for the grant of a cowle started early in 1908 with an application by the first defendant on his own behalf and on behalf of several other ryots for the purpose of building houses for himself and the ryots. After inspection by one of the Estate Officials and measurement of the plots a sketch was prepared which was signed by the first defendant and it was ascertained that three plots measuring respectively 9-6-0, 27 and 2 kurukkams (1 kurukkam: 0·56 acre) respectively should be assigned on cowle to the ryots. It is alleged that in November, 1910, the Collector and Agent of the Court of Wards sanctioned the assignment of these plots on payment of the *nazar* calculated at so much per kurukkam, the rates being different for the different plots. The deed or cowle was however not executed till February, 1916. The plaintiff's case was that what was actually conveyed and intended to be conveyed was the specific area of 38 and odd kurukkams situated in three plots and not all the land that was included in the boundaries which were also mentioned in the description of the property in the cowle deed. This allegation of the plaintiff was disputed by the defendants and that forms the main controversy in the suit, namely, what was the land that was conveyed by the deed of 1916, Ex. B. The learned Subordinate Judge has decided the

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controversy in favour of the defendants, and the plaintiff appeals.

The only point that has been argued in this appeal is the point referred to above, namely, the actual extent of land that was conveyed by the cowle deed of February, 1916. Unfortunately in this case the lower Court does not appear to have given sufficient consideration to all the evidence in the case and directed its mind to all the considerations that arise in deciding a dispute of this kind. No doubt in several places the learned Subordinate Judge observes that on a consideration of the entire documentary and oral evidence he has come to a certain opinion; but these general words may amount to nothing more than an unmeaning formula, and we are not satisfied that the learned Subordinate Judge considered the evidence with that amount of care which the importance of the case demanded. We have therefore had to go into all the details of the evidence ourselves and study the various plans filed in this case with some care. Before going into the details of the evidence it is perhaps desirable to say a few words on the question of law that was touched upon in the argument. A reference was made to *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*[1] and *Bomanji Ardeshir* v. *Secretary of State for India*[2] on behalf of the respondents for the purpose of showing that it was not permissible to construe the cowle deed in the light of what happened before the actual deed was granted. The learned Subordinate Judge relied on *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*[1] in coming to the conclusion that the negotiations which led up to the grant of the cowle would not be evidence in a case where the question to be decided was the construction of the terms of the deed itself. It is however necessary to point out that *Durga Prasad Singh* v. *Rajendra Narayan Bagchi*[1] was a case where the boundaries were perfectly clear, three of the boundaries being the boundary lines of three different mouzas as per thak, the remaining fourth boundary being the boundary of another plot granted to another person. There was thus no difficulty in that case and no dispute even as to what the exact boundaries were. No doubt in a case where the boundaries are undisputed or can be definitely ascertained, the

1. (1913) 26 M.L.J. 25: L.R. 40 I.A. 223: I.L.R. 41 Cal. 493 (P.C.).
2. (1928) L.R. 56 I.A. 51: I.L.R. 53 Bom. 230 (P.C.).

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extent which is obviously wrong according to the boundaries can be deemed to be a *falsa demonstratio* and therefore ignored. In the other case, *Bomanji Ardeshir* v. *Secretary of State for India*[1] the position was indeed more clear. The question there arose whether what was granted was a yearly sum of money (Rs. 4,000) out of the two villages, Juhu and Vile Parla in the neighbourhood of Bombay, or the two villages themselves. The grant was very clear that it was in respect of the two villages named therein and it was admitted in that case that before this deed what was being given was a money payment and it was obviously the intention of the parties to substitute the previous money payment by something else. It was therefore held that in the circumstances of the case that it was not open to the Government to rely on the previous correspondence which led up to the grant and to contend on the strength of such correspondence that what was really intended to be given was not the two villages but only a sum of money payable every year. It would therefore appear that these decisions will not give much assistance in deciding the controversy in this appeal. In construing the terms of a document it is permissible not only to look at the terms of the document but also to the surrounding circumstances with a view to discover the intention of the parties as expressed in the deed. Thus where the terms are not clear and unambiguous and there is some inconsistency between different parts of the same document the only way of solving the ambiguity, if any, is to look at the surrounding circumstances, namely, the circumstances which led to the grant, and the circumstances subsequent to the grant in order to discover whether any portion of the instrument amounts to a *falsa demonstratio*. The general question has been dealt with in *Van Diemen's Land Co.* v. *Table Cape Marine Board*[2] and in a subsequent case *Watcham* v. *East Africa Protectorate*[3], in which the previous authorities have been reviewed. In the latter case their Lordships of the Privy Council laid down the principle that even in the case of a modern instrument in which there is a latent ambiguity evidence may be given of user to show the sense in which the parties to it used the language they have employed and their intention in executing the instrument as revealed by

1. (1928) L.R. 56 I.A. 51 : I.L.R. 53 Bom. 230 (P.C.).
2. (1906) A.C. 92.
3. (1919) A.C. 533.

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their language interpreted in this sense. They have laid down the further principle that even where the ambiguity was not latent but patent the same principle would apply, though without in any way conflicting with the well-established principle that where the terms of a deed are clear and unambiguous the parties, what ever their intention, in fact, may have been, on entering into it are bound by its terms, and extraneous evidence cannot be received in explanation of it.

In the case before us, while no doubt the events which led up to the grant which is said to have been made in 1910 though not evidenced by any deed would appear to show that the intention of the parties was that only 38 and odd kurukkams of land as delineated in the plan Ex. U were to be granted to the first defendant and the other ryots, nevertheless there is not sufficient evidence to show that what was actually intended to be granted by the deed of February, 1916, was only what was intended to be granted in 1910. No doubt the deed recites a letter of the agent of the Court of Wards of 8th November, 1910; but that letter has not been produced by the plaintiff though referred to in the plaint and also referred to in the first defendant's written statement. It was the first defendant's contention in the written statement that even according to what was granted to him in 1910 he was entitled to all the lands that are now claimed by him. It is possible that during this interval—between November, 1910 and February, 1916—something might have happened which led the plaintiff's officials to grant more than what was originally granted or intended to be granted in 1910. That this is not a mere possibility is shown by the fact that a suit had been instituted in 1914 by one Palaniappa Chetti against the present plaintiff and the first defendant in respect of the western portion of the land now claimed as part of plot I by the first defendant. It is extraordinary to find that even in the plaint the history of the events which led up to the grant shows a hiatus in more than one place. In paragraph 5 of the plaint the history is taken up to 4th May, 1908, when a sketch was prepared and statements were recorded. What happened thereafter till November, 1910, is passed over in silence. As a matter of fact this silence as to the events that took place between 1908 and 1910 is suggestive; because, during this interval what happened was that though at first there was the idea of granting a cowle to the first defendant and his fellow ryots, subsequently the Court of Wards decided to sell the plots in public auction and actually sold them in public auction and one of the purchasers therein was the plaintiff in the suit of 1914. It is therefore obvious that before the Court of Wards decided to assign the lands

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to the first defendant and the other ryots in November, 1910, there was this difficulty in the way of the Court of Wards in making the grant brought about by these sales in auction to certain Chetti purchasers; and it is certainly possible that this difficulty might have led the Court of Wards to grant more than what was originally intended. In any case the order of the Collector and agent to the Court of Wards dated 8th November, 1910, has not been produced and it is impossible to say in its absence what exactly was granted or intended to be granted by that order. No satisfactory explanation is forthcoming for the omission as to why this important letter has not been produced in evidence. It is not alleged that it is not available. All that is alleged is that this omission might have been due to carelessness or a belief that it was unnecessary on the part of the legal advisers of the plaintiff in the Court below. The plea of carelessness is not, at its best, a plea entitled to much weight and when the circumstances are such that it is difficult to be certain that the plea of carelessness is not put forward in order to cover up a deliberate omission, it is impossible to overlook an important omission of this kind. It is *prima facie* not likely that the legal advisers of the plaintiff would have failed to perceive the importance of filing this document in evidence, which was relied on by the first defendant also in his written statement. It is certainly not open to the plaintiff-appellant in these circumstances, that is, in the absence of the letter in question, to contend that that letter conveyed exactly what was described in the plan Ex. U and no more. It may be mentioned in this connection that no application was made at the time of the filing of the appeal or subsequently for permission to file this letter or order as additional evidence. The other hiatus in the plaint refers to the interval between November, 1910 and February, 1916. During this interval the suit had been filed by one of the Chetti purchasers as mentioned already and in that suit and in the defence of that suit the present plaintiff and the present first defendant who were both defendants in that suit appear to have made common cause. It is possible therefore that this co-operation in the defence of that suit might have led the plaintiff to agree to give more than what was originally intended when the deed was actually executed in 1916. It is therefore not possible to say from a consideration of the events that led up to the grant that the intention of the parties was clearly to the effect that only the extent of 38 and odd kurukkams as noted in the original plan Ex. U was to be granted and no more. If really that was the intention nothing would have been easier than to affix the plan Ex. U or a copy of it to the grant Ex. B or to refer to that plan in describing the land that was granted. This was not done; and no reasonable

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explanation for this omission is forthcoming. It is not as if the plaintiff's zamindari was not well served, for it was under the management of the Court of Wards with an officer of the I. C. S. on the spot as Estate Collector; and it is difficult to believe that those who advised the plaintiff when the deed was executed in February, 1916, would not have suggested a reference to the plan if the intention had been to grant only the plots as shown in the plan. On the contrary, there is the fact that in the cowle itself there is a specific provision as to what should happen if and when it is found that there is a greater extent included in the boundaries mentioned in the cowle. The fourth clause of the grant Ex. B runs as follows:—

"If it is at any time found that the ryot is in possession of larger extent that the said 38-6-0 kurukkams of land the ryots shall pay the landholder for such excess within the boundaries specified hereunder proportionate rent at the rate aforesaid, but shall make over free and unencumbered to the landholders the entire excess beyond the boundaries with damages of rent at the market rate for three faslis prior to the date of such discovery."

It is therefore provided in the deed as to what should happen if there were more extent found within the boundaries and without the boundaries mentioned in the deed. If the excess were within the boundaries the grantee was to enjoy the land on condition of paying rent for the excess area; if the excess were outside the boundaries he took nothing and had to hand over such excess to the grantor. This seems to indicate that the intention of the parties was that the boundaries were to be looked to for the purpose of deciding what was the land that was granted or the land to which the grantee would be entitled under the grant; in other words, cl. 4 of the deed shows that, whatever the extent of the land intended to be granted by the cowle might be, the entire extent of land within the boundaries given in the cowle was to be held by the grantee subject only to the condition that, if that extent was in excess of 38-6-0 kurukkams, rent should be paid for the area in excess; it is only if excess was found outside the boundaries or, in other words, where the grantee had encroached beyond the boundaries upon the land of the grantor the grantee was bound to hand over possession of such excess with damages to the grantor. Ex. B the grant describes the land in cl. 1 as follows:—

"The kudi right in the holding comprised within the boundaries hereunder mentioned in the village of Devasthanam Kattunachi, hamlet of Ayan Siruvayal Village, Tirupathur Taluk and measuring 38-6-0 kurukkams of dry lands has been assigned to the said ryot under the orders of the Collector of Ramnad and agent to the Court of Wards R.O.C. No. 639 Cor. of 1910 dated 8th November, 1910, for a consideration of Rs. 2,489-10-0 subject to an annual rent of rupee one per kurukkam."

The third clause provides that the

"Ryot shall enjoy the said land permanently at his own will and pleasure

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by using the same for agricultural, horticultural and house building purposes.'

At this point the comment may be made that whereas 38 and odd kurukkams were originally intended to be granted for building purposes only, the cowle mentions agricultural and horticultural purposes also in addition. The boundaries are described fully in the schedule and these will be considered when we come to deal with the case relating to each of the three plots. One general observation may be made before dealing with the case as regards each of the three plots, and that is, while some of the boundaries are very clear being well-defined physical boundaries others are most uncertain and vague, and unfortunately in each of these three plots one of the boundaries and that one which matters most is undefined; for instance, in plot I the eastern boundary is described as Panni Vilundan Pallam, in other words, the pond or mire in which the pigs used to wallow; in plot II the eastern boundary which is most material is described as a single palmyra tree; in plot III the western boundary, also material, is described as an oil mill.

We shall now deal with the evidence relating to each of the plots. Taking plot I there is no doubt about the southern or the northern boundaries. The dispute relates to the western and the eastern boundaries. The western boundary is given in the document and as Nallam Chetti Subramaniam Chetti's cowle land. If that boundary which is well defined is acted upon there can be no doubt that first defendant must succeed in his contention as regards the western boundary; or in other words Survey No. 414 will be included in the grant. This boundary therefore is one about which there is really no doubt, because it is not argued before us that the boundary as described in the deed is not as shown in the Commissioner's plan; unless the description of the western boundary is entirely ignored so far as plot I is concerned it is impossible to accept the plaintiff's assertion that Survey No. 414 was not included in the grant. There is really no reason why the boundary should be entirely ignored simply because if that boundary is acted upon the extent of the plot would be very much more than what is mentioned in the deed. No doubt if one was certain that only a certain extent was given and no more, and that the boundaries can therefore be ignored entirely the case may be different; but that is not so in the present case. The doctrine, *falsa demonstratio non nocet*, can be of very little use unless one can be fairly certain that any particular *demonstratio* is false. Now the question is, is the *demonstratio* or description regarding the western boundary of plot I false? There is no reason to suppose that it is false. Both parties were perfectly aware of the fact where Subramaniam Chetti's cowle lands ended on the east and that there was kudi-

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yiruppu the east of it. There is a reference to this in the suit of 1914 and also in the previous documents, that is, the documents previous to 1910. There is also a reference to it in a subsequent document between 1910 and 1916, that is, the statement of the first defendant, Ex. T-2. We find in the deed Ex. B. which was executed in 1916 the western boundary being given deliberately as Subramaniam Chetti's cowle lands. In these circumstances it is impossible to say that the description of the boundary is false and may be ignored. It is therefore impossible not to accept the conclusion of the Court below that the western boundary is the eastern boundary of Subramaniam Chetti's cowle land as shown in the Commissioner's plan, and that therefore Survey No. 414 must be deemed to have been included in the cowle. As regards the eastern boundary the position is different. For, in the first place, it is not a well-defined physical feature and there is a dispute about it. As mentioned already the eastern boundary is described as a pond resorted to by pigs. Obviously this cannot be a boundary line; it may indicate at the most a small pit or depression in the ground. Secondly, it is impossible to be certain where this pit or depression was. The Commissioner's report shows that there are several pits in this locality which would answer this description; and it is not the case of the defendants that any particular pit among these alone was favoured by pigs; nor is it possible to say that it is not the pit or depression pointed out by the plaintiff which is the most western of the pits. The learned Subordinate Judge in dealing with this question has fallen into an error as to what the Commissioner had reported about these pits. He observes that the pits pointed out to the Commissioner by the plaintiff's agents came into existence when new buildings were constructed. As a matter of fact what the Commissioner reported was that it was the pit shown by the first defendant that came into existence when new buildings were constructed; in other words the pit which was shown as the eastern boundary of the plot by the first defendant was one which came into existence after the grant of the cowle. In these circumstances we have little doubt that the learned Subordinate Judge has gone wrong in placing the eastern boundary farthest east, so as to include the whole of S. No. 415-1. We find that the eastern boundary of plot I must be the boundary as shown by the plaintiff in the Commissioner's plan which cuts S. No. 415-1 into two nearly equal halves.

Plot II is of larger extent. There is practically no dispute so far as the southern and western boundaries are concerned. The northern boundary has been fixed by the Court below in favour of the plaintiff. It has been found to be a cart track and a channel,

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the cart track being the one shown in the plans A and AA-1. On this point we see no reason to differ from the conclusion of the Court below. The boundary as described is a channel and a cart track. The question therefore is to identify the channel and the cart track. The cart track as well as the channel have been shown one in continuation of the other in the plan Exs. A and AA-1. The channel runs roughly along the northern boundary as shown in the Commissioner's plan according to the plaintiff's case and the cart track in question is a cart track which runs from east to west almost in continuation of the channel. These have been fixed as the northern boundary of this plot by the Court below and we confirm that finding so far as that boundary is concerned. As regards the eastern boundary of this plot there is considerable difficulty because of the description of the boundary in the deed itself as a single palmyra tree (othapanai). This hardly deserves the name of a boundary line, for, it is impossible to conceive of a tree being a boundary *line*, and the description is so vague in view of the fact that in this waste land when it was granted there seem to have been a number of palmyra trees. The first defendant-respondent's case is that this tree is somewhere in the south-western corner of S. No. 418-2, in other words, that it is one of the three trees, the stub-ends of which have been marked on the Commissioner's plans as red dots. The plaintiff's case is that the palmyra tree was situated somewhere to the east of the road that runs through this plot and to the south of the compound of one Annamalai Chetti. It is obvious that the respondent's story cannot be true; the evidence on their side itself shows that it cannot be true. Admittedly the tree in question was cut some 15 years ago or thereabouts. The karnam examined as D.W. 1 says that it was cut 20 years ago and he says that the tree was a furlong to the east of the bund of Chinnakadalai tank. The Commissioner's plan is drawn to scale, the scale being 1 inch=132 feet. A look at the plan would show that the tree could not be where it is now sought to be located. Even otherwise the existence of other stumps of palmyra in close proximity to this alleged single palmyra shows that it could not have been described as a single palmyra. In cross-examination he admitted that he could not say in whose punja the tree stood and further that:

> "It is not true that at the place where the single palmyra stood two or three stub-ends of palmyra trees are even now to be found."

The Commissioner's plan clearly shows that there are two or three such stub-ends close to one another at the spot mentioned. The witness's evidence therefore cannot be accepted. In these circumstances, it is impossible to say that the eastern boundary has been

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definitely established by the respondents. On the other hand it is not possible to say that it has been established by the plaintiff beyond doubt though there is some evidence to the effect that there was a palmyra tree to the south of Annamalai Chetti's compound mentioned above. This is a case in which the boundary fails to throw light, and the extent also. For, taking the extent alone the eastern boundary would be west of the road which cuts through the plot even as admitted by the plaintiff. It is obvious therefore that the extent cannot help to locate the eastern boundary of the plot and the description in the deed of this boundary as a single palmyra tree is of so little help that it is impossible to say what the eastern boundary was intended to be at the time the deed was executed. In this state of the evidence one can only decide by actual possession some time before or after the grant; though there is some dispute as to when the construction of some of the buildings took place, it is conceded by both sides that there are a row of buildings and compounds on the east of the plot as shown by the plaintiff. These are marked in the Commissioner's plan and as these houses and compound walls must have been in existence for several years prior to the suit, there is no other way of fixing the eastern boundary except by regarding the eastern limit of these buildings and compounds as the eastern boundary line. We accordingly fix the eastern boundary of plot II as the line connecting the cart track which forms the northern boundary with the eastern limit of the compounds in this plot and continuing onwards till it meets the southern boundary about which there is no dispute, in other words, the eastern boundary as shown in the plaint of the actual encroachments in this plot will be regarded as the eastern boundary of the plot.

What remains is plot III. Here the eastern and southern boundaries are not in dispute. The northern boundary also is not open to dispute because it is described as "south of tank water-spread". The real difficulty arises in determining what the western boundary was. This is described in the document, as mentioned already, as an oil mill. There are several oil mills in this locality. Even the oil mill pointed out by the respondents as the western boundary has another oil mill in close proximity to it, as is seen from the Commissioner's plan. Besides, it must be remembered that the oil mill cannot be regarded as a boundary *line*. The oil mill is really in the north-western corner and even assuming that this mill is taken as the western boundary a line joining the oil mill anywhere on the southern boundary would satisfy the description of the boundaries. This would cut into two the *urani* recently constructed at some considerable cost by one of the

respondents. In these circumstances it is not possible to say exactly where the western boundary line should be drawn, and one has to decide only on the basis of actual occupation and possession. The western boundary will be therefore the western boundary as shown by the plaintiff and a line drawn along the south of the *urani* up to the limit of the adjoining survey number, and thenceforward from the point of intersection northwards along the line as shown by the defendants.

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The decree of the lower Court will therefore be modified as indicated above. In other respects the decree is confirmed and the appeal fails. The appeal abates as against respondents 2, 4, 12, 20 and 23 and so far as they are concerned the appeal is dismissed. As the appeal succeeds only in part, and that too mainly as against the first respondent, we direct that half the costs in this appeal of the contesting respondents, one set, be paid by the appellant, and that the appellant do get half his costs of this appeal from the first respondent.

S. V. V. — *Decree modified and appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE ABDUR RAHMAN.

Nama Nagayya .. *Petitioner* (Plaintiff)*

*v.*

Kalle Narasayya described as Kalle Narasimhayya in records of the lower Court .. *Respondent (Defendant).*

Nagayya *v.* Narasayya.

*Limitation Act (IX of 1908), Ss. 19, 20 and 21—De facto guardian whether 'lawful guardian'—Acknowledgment by him whether would keep alive debt against a minor.*

On the question whether an acknowledgment of a debt made by a person described as *de facto* guardian of a minor, being the son of the sister of the grandfather of the minor, would keep alive the debt against the minor which would otherwise become barred,

*Held*, that for the reasons given by Kumaraswami Sastri, J., in *Ramaswami* v. *Kasinatha*, A.I.R. 1928 Mad. 226, a *de facto* guardian cannot be considered to be the lawful guardian within the meaning of S. 21 of the Limitation Act for the purpose of acknowledging a debt to keep it alive against a minor.

*Tirappayya minor by guardian Ganjayya* v. *Ramaswami*, (1913) 24 M.L.J. 428, dissented from.

A *de facto* guardian's position strictly speaking is only that of an intermeddler of the estate of the minor. No doubt he may have been managing the estate of the minor and probably he may have been managing the estate to the advantage of the minor as well. He remains an intermeddler all the

* C. R. P. No. 997 of 1936. 26th April, 1938.

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same. By a constant course of conduct of management his position as that of an intermeddler cannot be converted into that of a lawful guardian.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsiff of Prodattur dated 25th March, 1936, and passed in S. C. S. No. 574 of 1935.

*N. Vasudeva Rao* for Petitioner.

*V. Ramaswami Aiyar* and *V. Seshadri* for Respondent.

The Court (*Venkataramana Rao, J.*) made the following

ORDER OF REFERENCE TO A BENCH.

The question raised in this Civil Revision Petition is one of importance. It is this: whether an acknowledgment of liability by a *de facto* guardian of a minor would be a valid acknowledgment on his behalf under S. 19 of the Limitation Act, that is, whether an acknowledgment by a *de facto* guardian would be an acknowledgment by a lawful guardian within the meaning of S. 21 of the Limitation Act. In *Tirappayya minor by guardian Ganjayya* v. *Ramaswami*[1], Bakewell, J., seems to have taken the view that a *de facto* guardian can be a lawful guardian within the meaning of S. 21. This view was expressly dissented from in *Ramaswami* v. *Kasinatha*[2] by Kumaraswami Sastri and Curgenven, JJ., but it is urged before me that the observation therein is only *obiter* because the learned Judges also held that the *de facto* guardian had no authority to acknowledge the debt because the amount due under the bond in question in that case could have been paid out of the income and there was no necessity to keep the debt alive. Mr. Ramaswami Aiyar has brought to my notice the decision in *Bireswar Mukerjee* v. *Ambika Charan Bhattacharjea*[3], which takes the same view but a different view appears to have been taken in the Patna High Court which is in consonance with the view of Bakewell, J.

As the question is of frequent recurrence it is desirable that there should be a decisive ruling of a Bench on this point and I therefore refer this Civil Revision Petition for disposal by a Bench.

1. (1913) 24 M.L.J. 428. 2. A.I.R. 1928 Mad. 226.
3. (1917) I.L.R. 45 Cal. 630.

Nagayya *v.* Narasayya.

Madhavan Nair, J.

In pursuance of the above Order of Reference, the Court (*Madhavan Nair* and *Abdur Rahman, JJ.*) delivered the following

JUDGMENT. *Madhavan Nair, J.*—The plaintiff is the petitioner. In this revision petition we are called upon to consider the question whether an acknowledgment of a debt made by a person described as *de facto* guardian of a minor would keep the debt alive against the minor which would otherwise become barred. The *de facto* guardian is the son of the sister of the grandfather of the minor.

S. 19, Expl. 2 of the Limitation Act says that an acknowledgment to be effective against the person making it must be signed "either personally or by an agent duly authorised in his behalf". S. 20 requires that effective payment must be made by the person liable to pay or by his agent duly authorised in this behalf. S. 21 of the Limitation Act explains the expression "agent duly authorised in this behalf" and says "in Ss. 19 and 20 'it' shall include in the case of a person under disability his lawful guardian, committee or manager, etc." This sub-section was introduced because there was a conflict of decisions as to whether a guardian of a minor was an agent within the meaning of Ss. 19 and 20. The question we have got to consider is whether the *de facto* guardian in the present case is an agent duly authorised to acknowledge this debt on behalf of the minor.

It may be stated at once that he is not a lawful guardian of the minor under the Hindu Law, nor has he been appointed a guardian by authority or by a will. The learned Counsel for the petitioner in support of the contention that the *de facto* guardian is lawful guardian relied mainly on two decisions, one a decision of this Court and another a decision of the Patna High Court. The decision of this Court is reported in *Tirappayya minor by guardian Ganjayya* v. *Ramaswami*[1]. That is a decision by a single Judge. In that case the learned Judge, Bakewell, J., was of opinion that a person who is acting as lawful guardian, though not legally appointed, can bind the estate for necessary purposes and that such a person is a lawful guardian within the meaning of S. 21. This decision no doubt supports the petitioner. The decision in the Patna High Court is reported in *Gita Prosad Singh* v. *Ragho Singh*[2]. In

1. (1913) 24 M.L.J. 428.
2. (1917) 40 I.C. 809.

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that case payment of money due under a mortgage bond was made by the *de facto* guardian of a minor in order to avoid the immediate bringing of a suit on the bond against the minor. The question was whether the payment made would save the bar under S. 20 of the Act. The learned Judge has held that the *de facto* guardian would come within the description of the term "lawful guardian" in S. 21. This also supports the petitioner's case. The decision has got to be taken in connection with the facts of the case. Both these cases were considered by a Bench of this Court in a decision reported in *Ramaswami* v. *Kasinatha*[1]. In that case Kumaraswami Sastri, J., who wrote the leading judgment dissented from the view of Bakewell, J., in *Tirappayya minor by guardian Ganjayya* v. *Ramaswami*[2] and explained the circumstances bearing upon the decision in *Gita Prosad Singh* v. *Ragho Singh*[3]. In that Patna case the person who made the payment was no doubt the *de facto* guardian but the learned Judge pointed out that there was nothing tangible on the records to show that he was not the lawful guardian. Reference is made in the judgment to certain suits and orders where he was described as guardian and it was in such circumstances that the payment made by him would be an effective payment. Barring these three decisions no decision directly bearing on the question has been brought to our notice by the learned Counsel. There is a decision of the Calcutta High Court reported in *Bireswar Mukerjee* v. *Ambika Charan Bhattacharjea*[4], which supports the contention of the defendant that a *de facto* guardian cannot be considered to be lawful guardian within the meaning of S. 21 of the Limitation Act. This case also has been considered by the learned Judges who decided the case in *Ramaswami* v. *Kasinatha*[1]. We were referred to a series of cases by the learned Counsel for the petitioner to show that alienations made by *de facto* guardians under the Hindu Law were held valid if they were for the benefit of the minor. None of those cases have any bearing on the question. We are not concerned with the question whether the alienation should be binding or not.

The question we have to consider is whether the person described as *de facto* guardian would come within the description

1. A.I.R. 1928 Mad. 226.
2. (1913) 24 M.L.J. 428.
3. (1917) 40 I.C. 809.
4. (1917) I.L.R. 45 Cal. 630.

of lawful guardian within the meaning of S. 21 of the Limitation Act. As already stated he is not the natural guardian nor was he testamentary guardian. His position strictly speaking is only that of an intermeddler of the estate of the minor. No doubt he may have been managing the estate of the minor and probably he may have been managing the estate to the advantage of the minor as well. He remains an intermeddler all the same. By a constant course of management, his position as that of an intermeddler cannot be converted into that of a lawful guardian. We accept with great respect the reasoning of Kumaraswami Sastri, J., in *Ramaswami* v. *Kasinatha*[1], which was concurred in by Curgenven, J. For the reasons given by the learned Judge we hold that a *de facto* guardian cannot be considered to be a lawful guardian within the meaning of S. 21 for the purpose of acknowledging a debt to keep it alive against the minor. In our opinion the decision in *Tirappayya minor by guardian Ganjayya* v. *Ramaswami*[2] does not state the law correctly. As the suit debt is therefore barred as it has not been acknowledged validly by the petitioner's guardian, the suit was rightly dismissed by the lower Court. The Civil Revision Petition is dismissed with costs.

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K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Vr. L. Vr. S. Pethaperumal Chettiar (deceased) and others .. *Appellants** (*Plaintiff and Nil*)

*v.*

V. Al. V. Ramaswami Chettiar and others .. *Respondents* (*Defendants*).

Pethaperumal Chettiar v. Ramaswami Chettiar.

*Partnership—Settlement—Clear statement of party to abide by an amount fixed and not to seek investigation of accounts—Whether account to be re-opened.*

Where the plaintiff, having a share in the partnership of the defendant, on attaining majority dispensed with the production of accounts and entered into a settlement whereby he agreed, after taking competent advice, to receive a gross sum in lieu of amounts that might be found payable to him and in

1. A.I.R. 1928 Mad. 226. 2. (1913) 24 M.L.J. 428.

* Appeal No. 257 of 1933. 26th January, 1938.

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effect he had said 'I do not wish that there should be a prolonged scrutiny of the long-standing accounts. I want the sum payable to be fixed at once in the presence of mediators and I am prepared to take it in lieu of what is due to me,'

*Held*, that having done this, he could no longer repudiate the arrangement and claim that the settled account should be reopened.

*Law* v. *Law*, (1905) 1 Ch. 140, followed.

Appeal against the decree of the Court of the Subordinate Judge (Additional) of Devakottah in O. S. No. 10 of 1931.

*T. L. Venkatarama Aiyar* for Appellants.

*M. Patanjali Sastri* and *N. G. Krishna Aiyangar* for Respondents.

The judgment of the Court was delivered by

Venkatasubba Rao, J.

*Venkatasubba Rao, J.*—We have heard Mr. Venkatarama Aiyar fully and do not propose to call upon the respondents. The plaintiff-appellant complains that he is not bound by the arrangement evidenced by Exs. A to F, the outcome of a settlement entered into between himself and the first defendant (defendants 2 and 3 are the brothers of the latter and need not be specially mentioned), on the ground that it is vitiated by undue influence and coercion. The facts are fully set out in the lower Court's judgment, which we do not propose to recapitulate. The material facts which need be stated are these. The fourth defendant is the mother of the plaintiff and aunt (mother's sister) of the first defendant. At the time of the death of the plaintiff's father in 1918 there was a partnership which was being carried on. The first defendant and his brothers were partners in that firm entitled to a certain share. The plaintiff's father was a sub-partner possessing a fractional interest in the last mentioned share. The business of the firm was continued subsequent to the death of the plaintiff's father. There was some other concern belonging to the deceased father, which after his death passed into the hands of the defendants' family. The plaintiff was living with his mother, who dealt with his estate and had various sorts of dealings with the first defendant. There was a promissory note outstanding, which had been executed by her on the 11th August, 1927, in his favour. The plaintiff came of age on the 31st July, 1930, and the settlement in question took place on the 9th August of the same year. The first defendant required the plaintiff to renew the promissory note

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which was about to get barred and said that if his request was not complied with, he had no alternative but to file a suit upon it. It was at this juncture that the settlement in question took place. There were then several accounts to be settled between the parties. The plaintiff owed the first defendant, besides the amount due on the promissory note mentioned above, other sums also. That the amount due by him in the aggregate was about Rs. 40,000 is not denied. There were amounts payable to the plaintiff's estate by the first defendant not only in respect of the partnership to which reference has been made, but also under other headings. The settlement proceeded upon the ground that the amount payable to the plaintiff and the amount payable by him should be set off, one against the other, that in addition the first defendant should pay the plaintiff a sum of Rs. 1,000 and that the account should be treated as finally closed. Mr. Venkatarama Aiyar contends that such a settlement cannot be held binding on the plaintiff. The positive case set up of undue influence and coercion does not require serious notice. The question then for decision is, whether in view of the situation of the parties and by reason of the accounts not having been investigated, the plaintiff becomes entitled in law to impeach the transaction. There are two things to be said in favour of the plaintiff. *First* he had just attained the bare age of majority and transactions with persons of that sort are jealously watched by the Courts, and *secondly* the parties stood in fiduciary relationship, as there was undoubtedly a duty cast on the first defendant (who occupied the position of a surviving partner) to make a full disclosure of the state of the account. Where fiduciary relation is established, it is settled law that the person in fiduciary position should affirmatively prove that the weaker party was a free agent and had independent and disinterested advice. That the plaintiff had just come of age is, as stated above, another factor, which also makes it necessary to go into the question whether he had such protection as to secure to him a free and unfettered judgment, independent of any sort of control (*see* the judgment in the case decided by one of us in *Narayana Doss Balakrishna Doss v. Buchraj Chordia Sowcar*[1].

That the plaintiff had competent and independent advice cannot be denied. He was assisted by three experienced men

1. (1927) 53 M.L.J. 842.

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of his community (one of them being his brother-in-law and the other two his *dayadis*), who intervened on his behalf and in his interest. They are euphemistically termed 'mediators'; but that they were intent upon safeguarding his interests alone there can be no doubt. There was a fourth person interested in the plaintiff, who also joined in the discussions which led to the settlement. The plaintiff's mother was near the spot where the negotiations took place and was consulted. It has also been abundantly proved that there was neither importunity nor persuasion on the part of the first defendant; on the contrary, he was prepared to produce the accounts and wanted some little time but the plaintiff and his advisers would brook no delay. The plaintiff though young, was, as the lower Court points out, very shrewd and what is more, there was a secret understanding between him and the so-called mediators, that once his indebtedness was wiped out as the result of the documents that were to come into existence, he should repudiate the arrangement and file a suit claiming an account. That the plaintiff has not come to the Court with clean hands, is a part of his own case as the secret understanding is set up by him in his plaint. Of the three mediators one died before the trial and the remaining two were examined for him and admit that they gave this dishonest advice to the plaintiff.

On these facts it is perfectly clear that the settled account cannot be re-opened. As stated by the Judicial Committee:—

> "If . . . . . persons meet and agree not to ascertain the exact balance, but agree to take a gross sum as the balance; a sum which one is willing to pay and the other is content to receive . . . . . it is obvious that the production of vouchers is entirely out of the question. . . . for the very object of the parties is to avoid the necessity for producing these vouchers". (*Henry McKellar* v. *John Wallace*[1].)

This is precisely what happened here. The plaintiff dispensed with the production of the accounts, and agreed after taking competent advice to receive a gross sum in lieu of the amounts that might be found payable to him. That the right to disclosure can be waived is quite clear. The plaintiff in effect stated:—

> "I do not wish that there should be a prolonged scrutiny of the long-standing accounts. I want the sum payable to be fixed at once in the presence of the mediators and I am prepared to take it in lieu of what is due to me."

1. (1853) 5 M.I.A. 372 at 395.

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Having done this, he can no longer repudiate the arrangement and claim that the settled account should be re-opened (*Law* v. *Law*[1]). That the plaintiff had excellent reasons for having chosen this course, is perfectly clear. There were questions of very doubtful nature (as the evidence shows) which could have been raised, and his advisers rightly thought it more prudent to enter into a settlement than litigate in a Court of law.

The learned Judge in the Court below in his lucid judgment has discussed the matter fully and has applied to the facts found, the right principles of law. The appeal fails and is dismissed with costs.

There is one matter which requires special mention. For the Rs. 1,000 payable to the plaintiff under the settlement, a hundi was passed to him, which he thought fit not to cash, owing to the attitude adopted by him. Before we pronounced judgment Mr. Patanjali Sastri has intimated that his clients defendants 1 to 3 are prepared to pay the amount due under the hundi, and we record that undertaking. The amount payable under the hundi will go in reduction of the costs payable to the respondents. The amount of costs and the amount due under the hundi will be set off one against the other and only for the balance due either party will be liable.

K. C. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Ramaswami Aiyangar and another .. *Petitioners (Respondents Nos. 2 and 3)*

*v.*

Ramaswami Patrachar and others .. *Respondents (Petitioner and Respondents 4 to 9).*

Ramaswami Aiyangar v. Ramaswami Patrachar.

*Criminal Procedure Code (V of 1898), S. 144 (1) and (4)—Order of Sub-Magistrate under—Joint Magistrate not only rescinding that order but making new orders—Jurisdiction of.*

While it is open to a superior Magistrate to alter or rescind the order of an inferior Magistrate, he cannot make a new order under S. 144 (4), Criminal Procedure Code, though no doubt he could have made it under sub-S. (1) of S. 144, Criminal Procedure Code.

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1. (1905) 1 Ch. 140.

* Crl. R. C. No. 826 of 1937. 6th May, 1938.
Crl. R. P. No. 775 of 1937.

Ramaswami Aiyangar *v.* Ramaswami Patrachar.

Where the Sub-Magistrate of a place called *V* made a certain order under S. 144 (1), Criminal Procedure Code, but both the parties applied under S. 144 (4), Criminal Procedure Code, to the Joint Magistrate of *K* who had jurisdiction over the Sub-Magistrate of *V*, and he not only rescinded the order of the Sub-Magistrate but made a positive order prohibiting some of the parties from in any way interfering with the execution by the trustee of a temple of an undertaking given by him and also prohibiting some of them from entering a temple without a written consent from the trustee,

*Held.* that the above orders of the Joint Magistrate were without jurisdiction and hence declared to be null and void.

*Muthukumaraswami Nadar* v. *Muhammad Rowther,* (1921) 42 M.L.J. 352 and *Sevugan Chettiar* v. *Karuppan Chettiar,* A.I.R. 1937 Mad. 487, followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Joint Magistrate of Kumbakonam in M. C. Nos. 87 and 89 of 1937, dated 21st October, 1937.

*T. R. Srinivasa Aiyangar* and *T. Krishnaswami* for Petitioners.

*V. T. Rangaswami Aiyangar, K. Aravamudha Aiyangar, R. Desikan* and *T. S. Venkatesa Aiyar* for Respondents.

*K. Venkataraghavachariar* for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—In this case the Sub-Magistrate of Valangiman made a certain order under S. 144 (1) of the Criminal Procedure Code. Both the parties applied to the Joint Magistrate of Kumbakonam under sub-S. (4) of S. 144, Criminal Procedure Code and after hearing these petitions, the learned Joint Magistrate not only rescinded the order of the Sub-Magistrate but went further and made certain other orders which had nothing to do with the order which was sought to be rescinded or altered. In other words, he made a positive order prohibiting respondents 2 to 8 in one of the petitions from in any way interfering with the execution by the trustee of a certain undertaking given by him and another prohibiting respondents 2 and 3 from entering the temple without the written consent of the trustee. In a somewhat similar case where the superior Magistrate did not confine himself to rescinding the order of the inferior Magistrate but went to the length of prohibiting certain counter-petitioners from taking a car in procession, namely, *Muthukumaraswami Nadar* v. *Muhammad Rowther*[1],

1. (1921) 42 M.L.J. 352.

Odgers, J., held that the superior Magistrate was acting without jurisdiction inasmuch as the jurisdiction conferred by sub-S. (4) of S. 144 is confined to rescinding or altering the order of the inferior Magistrate. I have had to consider the same question recently in *Sevugan Chettiar* v. *Karuppan Chettiar*[1]. There I came to the conclusion that while it is open to the superior Magistrate to alter or rescind the order of the inferior Magistrate, he cannot make a new order under S. 144 (4), Criminal Procedure Code, though no doubt he could have made it under sub-S. (1) of S. 144. I have no doubt that the learned Joint Magistrate exceeded his jurisdiction in passing the orders prohibiting certain respondents from interfering with the execution by the trustee of a certain undertaking given by him and prohibiting certain respondents from entering the temple without the written consent of the trustee. These orders of the learned Magistrate are without jurisdiction and are therefore declared to be null and void. No doubt these orders were to be in force for only two months and that period has long ago been expired. Nevertheless the respondents are entitled to have it declared that the orders referred to above are without jurisdiction and are of no force and effect. It is needless to say that this declaration does not in any way decide the respective rights of the parties as it refers only to the jurisdiction of the Magistrate and that too when acting under sub-S. (4) of S. 144, Criminal Procedure Code. It does not in any way prevent the Magistrate from acting, if necessary, under the first sub-section of S. 144 in future.

Ramaswami Aiyangar *v.* Ramaswami Patrachar.

K. C. ——— *Orders set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Janaki Ammal .. *Appellant** (*8th Defendant*)

*v.*

G. Perumalswami Nadar and others .. *Respondents* (*Plaintiffs 3 to 5*).

Janaki Ammal *v.* Perumal-swami Nadar.

*Hindu Law—Right of residence of mother in the family house, how far enforcible—Circumstances demanding her vacating the family house—Court's power to direct her to vacate the house, if justice demands it.*

1. A.I.R. 1937 Mad. 487.

*O. S. A. No. 25 of 1938. 25th April, 1938.

Janaki Ammal v. Perumalswami Nadar.

On a partition, the Court can direct a Hindu mother to vacate the family house if the circumstances demand it. She has a right to a suitable residence and if one can be found among the family properties, it is going very far to say that the Court cannot compel her to accept it when a fair partition demands it. The coparceners have a right to separate and a right to have the estate partitioned and the Court must do justice to all parties.

*Ramanadhan* v. *Rangammal*, (1888) I.L.R. 12 Mad. 260 (F.B.), referred to.

On appeal from the judgment of the Honourable Mr. Justice Gentle, dated 11th January, 1938 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2880 of 1937 in C. S. No. 655 of 1921.

*K. Rajah Aiyar* and *A. S. Nataraja Aiyar* for Appellant.

*Srinivasaraghavan* and *Thiagarajan* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

*The Chief Justice.*—This appeal raises the question whether a Hindu mother has the right to remain in the family house after it has been sold at an auction held in pursuance of an order passed in a partition suit and has been purchased by another branch of the family. One Thavasamuthu Nadar had three sons, Rathnaswami, Vallathambi and Guruswami. Rathnaswami married Amanthammal, the sixth defendant in the suit out of which this appeal arises, and by her had two sons and one daughter (the first and second plaintiffs and the ninth defendant). Vallathambi married Janaki Ammal, the appellant, who was the eighth defendant and by her had five sons and one daughter (the first, second, third, fourth, fifth and eleventh defendants). Guruswami married Raja Rajeswari Ammal, the seventh defendant, who bore him three sons and a daughter (the third, fourth and fifth plaintiffs and the tenth defendant). Thavasamuthu lived with his three sons and their families in the family house at Porayar, Tanjore District. He was a man of considerable wealth and died leaving a large number of immovable properties. According to the plaint, Thavasamuthu died in or about the year 1885. Guruswami, the youngest son, died in 1920. Rathnaswami and Vallathambi survived their father, but predeceased Guruswami. In the year 1921, a partition suit (C.S. No. 655 of 1921) was filed by the sons of Rathnaswami and Guruswami. On the 18th January, 1924, a preliminary decree for partition was passed by Devadoss, J., who directed that the questions relating to the maintenance of the widows of Rathnaswami, Vallathambi and

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Guruswami and their rights to reside in family "properties" should be decided after the receipt of the report from the Official Referee.

. . . . . . .

On the 10th November, 1936, the case came before Wadsworth, J., who passed what has been described as an interim final decree. Wadsworth, J., directed that the suit should be remanded to the Official Referee for the preparation of a final account on the basis of his order and for the framing of a scheme of partition. On the 30th July, 1937, the Court directed that the immovable properties comprising the estate should be sold at an auction at which the members of the three branches of Thavasamuthu's family alone should have the right to bid. In other words there should be a private, not a public auction. This private auction took place in September, 1937. The family house was bought by the third, fourth and fifth plaintiffs. Their branch altogether bought nine properties, of a total value of Rs. 53,000. The appellant's sons bought 23 houses with land attached for which they paid about Rs. 2,00,000. Lakshmana Rao, J., dealt with the question of the confirmation of these sales. The appellant objected to the sale of the family house being confirmed and asked the learned Judge to cancel it or to declare that the sale was subject to her right to reside therein. The learned Judge rejected her contentions and confirmed the sale without any restriction. The appellant, however, refused to vacate when called upon to do so by the receivers and they had to apply to the Court for an order directing her to vacate. This application was heard by Gentle, J. The third, fourth and fifth plaintiffs offered to allow the appellant, although she was not their mother, but the mother of the first, second, third, fourth, fifth and eleventh defendants, to reside in another house which they had purchased, until the partition had been completed. The learned Judge considered that this was a very reasonable suggestion and passed an order directing the appellant to vacate the family house on this condition. The present appeal lies from this order. It has not been suggested that the respondents are unwilling to comply with the condition, but it is said that the learned Judge was wrong in directing the appellant to vacate at all. It is said that under Hindu Law she has an absolute right to remain in the house until her death. While recognising that as a general rule a Hindu mother has a right to reside in

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the family house the respondents contend that in the special circumstances of this case the appellant is bound to vacate. They also contend that partition of the family properties puts an end to the right of a mother to remain in the family house, and in such circumstances she must accept a suitable residence elsewhere.

Mr. Rajah Aiyar, on behalf of the appellant, relies on the Full Bench decision of this Court in *Ramanadhan* v. *Rangammal*1 and particularly on the following passage which appears at page 270 of the report:—

> "The right of residence of Hindu females is ordinarily referable to the mily house and a purchaser may be presumed to have notice of that fact. ‹t is reasonable to hold that he is not a *bona fide* purchaser entitled to eject her, unless it is proved that the sale is valid as against her, either because, as in this case, it is made in liquidation of a debt binding on her or an ancestral debt, or with her consent or in circumstances which would sustain a plea of equitable estoppel against her."

Mr. Doraiswamy Aiyar on behalf of the respondents does not challenge the correctness of this statement of the law, but he says that the appellant is bound to vacate in the circumstances of this case.

In her written statement the appellant laid no claim to a right to reside in this particular house, but set up the plea that a house for her residence had to be set apart. The judgment of Devadoss, J., in postponing the consideration of the question as to the houses in which the widows were to live made no special reference to the family house. No issue was raised as to the right of the appellant to remain in the family house and the present plea was not advanced until the sale had taken place. The suit proceeded on the basis that the appellant had the right to live in one of the family properties, not in a particular house, and the contention which she raised when the matter came before Lakshmana Rao, J., was clearly an afterthought. Moreover the auction of the estate properties took place on this basis. Therefore, it seems to me that the appellant should not be allowed to say that the sale is not binding on her.

This is sufficient to dispose of the appeal, but I will deal with Mr. Doraiswami Aiyar's second point which is based on the judgments of this Court in the *Official Assignee of Madras*

1. (1888) I.L.R. 12 Mad. 260 (F.B.).

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v. *Rajabadhar Pillai*[1] and *Suryanarayana Rao Naidu* v. *Balasubramania Mudali*[2]. In the former case Schwabe, C. J., expressed that it was quite wrong to say that the members of a joint Hindu family have rights *in rem* to residence in a particular house. He thought that it was true that while it was being used as a family house the family members had a right to reside there, but he expressed serious doubts as to whether they had a right to any particular room, and went on to say that on partition it was clearly a matter for the tribunal arranging the partition to say whether it was in the general interest of the coparceners that residence should be given in a particular house or not. In *Suryanarayana Rao Naidu* v. *Balasubramania Mudali*[2], Sadasiva Aiyar, J., quoted with approval the dictum of Peacock, C. J., in *Mangala Debi* v. *Dinanath Bose*[3], where he said that the father's widow and the other females of the family could not be turned out of the dwelling selected by the father for his residence and in which he left the females of his family at his death until some other place had been provided for them. In this judgment of Sadasiva Aiyar, J., Wallis, C. J., concurred. It seems to me that there is considerable force in the contention that on a partition, the Court can direct a mother to vacate the family house if the circumstances demand it. She has a right to a suitable residence and if one can be found among the family properties it is going very far to say that the Court cannot compel her to accept it when a fair partition demands it. The coparceners have a right to separate and a right to have the estate partitioned and the Court must do justice to all parties.

In the circumstances of this case we have no hesitation in holding that the order of Gentle, J., is correct. Consequently the appeal will be dismissed with costs in favour of the 3rd, 4th and 5th plaintiffs.

K. C. —— *Appeal dismissed.*

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1. (1923) 46 M.L.J. 145.
2. (1920) 38 M.L.J. 433: I.L.R. 43 Mad. 635.
3. (1869) 12 W.R. (O.J.) 35: 4 Beng. L.R. 72 (O.J.).

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Ramanatha Gurukkal *alias* Parameswara Gurukkal .. *Appellant** (*Plaintiff*)

*v.*

V. V. R. Arunachalam Chettiar and another .. *Respondents* (*Defendants 1 and 3*).

Ramanatha Gurukkal *v.* Arunachalam Chettiar.

*Madras Hindu Religious Endowments Act (II of 1927), Ss. 43 (3) and 73—Dismissal of a hereditary Archaka for physical disability—If proper—Special remedy of appeal in S. 43—Dismissed office-holder—Suit in Civil Court to set aside order of dismissal—Competency of.*

Where a hereditary Archaka is dismissed by the trustee on the ground that he suffered from a physical disability which made him unfit to hold office,

*Held*, this was a sufficient ground for passing an order of dismissal under S. 43 (3) of the Madras Hindu Religious Endowments Act.

S. 73 is a clear indication that the provisions of S. 43 setting up a special machinery of appeal and conferring finality on the decisions in appeal by dismissed office-holders was intended to oust the jurisdiction of the Civil Court to question the propriety of the order of dismissal passed under that section.

*Kamaraja Pandiya Naicker v. The Secretary of State for India in Council*, (1934) 69 M.L.J. 695, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly dated 18th December, 1933, and passed in A. S. No. 24 of 1933 preferred against the decree of the Court of the District Munsiff of Kulitalai in O. S. No. 240 of 1928.

*P. Somasundaram* and *G. Balaparameswari Rao* for Appellant.

*S. Narayana Rao, M. Surya Rao, K. V. Gopalaswami* and *R. Venkata Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises the question of the precise force of the words, "the decision of the Board shall be final" at the end of S. 43, cl. 3 of the Madras Hindu Religious Endowments Act (II of 1927).

The appellant was the hereditary Archaka in a non-excepted temple the control of which is regulated by the

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* S. A. No. 381 of 1934. 4th August, 1938.

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Religious Endowments Act. It is found as a fact by the lower appellate Court that he was dismissed from the office by the trustee, the first defendant and that the order of dismissal was communicated to him. Instead of preferring an appeal to the Committee or to the Board, he filed a suit praying for a declaration of his right to the office and for an injunction restraining the trustee from interfering with the performance of his duties. Various contentions have been raised for the appellant by Mr. Muthukrishna Aiyar, some of which seem to me to have little force. It is contended that assuming that there is a statutory exclusion of the jurisdiction of Civil Courts, this exclusion can only relate to orders of dismissal which are not arbitrary and once there is an averment that a temple servant has been dismissed in an arbitrary manner, the suit must be treated as one relating to an act which is not a legal order of dismissal at all and that the Civil Courts can exercise a jurisdiction which otherwise they would not possess. It seems to me that this contention is unsound and that if an order of dismissal validly communicated is one which the Civil Courts cannot scrutinise a mere allegation that it is an order which from its arbitrary nature deserves scrutiny would not be sufficient to confer jurisdiction.

It is also contended that S. 43 applies only to punishments for causes enumerated in cl. (1) of that section, namely, breach of trust, incapacity, disobedience, neglect of duty, misconduct or other sufficient cause and that the present order of dismissal does not fall within those categories. But actually in the present case, the reason put forward by the trustee for dismissing the plaintiff was that he suffered from a physical disability which made him unfit to hold office. Whether or not there in fact were other matters which led to the plaintiff's dismissal the ground of dismissal stated is, to my mind, one which, if true, might be treated as indicating an incapacity to hold office sufficient to clothe the trustee with the power to pass an order of dismissal under S. 43 of the Act.

The substantial ground upon which this appeal is based relates to the machinery of appeal set up by S. 43 and the interpretation of the word "final" in sub-cl. (3) of S. 43. Sub-cl. (2) provides for an appeal to the Committee against an order of the trustee under sub-cl. (1) and sub-cl. (3) provides

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that:

"A hereditary office-holder or servant of a temple may prefer an appeal to the Board against the order of a committee on an appeal under sub-S. (2) and the decision of the Board shall be final."

It is argued that the machinery of appeal set up in the section is not intended to oust the jurisdiction of the Civil Courts and that the word "final" means only final so far as the process of appeal to what I may call the executive authority is concerned. The argument is that the right of a hereditary Archaka to his office is a common law right and that the jurisdiction of Civil Courts to protect that right cannot be taken away except by express words or by words of which the necessary implication is that the jurisdiction of the Court has been removed. The case-law on this subject has been summarised by Varadachariar, J., in *Kamaraja Pandiya Naicker* v. *The Secretary of State for India in Council*[1]. The principles underlying the cases have been stated in terms which I would respectfully adopt. The learned Judge points out that a statute may attach finality to particular orders in the sense of precluding a further appeal to the statutory authorities; whether it was intended to go further and oust the jurisdiction of the Civil Courts as well will depend not upon words of that kind but upon the general scheme of the particular legislation. He goes on to point out that the ordinary rule is that where a person's liberty or property is interfered with under colour of statutory powers, he has a cause of action which the Civil Courts are bound to entertain unless a bar to such entertainment has been enacted expressly or at least by necessary implication. Applying these principles to the present case, what we have is a claim to be restored to a common law office from which the plaintiff has been removed in the exercise of powers created by a particular statute, which statute prescribes two separate appeals to authorities specially constituted for the purpose and superior to the original disciplinary authority. *Prima facie* it would appear that there is a statutory limitation to a common law right which right has been restricted in its working by the procedure specially laid down for remedying any wrongs which may have been done to the holder of a common law right. It has been further contended on behalf of the respondent that not only is there a clear provision for a machinery

1. (1934) 69 M.L.J. 695.

Ramanatha Gurukkal *v.* Arunachalam Chettiar.

for remedying the wrong of which the plaintiff complains but that there is also an express provision in the Act indicating the intention of the legislature that Civil Courts should not deal with wrongs of the kind now under consideration. Reference is made to the last clause of S. 73. S. 73 has obviously been drafted to take the place, so far as temples under the control of the Religious Endowments Board are concerned, of S. 92 of the Civil Procedure Code. There is, however, a significant change in the wording of the final clause which restricts the jurisdiction of Civil Courts in suits of this nature in comparison with the corresponding provision of S. 92, Civil Procedure Code. Sub-cl. (2) of S. 92 clearly prohibits the filing of suits other than those instituted in the manner laid down in sub-S. (1) only in so far as such suits claim reliefs specified in sub-S. (1). Sub-cl. (3) of S. 73 of the Religious Endowments Act however does not restrict the prohibition of suits in Civil Courts to suits claiming those reliefs specified in sub-S. (1) of that section, but it lays down in much more general language:

"No suit in respect of such administration or management shall be instituted except as provided by this Act."

The words "such administration or management" have been interpreted by a Bench of this Court as referring back to the previous clause and meaning any suit in respect of the administration or management of a religious endowment (*Singam Aiyangar* v. *Kasturi Ranga Aiyangar*[1]).

Undoubtedly a simple suit by a hereditary Archaka to establish his right to succeed to the office would not be a suit in respect of the administration or management of a religious endowment. What has happened is that the Archaka has been dismissed by the trustee in the exercise of his powers of administration and management conferred upon him under the Act. I am unable to hold that a suit which is in effect a suit to set aside a dismissal by a trustee in the exercise of these powers is not a suit in respect of the administration or management of the religious endowment. I am therefore of opinion that S. 73 of the Act is a clear indication that the provisions of S. 43 setting up a special machinery of appeal and conferring finality on the decisions in appeals by dismissed office-holders

1. (1937) 2 M.L.J. 931 at 934.

Ramanatha Gurukkal *v.* Arunachalam Chettiar.

was intended to oust the jurisdiction of Civil Courts to question the propriety of an order of dismissal passed under that section and communicated to the person dismissed. A special remedy is created by the statute for any wrong which may have been caused in the exercise of disciplinary powers conferred by the statute and it is to my mind clearly not in accordance with the scheme of the Act to prosecute a pre-existing remedy provided by the Civil Courts and to ignore the statutory remedy laid down in the Act.

In the result therefore the appeal is dismissed with costs.

Leave to appeal is granted.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Gottepulla Bapayya Naidu .. *Petitioner**

*v.*

Peta Bapayya and others .. *Respondents.*

Bapayya Naidu *v.* Bapayya.

*Contempt of Court—Proceedings pending before Court—Statements against published—Grave offence—Punishable even if apology were tendered.*

Where the contempt of Court is of a very grave nature, the party in contempt may be punished in spite of apology tendered.

There is nothing more incumbent upon Courts of justice than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard.

*The St. James's Evening Post case*: *Roach* v. *Garvan*, (1742) 2 Atk. 469: 26 E.R. 683, followed.

*Rajah of Venkatagiri* v. *Rama Naidu*, (1938) 2 M.L.J. 81: I.L.R. (1938) Mad. 545 referred to.

Petition under S. 2 of Act XII of 1926, S. 151 of the Civil Procedure Code, and S. 224 of the Government of India Act, 1935, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to commit the respondents herein for contempt of Court.

*M. Appa Rao* for Petitioner.

*B. Jagannadha Doss* for *S. Suryaprakasam* and *K. Venkatarama Razu* for Respondents.

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* Crl. M. P. No. 247 of 1938. 2nd May, 1938.

Bapayya Naidu
*v.*
Bapayya.

Leach, C. J.

The judgment of the Court was delivered by

*The Chief Justice.*—This is an application to commit the three respondents for contempt of Court. The petitioner is the Mokhasadar of Kondaporava, Kistna District. The first respondent is the President of the West Kistna Congress Committee, the second respondent is the Secretary of that Committee, and the third respondent is said to be the printer of the pamphlet which is the subject-matter of this petition. Last year there was trouble between the petitioner and the ryots on his estate and he filed a complaint in the Court of the Sub-Magistrate, Tiruvarur, alleging an offence under the Cattle Trespass Act against 26 of the ryots. It was said that they had rescued cattle which were being taken to the pound after a trespass. He also complained that the ryots had unlawfully interfered with the produce of his forests and were guilty of "turbulent acts endangering human life and property". In this connection he instituted proceedings under S. 144 of the Code of Criminal Procedure against 11 ryots in the same Court. He also filed a number of applications under S. 74 of the Madras Estates Land Act. While these proceedings were pending a pamphlet was distributed containing the following statements:—

" The Zamindars and Mokhasadars are oppressing in many ways the ryots in their village, since the success of the Congress in the elections. The sole cause for oppressing the ryots is that they voted for the Congress and helped to establish the Congress Government.

* * * * *

" The Mokhasadar is oppressing the ryots in many ways by not granting pattas to the ryots in relation to their lands even in their possession by not giving receipts for cists paid, by including in his house-farm lands the lands in possession of the ryots whenever he is displeased.

"As the ryots have not submitted to the Mokhasadar who by not granting pattas to the Kondaparava ryots who are suffering like this from a very long time, attempted to deprive them of their rights they are enjoying from of old, the Mokhasadar is now harassing those poor ryots illegally foisting upon the villagers a pound case (under Cattle Trespass Act) against 26 of them, a forest case against 11 of them, summary suits on 43 of them and a case against 3 of them for alleged murdering of a forest watcher and by fabricating many such cases.

" These poor ryots who are bent down by unbearable poverty for a very long time are unable even to protect their rights again in these illegal cases set up by the Mokhasadar. Therefore, we request the public to render monetary and such other voluntary help in order that the rights of the ryots may be protected."

Bapayya Naidu v. Bapayya.

Leach, C. J.

In the affidavit in reply the first respondent has taken objection to certain parts of the translation of this petition, which was supplied by the petitioner and for the words "illegally foisting upon the villagers" he would have substituted "has unjustly launched". The senior Telugu Interpreter of the Court has been called before the Court and he says that the words used actually mean "unjustly concocted".

The first respondent as president of the Committee takes full responsibility for the publication of this pamphlet, and, recognising that the statements do amount to contempt of Court, has tendered an apology. The second respondent has stated that he had nothing to do with the drawing up of the pamphlet and that he was unaware of its issue. The third respondent says that he is not responsible as the printer, as he had let his press to another sometime before the pamphlet was printed. The learned Advocate for the petitioner has accepted the pleas of the second and third respondent and the case has proceeded against the first respondent alone.

The contempt here is of a very grave nature. While these proceedings were pending the West Kistna Congress Committee issued this pamphlet accusing the petitioner of having deliberately launched false cases against his ryots and in other ways oppressing them and the first respondent acknowledges responsibility. In a recent case of a similar nature—*Rajah of Venkatagiri* v. *Rama Naidu*[1], I had occasion to refer to the observations of Lord Hardwicke in *The St. James's Evening Post case*: *Roach* v. *Garvan*[2], where he said that:

> "Nothing is more incumbent upon Courts of justice, than to preserve their proceedings from being misrepresented; nor is there anything of more pernicious consequence, than to prejudice the minds of the public against perons concerned as parties in causes, before the cause is finally heard."

And I would add, as I added in the previous case it is no excuse to urge that the minds of the trial Judge would not be affected by the state ments.

The offence here is so grave that we consider we should not be doing justice if we accepted the apology of the first respondent and let the matter rest there. We consider that this is a case in which a fine should be inflicted, and we direct

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1. (1938) 2 M.L.J. 81: I.L.R. (1938) M. 545.
2. (1742) 2 Atk. 469: 26 E.R. 683.

the first respondent to pay a fine of Rs. 250 within 10 days, failing which he will undergo simple imprisonment for a period of one month. He will also pay the costs of the petitioner which we fix at Rs. 100.

K. C. ——— *Petition allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Shahabuddin Sahib .. *Petitioner** (*Defendant*)

*v.*

Tota Venkatachalam Chettiar .. *Respondent* (*Plaintiff*).



*Negotiable Instruments Act (XXVI of 1881), S. 9—Holder in due course—Promissory note—'Payable' on demand—If matures on date of execution—Consideration legal but motive for executing the note illegal—If vitiates the note.*

One *A* owed some money to *G*. In respect of that *G* had obtained two decrees against *A*. The defendant *S* was an agent for collection of *G*. He (*S*) felt that *A* could give some useful evidence in a suit which he intended to file against a third person. *A* and *S* therefore entered into an arrangement under which *S* agreed to discharge the debts due to *G* by *A* and *A* agreed to depose in favour of *S*. But *S* was not able presently to pay off *G*. He (*S*) therefore paid a portion and for the balance due from *A* under the decrees, he (*S*) executed a promissory note on 29th August, 1935, payable on demand to *G*. Thereupon *G* certified satisfaction of the decrees. As the money was not paid, *G* sent a notice dated 7th September, 1935, calling on him to discharge the note by the 15th September, failing which, it was mentioned in the notice that the promissory note would be assigned. Though time was given till 15th, the note was actually assigned to the plaintiff on the 14th itself. In a suit by the assignee on the promissory note, it was contended among others that firstly the note had matured before assignment on the grounds (*i*) that the note being one payable on demand, it matured on the date of execution itself and (*ii*) that there was a demand on 7th September before assignment and therefore the assignee was not a holder in due course and secondly that the note was for an illegal consideration and therefore unenforceable.

*Held*, (*i*) an on demand promissory note does not always mature on the date of the note itself. The date of its maturity will depend upon the circumstances of each case. One of the safe guides will be to ascertain if a demand has been made and refused.

(*ii*) The promissory note was assigned before the 15th September, date fixed for complying with the demand for payment. The note had not therefore matured before assignment and the plaintiff was therefore a holder in due course.

(*iii*) A promissory note executed in consideration of giving evidence is unenforceable. But the consideration here is *A's* release from the decretal debts which is a good consideration. Motive for executing the promissory note and *G's* knowledge of the motive will not vitiate the transaction.

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* C. R. P. No. 480 of 1936. 22nd April, 1938.

Shahabuddin Sahib v. Venkatachalam Chettiar.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of Small Causes at Trichinopoly in S. C. S. No. 3626 of 1935.

*B. Pocker* for Petitioner.

*S. Amudachari* for Respondent.

The Court delivered the following

JUDGMENT.—The facts which had led up to this revision may be briefly stated. One Anthonimuthu owed some money to Gnanaprakasam Pillai for which the latter had secured two decrees against the former. The defendant was an agent to the aforesaid Gnanaprakasam Pillai for the purpose of collecting his outstandings. When he went to realise the debts due to Gnanaprakasam Pillai he discovered that Anthonimuthu could give useful evidence in a case which he intended to institute against some third person, with whom I am not concerned here. An arrangement was thus arrived at between the defendant on the one hand and Anthonimuthu on the other, under which the latter promised to depose in the defendant's favour and the former agreed to discharge the debts due to Gnanaprakasam Pillai by the latter. It appears that the defendant was not in a position to pay the debts due to Gnanaprakasam Pillai at the moment. He consequently paid a sum of Rs. 100 only in cash and after deducting Rs. 50 which would have been due to him for his commission on realisation of the debts due from Anthonimuthu, he executed a promissory note on 29th August, 1935 (Ex. A) in favour of Gnanaprakasam for Rs. 580. Gnanaprakasam agreed to this and released Anthonimuthu from his decrees and certified payment to the Court. Gnanaprakasam then served the defendant with a notice on 7th September, 1935 (Ex. 1) under which he was asked to discharge his liability by the 15th of September, failing which, it was so mentioned in the notice, the promissory note would be assigned. It appears, however, that the promissory note was assigned in favour of the plaintiff a day before the time given in the notice for payment, *i.e.*, on 14th September, 1935 and the assignee filed this suit on its basis, which was decreed by the lower Court. The defendant has now come up to this Court and has urged the dismissal of the suit on the grounds that the plaintiff was not a holder in due course and inasmuch as the promissory note was executed for an illegal consideration, it could not be enforced in a Court of Law.

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Three reasons were given by Mr. Pocker to show that the plaintiff was not a holder in due course; (1) that as the promissory note was payable on demand, it should be deemed to have matured on the date on which it was executed and an assignment on a subsequent date would not place the plaintiff in a position better than that of his assignor; (2) as a demand was made by Gnanaprakasam Pillai on 7th September, 1935, an assignment subsequent to that date could be of no avail to the plaintiff, who would be subject to such equities as existed at the time of transfer; and (3) as a notice of dishonour was given by the defendant to Gnanaprakasam Pillai on 13th September, the holder took the instrument subject to the vice with which the bill was tainted at the time of the transfer.

The learned Counsel for the petitioner has placed his reliance on S. 9 of the Negotiable Instruments Act in support of his first objection. It is true that the language of the section lends some support to the argument advanced by him; but I do not think it would be seriously contended that the promissory notes, which are payable on demand could not be negotiated in such a manner as to make their holders to be holders in due course under any circumstances. It would come as a rude shock to the commercial community in India, if they discovered that the legal position in regard to such promissory notes happens to be what has been contended for before me. The contention raised by Mr. Pocker is based on the supposition that promissory notes of this kind must be taken to have matured on the date on which they are executed. The date on which limitation would start in regard to these notes could not be a safe guide to come to a conclusion that even for this purpose they should be presumed to have matured on the date on which they were executed. There is nothing in the Negotiable Instruments Act which would warrant such a conclusion. On the contrary, the ordinary presumption under S. 118 (*d*) of the Negotiable Instruments Act is that every transfer of a Negotiable Instrument was made before its maturity and there is no reason why this presumption should not be extended to promissory notes which are payable on demand. I am therefore of the opinion, that for this purpose a promissory note which is payable on demand cannot be regarded as having matured on the date on which it came into existence. The date of its maturity would, I feel, depend upon the circum-

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stances of each case. In the case of such a promissory note, as has been mentioned above, one of the safe guides would be to ascertain if a demand had been made and refused. The length of the time for which the promissory note has not been paid would also be a relevant factor in order to ascertain if the promissory note was a stale one. If it has been in the hands of the holder for an unreasonable length of time, the transferee may be considered to be put on enquiry, but if there is nothing which may give any legitimate cause for suspicion, the ordinary presumption referred to above would have to be raised in his favour. The date of the execution of the promissory note in suit and the date of its transfer to the plaintiff are therefore material and it is highly improbable that the plaintiff could suspect that during an interval of sixteen days, which had passed between the date of the execution of the promissory note and its transfer to the plaintiff, a demand was made by his assignee and refused by the defendant. I would therefore hold that the promissory note in suit could not be considered to have matured on the date on which it was transferred to the plaintiff.

As for the second reason which has been urged by the learned Counsel on behalf of the petitioner, it appears that the demand was made by Gnanaprakasam Pillai under which the defendant was asked to pay his dues on or before the 15th September, 1935 (Ex. I). The promissory note was, as stated above, assigned on 14th September and the mere fact of the demand would not be sufficient to enable me to hold that it had matured before the expiry of the time given for payment. Moreover there is no evidence, on the record from which I could infer that the plaintiff had any knowledge of the demand made by Gnanaprakasam Pillai on 7th September, 1935.

As for the third reason, the notice of dishonour by the defendant to Gnanaprakasam Pillai had not been produced on the record and no secondary evidence of the same has been given. But from Gnanaprakasam Pillai's reply to that letter which is on the record (Ex. II-*a*) it appears that it was delivered to him on 16th September, 1935. The notice of dishonour must therefore be deemed to have been conveyed to Gnanaprakasam Pillai on that day and not earlier; but as pointed out above the promissory note had already been trans-

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ferred on 14th September, 1935. This contention must also be repelled.

The result is that the plaintiff would not be affected in the circumstances by S. 59 of the Negotiable Instruments Act. He has been found by the lower Court to be an indorsee for consideration and there is nothing on the record to show that he had any cause to believe the existence of any defect in the title of the assignor. He must therefore be presumed to be a holder in due course as defined in S. 9 of that Act.

The next ground which has been urged on behalf of the petitioner is that the promissory note was for an unlawful consideration. The petitioner's learned counsel has relied on *Seshanna Chetty* v. *Ramaswami Chetty*[1] and *Adiraja Chetty* v. *Vittil Bhatta*[2] in support of his contention. There is no doubt that a promissory note executed in consideration of giving evidence is unenforceable—whether the statement which a person may have promised to give be either true or false. There would be no consideration if the evidence which he had undertaken to give be true, as it would then be a promise to perform a public duty which he is bound by law to discharge; but if the evidence be false the consideration would be positively vicious and illegal. In the first case there would be no consideration at all and in the latter case the consideration would be unlawful. It has therefore been urged that the consideration for the promissory note in suit being either non-existent in the eye of law or being illegal, the transfer of the same would be void and would confer no title in the plaintiff to recover. Mr. Pocker has cited two English cases, *Pearce* v. *Brooks*[3] and *Cannan* v. *Bryce*[4], and a Madras case *Pannichand* v. *Nanoo Sanker Tawker*[5] to substantiate his contention. They are authorities for the proposition that any one who contributes to the performance of an illegal act with a knowledge that the subject-matter of his contract is intended to be illegally applied cannot recover on the contract. This proposition may be correct and even incontrovertible so far as it goes. But the question is, if it has any application to the facts of the case.

1. (1868) 4 M.H.C.R. 7.
2. (1914) M.W.N. 322.
3. (1866) 1 Exch. 213.
4. (1819) 3 B. & Ald. 179: 106 E.R. 628.
5. (1908) 18 M.L.J. 456.

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It has been found by the lower Court that the money was due to Gnanaprakasam Pillai for which decrees had already been passed in his favour and which were certified by him, as a decree-holder to have been duly satisfied on the receipt of the promissory note executed by the defendant. Anthonimuthu's release from the decretal debts would undoubtedly furnish a good consideration for the promissory note in suit. The question then is if, as found by the lower Court, Gnanaprakasam's knowledge of the defendant's motive for executing the promissory note would vitiate the transaction. It is clear that Gnanaprakasam was not to benefit by the contract entered into between Anthonimuthu and the defendant. I have already held that the consideration which had emanated for Gnanaprakasam, namely, the release of Anthonimuthu from his decretal debts, was a valuable one. The object of the contract in substituting the defendant for Anthonimuthu cannot be said to be illegal. If the object and consideration are legal, the contract cannot be avoided under S. 23 of the Indian Contract Act. Gnanaprakasam's knowledge of the defendant's motive in executing the promissory note cannot be held to make it unenforceable at his instance. Motive should not be confused with the object and consideration of a contract. They are essentially different. If the object and consideration are found to be legal and valuable, the transaction cannot be avoided simply because the promisee happens to know the reason for which the defendant promisor had executed the promissory note in his favour. As pointed out by Mukerjee, J., in *Dehra Dun Electric Tramway Company* v. *Official Liquidators*[1]:

> "A contract cannot be vitiated, as a collateral contract happens to be unenforceable at law."

It would therefore follow that even if Anthonimuthu had agreed to give false evidence in favour of the defendant, the illegality of the consideration of the contract between Anthonimuthu and the defendant would not affect the validity of the transaction between the defendant on the one hand and Gnanaprakasam Pillai on the other. There is nothing on the record to show that Gnanaprakasam Pillai was a party to this arrangement between Anthonimuthu and the defendant. Nor has it been proved or found that Gnanaprakasam knew that

1. (1929) I.L.R. 52 All. 406.

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the evidence to be given by Anthonimuthu was false. *A priori* the same result would follow if the evidence which Anthonimuthu had agreed to give were true, as in that case there would be no consideration for the contract but this would not affect the legality of the contract between the defendant and the promisee.

Let me consider the case from a different point of view. It has been held in *Wild* v. *Simpson*[1] that the consideration would be considered to be contaminated with illegality if the plaintiff requires any aid from the illegal transaction to establish his case. Let me see if the plaintiff or his assignor Gnanaprakasam Pillai would be required to establish the nature of the contract between Anthonimuthu and the defendant in order to succeed on the promissory note executed by the defendant in Gnanaprakasam's favour. It is obvious that he would not be required so to do. Judging from this test also, the promissory note in suit cannot be held to be contaminated with an illegality.

Moreover, under S. 120 of the Negotiable Instruments Act, the defendant who is the maker of the promissory note in suit cannot be permitted to deny its validity as against the plaintiff who has been held to be a holder in due course.

In addition to this, since the plaintiff has been found to be a holder of the promissory note for consideration, he would be entitled to recover the amount either from his transferor or any prior party, which would in this case include the defendant.

For the foregoing reasons, the revision fails and is dismissed with costs.

S. V. V. —— *Petition dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE STODART.

Ponnambala Mudali .. *Petitioner* (Petitioner).*

Ponnambala Mudali, *In re.*

*Civil Procedure Code (V of 1908), O. 21, r. 86—Deposit of whole purchase money ordered to be forfeited—Order wrong—Initial deposit to be forfeited—Procedure of.*

Under O. 21, r. 86 of the Civil Procedure Code only the initial deposit of 25 per cent. could in any case be forfeited. But along with the balance of

1. (1919) 2 K.B. 544.

* C. R. P. No. 1577 of 1937. 22nd April, 1938.

Ponnambala Mudali, *In re.*

purchase money should also be deposited the cost of the general stamp to be affixed to the sale certificate. Otherwise the Court has jurisdiction to order the forfeiture of the initial deposit.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsiff of Tindivanam dated 17th May, 1937 and made in M. P. No. 447 of 1937 in S. C. S. No. 1215 of 1935 on the file of the Court of the District Munsiff of Tiruvannamalai.

*T. E. Ramabhadrachariar* and *K. Rama Aiyangar* for Petitioner.

*The Government Pleader* on behalf of Government.

The Court delivered the following

JUDGMENT.— Petitioner bought some property in court-auction.

The whole of the purchase money paid by him was forfeited under r. 86 of O. 21, Civil Procedure Code. He now asks me to revise the order of forfeiture. Only the initial deposit of 25per cent. could in any case be forfeited. To that extent the District Munsiff's order is wrong. As for the initial deposit the District Munsiff certainly had discretion to order its forfeiture since the party had not, along with the balance of the purchase money deposited, the cost of the general stamp to be affixed to the sale certificate. But having regard to the fact that the new rule requiring payment of the cost of the stamp was fairly recent having been in force for only six months and also to the fact that the clerk of the Court who issued the Chellan should have drawn the petitioner's attention to the new rule and asked him to pay the small sum necessary to defray the cost of the stamp, I think the Court need not have ordered forfeiture of the initial deposit and though this is a case in which this Court would not ordinarily interfere I think it is right that the District Munsiff's order be set aside and that the whole sum including the 25 per cent. initial deposit be returned to the petitioner subject to such deductions as are prescribed.

Both parties do bear their own costs of this petition.

K. C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The District Magistrate of Kurnool .. *Referring Officer**

*v.*

Chandra Thirumal Reddy and others .. *Respondents (Accused in P. R. No. 1 of 1938, on the file of the Taluk Magistrate of Koilkuntla).*

District Magistrate of Kurnool *v.* Chandra Thirumal Reddy.

*Criminal Procedure Code (V of 1898), S. 528—Application under—Power of Magistrate to award costs.*

A Magistrate has no power to award costs in applications under S. 528, Criminal Procedure Code.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the District Magistrate of Kurnool in his letter, dated 12th June, 1938—R. C. No. M-1-1731 of 1938.

*The Public Prosecutor* on behalf of the Crown.

Accused not represented.

The Court made the following

ORDER.—The view of the Joint Magistrate is untenable and he has no power to award costs in applications under S. 528 of the Code of Criminal Procedure.

The reference is therefore accepted and the order as to costs is set aside. The amount if levied will be refunded.

B. V. V. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Laldas Lakshmi Das and another .. *Appellants†* *(Defendants)*

*v.*

J. D. Italia .. *Respondent* *(Plaintiff).*

*Agreement—Provision for private arbitration—Breach of agreement—Allegation of fraud—Application by injured party to Court to decide th*

* Cr. R. C. No. 428 of 1938. (Case Refd. No. 13 of 1938). 12th July, 1938.

† O. S. A. No. 31 of 1938. 6th May, 1938.

Laldas Lakshmi Das *v.* Italia.

*issues—Discretion of Court to stay private arbitration and decide in open Court matters involving serious charges of fraud.*

Where by the terms of the respondent's employment entered in a written agreement executed in Madras it was provided that in the event of any dispute arising under the agreement the dispute should be referred to arbitration in Bombay, and the appellant subsequently invoked the arbitration clause by giving notice to the respondent to that effect and even went further by framing charges of fraud against him and the respondent naturally contended that the issue between the parties should be decided in open Court and not in private arbitration and demanded stay of arbitration, and the Court which was petitioned ordered accordingly,

*Held*, that the Judge who heard the application exercised the discretion vested in him properly, since the questions in issue involved serious allegations of fraud and the respondent had a right to ask the Court that matters affecting his honesty should be decreed in open Court.

*Russell* v. *Russell*, (1880) 14 Ch. D. 471, followed.

On appeal from the order of the Hon'ble Mr. Justice Gentle dated 18th March, 1938 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in application No. 348 of 1938 in C. S. No. 4 of 1938.

*V. T. Rangaswami Aiyangar* and *K. Ramaswami Aiyangar* for Appellants.

*N. T. Shamanna* for Respondent.

The judgment of the Court was delivered by

Leach, C. J.

*The Chief Justice.*—The appellants are a firm of merchants carrying on business in Madras. For the period from the 1st August, 1936 to the 31st July, 1937, the respondent acted as their "guarantee" broker in the purchase of groundnuts. The terms of the respondent's employment were embodied in a written agreement, which provided that in the event of any dispute arising under the agreement the dispute should be referred to arbitration in Bombay. The respondent was to be responsible for the weight, quality and refraction of the purchases made by him in the moffasil and the appellants were to be at liberty to refuse any lot of inferior quality despatched to them by him. By refraction was meant allowance for dirt and damaged and half-damaged seeds. The arrangement between the parties was that the respondent should issue certificates of quality before despatching goods to the appellants in Madras. On arrival of the goods the appellants had them examined and if it was found that they were not of the quality stated by the respondent he was responsible for the difference in value. After the agreement had been concluded differences arose with regard to the amount claimed by the respondent as his commission and the

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appellants accused the respondent of having fabricated documents with reference to the quality of goods supplied by him. On the 29th November, 1937, the appellants gave notice to the respondent of their intention to invoke the arbitration clause of the agreement, and on the 17th December their advocate wrote to the respondent's solicitor informing him that they had nominated a gentleman residing in Bombay as their arbitrator and calling upon him to nominate his arbitrator within seven days. On receipt of this letter the respondent filed the suit out of which this appeal arises. His reason for doing so is that as there have been grave charges of fraud made against him—in fact the appellants went to the length of filing a criminal complaint against him—the questions of issue between him and the appellants should be decided in open Court and not in private arbitration proceedings. Accordingly he applied to the Court for an order staying the arbitration proceedings. On the other hand, the appellants applied for an order staying the suit pending the decision of the arbitration. These applications came before Gentle, J., on the 18th March, 1938. The learned Judge decided that this was a case which should be tried in open Court and he directed the arbitration proceedings to be stayed. The appeal is from that order.

The learned Advocate for the appellants properly concedes that the Court has discretion to stay the arbitration proceedings, but he says that this is not a case in which this discretion should be exercised in favour of the respondent's application. The sole question we have got to decide is whether the learned Judge exercised the discretion vested in him properly. We have no hesitation in holding that the discretion which he did exercise was exercised wisely. The questions at issue between the appellants and the respondent involve serious allegations of fraud, and the respondent has the right to ask the Court that matters which affect his honesty and integrity should be decided in open Court. In this connection I will quote a passage from the judgment of Jessel, M.R., in *Russell* v. *Russell*[1] to be found at page 476 of the report:—

"Though I quite agree it is within the discretion of the Court to say, where one of the two partners desires it, that a dispute shall not be referred to arbitration, yet I must consider for a moment which of the two partners does desire to exclude arbitration. Does the party charging the fraud desire

1. (1880) 14 Ch. D. 471.

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it, or the party charged with the fraud desire it? Where the party charged with the fraud desires it, I can perfectly understand the Court saying, 'I will not refer your character against your will to a private arbitrator'. It seems to me in that case it is almost a matter of course to refuse the reference."

These observations have full application here. There is no substance in this appeal and it must be dismissed with costs which will be taxed in the ordinary way.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE STODART.

S. Rm. M. Rm. Ramanathan Chettiar late a minor by guardian Muthayi Achi *alias* Chittal Achi declared a major—*vide* Order dated 26th April, 1932 on C.M.P. No. 2397 of 1932 and another .. *Appellants** (*Defendants 1 and 5*)

*v.*

His Highness Maharana Shri Dowlat Singjee, Thakore Sahib of Limbdi represented by his agent Mr. V. C. Gopalaratnam, Advocate, High Court, Madras and others .. *Respondents* (*Plaintiff and Defendants Nos. 3 and 4*).

S.Rm.M.Rm Ramanathan Chettiar v. Thakore Sahib of Limbdi.

*Mortgage—Equitable mortgage by deposit of title-deeds—Memorandum referring to prior agreement—Whether requires registration—Sub-mortgage of equitable mortgagee's rights—Permissibility—Deposit of some title-deeds—Whether sufficient to create equitable mortgage—Non-registration of compulsorily registrable document—Reference to prove collateral fact—Registration Act (XVI of 1908), Ss. 17 and 49—Limitation Act (IX of 1908), Sch. I, Art. 132—Transfer of Property Act (IV of 1882), Ss. 58 and 59—Practice—Relief not asked for in plaint—Power of Court to grant.*

In deciding the question whether a memorandum relating to a deposit of title-deeds is within S. 17 of the Registration Act the Court should consider whether the memorandum constitutes the agreement with reference to the deposit between the parties or if it is simply evidence of a fact from which the mortgage can be inferred. Where a memorandum provided as follows: "We have pledged with you as equitable mortgage as agreed in our writing with you. . . ." and the agreement of deposit of the title-deeds was shown to be of earlier date.

*Held*, that the memorandum was merely evidentiary of a completed mortgage by deposit of title-deeds and that it did not require registration.

* Appeal No. 104 of 1932. 1st February, 1938.

S.Rm.M.Rm. Ramanathan Chettiar *v.* Thakore Sahib of Limbdi.

*Shaw* v. *Foster,* (1872) 5 H.L. 321; *Kedarnath Dutt* v. *Shamloll Khettry,* (1873) 11 B. L. R. (O. C. J.) 405; *Pranjivandas Jagjivandas Mehta* v. *Chan Ma Phee,* (1916) 31 M.L.J. 155: L.R. 43 I.A. 122: I.L.R. 43 Cal. 895 (P.C.); *Subramanian* v. *Lutchman,* (1922) 44 M.L.J. 602: L.R. 50 I.A. 77: I.L.R. 50 Cal. 338 (P. C.); *Krishnayya* v. *Ponnuswami Aiyar,* (1923) 46 M.L.J. 295: I.L.R. 47 Mad. 398 and *Sundarachariar* v. *Narayana Aiyar,* (1931) 60 M.L.J. 506: L.R. 58 I.A. 68: I.L.R. 54 Mad. 257 (P.C.), referred to.

The mortgagee's interest created by deposit of title-deeds can be sub-mortgaged by depositing the very title-deeds the deposit of which with him created his interest in the property.

Fisher on Mortgages, 6th Edition, p. 18, Halsbury's Laws of England, Vol. II, p. 82 and *Gurnam Kaur* v. *R.K. Banerjee,* (1936) I.L.R. 14 Rang. 522, referred to.

A deposit of some of the title-deeds relating to a property is enough to create a valid equitable mortgage over the entire property if it was the intention of the parties that the mortgage should be in respect of the entire property to which the documents of title relate.

*Wetherell,* Ex parte, (1805) 32 E. R. 1141; *Lacon* v. *Allen,* (1856) 61 E. R. 1024; *Bhupendra Nath Basu* v. *Mt. Wajihunnissa Begum,* (1917) 2 Pat.L.J. 293 and *V.E.A.R.M. Chettyar Firm* v. *A.K.R.M.M.K. Chettyar Firm,* (1928) I.L.R. 7 Rang. 28, referred to.

A compulsorily registrable document, such as a document creating a mortgage by deposit of title-deeds, though unregistered and inadmissible as evidence of a transaction affecting the immovable property, can be admitted as evidence of a collateral fact or for any collateral purpose; thus the acknowledgment of liability contained therein can be relied on to show that limitation was thereby saved.

*Varada Pillai* v. *Jeevarathnammal,* (1919) 38 M.L.J. 313: L.R. 46 I.A. 285: I.L.R. 43 Mad. 244 (P. C.); *Venkataratnam* v. *Subba Rao,* (1926) 51 M.L.J. 410: I.L.R. 49 Mad. 738 and *Davindar Singh* v. *Mt. Lachhmi Devi,* A.I.R. 1930 Lah. 985, referred to.

The Court can grant a relief which is not prayed for in the plaint but which is not inconsistent with the facts of the case, provided the defendant is not placed at any disadvantage in the course of the trial by reason of the defect in the pleadings.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in O.S. No. 1 of 1929.

*The Advocate-General (Sir A. Krishnaswami Aiyar), K. Umamaheswaran, M. Subbaroya Aiyar* and *T. S. Krishnamurthy Aiyar* for Appellants.

*V. V. Srinivasa Aiyangar* and *C. V. Athmanathan* for 1st Respondent.

The judgment of the Court was delivered by

Madhavan Nair, J.

*Madhavan Nair, J.*—This is an appeal by defendants 1 and 5 against the decree of the Subordinate Judge of Trichinopoly in O.S. No. 1 of 1929.

The plaintiff in the suit is H.H. The Maharana Thakore Sahib of Limbdi. In the appeal the question is raised as to whether the plaintiff is entitled to a sale of the suit properties

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in enforcement of an alleged sub-mortgage of an equitable mortgage by deposit of title-deeds, granted to him by the third defendant of the suit properties. These, called the Vadavoor lands, are situate in the Trichinopoly District. These and various other properties situated in Madras and Bangalore belonged to Messrs. Tawker & Sons, a well-known firm of jewellers in Madras. They mortgaged the title-deeds of all these properties to Messrs. Nagarseth & Sons, the third defendant in the present suit, in 1916 for a sum of over 18 lakhs of rupees borrowed from time to time for carrying on their family business. Exs. M, M-1 and M-2 are the documents which were deposited as the title-deeds of the properties. Of these Ex. M is only a judgment and, strictly speaking, is not a title-deed. In August, 1922, Nagarseth instituted C.S. No. 3772 of 1922 in the Bombay High Court (Ex. D-4 being the plaint) against Messrs. Tawker & Sons (who were defendants 1, 2 and 3), for the enforcement of the equitable mortgage. This suit was not finally decreed till 1928. Meanwhile, on the 17th January, 1925, Messrs. Tawker & Sons were adjudicated insolvents and the Official Assignee of Madras was made a party in that suit as the fourth defendant. In the course of the suit the present plaintiff was also made a party as the fifth defendant at the instance of the plaintiffs in that suit (the present third defendant)—*see* Ex. J dated 17th April, 1925—on the ground that they had made an "equitable sub-mortgage" in his favour of the title-deeds of the immovable properties situate at Madras, Trichinopoly and Bangalore mortgaged to them. He then lodged what is called a counter-claim against Nagarseth & Sons for Rs. 18,23,517-6-3 which he averred was secured by deposit with him of the title-deeds mentioned in the plaint and he prayed that the properties covered by the title-deeds be sold and the proceeds applied in satisfaction of his debt. *See* Ex. N. It may be mentioned here that the third defendant used to obtain moneys from the present plaintiff for lending them to the Tawkers. The present defendants 1 and 2, the latter representing the P.M.A. Estate as receivers, claiming right to the Vadavoor properties involved in the present suit as purchasers of the same in the course of execution proceedings in C.S. No. 196 of 1921 on the file of the High Court of Judicature at Madras, applied on the 12th April, 1928, to be made parties in C.S. No. 3772 of 1922. Thereupon the present plaintiff

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and the third defendant (fifth defendant and plaintiffs in the Bombay suit) agreed to omit from that suit their claim to the Vadavoor lands, the present suit properties, and to bring a suit for the same within three months in Madras. In the circumstances, the learned Judge declared that he made no order on the application (*see* Ex. O, dated the 18th June, 1928); and defendants 1 and 2 were not made parties to the suit. The learned Judge stated in Ex. O that the plaintiff and the fifth defendant (that is, the Nagarseths and the present plaintiff) agreed to omit from their suit their claim as regards the Vadavoor village and to file a suit within three months '*inter alia* against the applicants) that is, defendants 1 and 2) to enforce their claim against the said Vadavoor village in the Court of local jurisdiction'. In July, 1926, shortly after his appearance in the suit, an interim decree was passed by consent as between the Nagarseths and the present plaintiff. That decree (*see* Ex. L) directed the Nagarseths to pay him the sum of Rs. 19,26,232. No relief was granted with respect to the sub-mortgage, but it was decalred that:

"This decree is without prejudice to the rights of the 5th defendant (the present plaintiff) to take proceedings on the equitable mortgage of the properties in the Madras Presidency and to prove his claim in the insolvency against the estate of the first, 2nd and 3rd defendants (the Tawkers)."

Ex. L-1 is the copy of the amended decree passed in the Bombay suit on the 5th November, 1928 and in it the direction contained in Ex. O was repeated. It declared that for the amount due by Tawker & Sons to the Nagarseths, namely, Rs. 15,37,243, the Nagarseths were entitled to an equitable mortgage and a first charge on the lands comprised in the title-deeds with the exception of the lands in the Vadavoor village (the present suit properties) and it was declared that by virtue of the deposit of the title-deeds by the Nagarseths with the 5th defendant, the Rajah of Limbdi, the properties were validly mortgaged to the latter for the Nagarseths' debt to him which had been already fixed at Rs. 19,26,232 by the previous consent decree; and lastly it was declared that in default of payment by the Nagarseths to the Rajah he would be entitled to a decree absolute for sale but without prejudice to his own and Nagarseths' rights:

"To institute a suit (that is, the right of the plaintiffs and the 5th defendant) against S. Rm. M. Rm. Ramanathan Chettiar and Messrs. Fraser & Ross, Receivers of the P. M. A. Estate of Madras (the present 1st and 2nd

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defendants) to enforce their respective rights under the said mortgage as provided by the previous order of the 18th June." (Ex. O.)

Ten days after the decree in the Bombay High Court, the present plaintiff made an application in this Court sitting in insolvency for permission to buy all the mortgaged properties at a valuation of ten lakhs of rupees, agreeing to give credit for this sum in the mortgage decree and declaring his willingness to rank as an unsecured creditor for the balance of the amount. (*See* Ex. VI.) The Court thereupon authorised the Official Assignee who was seized of the estate of Messrs. Tawker, to execute a sale deed in favour of the plaintiff conveying all the properties. (*See* Ex. P dated 19th November, 1928.) The conveyance by the Official Assignee to the plaintiff of the entire mortgage properties including the present suit properties was made on the 17th April, 1929, under Exhibit Q.

In pursuance of his undertaking, *see* Ex. (O) the suit out of which this appeal arises was instituted by the plaintiff on the 8th December, 1928, for a declaration that he is the absolute owner of the plaint mentioned properties and that he is entitled to be in possession thereof. (*See* paragraphs 15 and 18 (*a*) of the plaint.) In cl. (*d*) of paragraph 18 he prayed that if the Court should decide that defendants 1 and 2 had any right to redeem or otherwise the suit properties in respect of the mortgage in favour of the 3rd defendant and the plaintiff, it may determine and give proper directions "in respect of the working out of the relative rights of the respective parties."

As will be presently mentioned, the plaint was allowed to be amended by order of the Court dated 12th November, 1930 (I. A. No. 1215 of 1930).

We will now briefly refer to the rights alleged by the defendants 1 and 5 to the suit properties and their contentions with regard to the rights claimed by the plaintiff. Records show that the 1st defendant and P. M. A. (now represented by the 2nd defendant) had obtained a decree (preliminary decree dated 26th April, 1922, decree absolute for sale dated 18th July, 1922) in C. S. No. 196 of 1921 against Messrs. Tawker & Sons for moneys advanced to them on a mortgage of certain properties not involved in the present suit and an order for sale had been made by the Court. During the course of execution proceedings the Official Assignee of Madras was made a party on the 16th February, 1925. As Tawker & Sons were not able

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to pay the amount in time they applied for postponement of sale and obtained an extension of time for payment by giving by way of additional security the present suit properties and *charging* the same with the payment of the amount due under the decree. The Court extended the time making the present suit properties also liable for the decree amount if it was not paid in time. (*See* Ex. XIX dated 23rd July, 1923.) As the amount was not paid the suit properties were auctioned and purchased by the 1st defendant and P. M. A. in 1925. The sale was confirmed (*see* Ex. XX dated 31st March, 1926) and a sale certificate was issued in their favour on the 12th May, 1926. (Ex. XX-*a*.) On the 12th April, 1926, as already stated, they applied to be brought on record in the Bombay suit. It may be mentioned here that in O.S. No. 762 of 1926, the partition suit in the P.M.A. family, Messrs. Fraser & Ross, the present 2nd defendant, were appointed receivers and hence they have been made a party to the present suit. The 5th defendant having become entitled by purchase to the interest of the P. M. A. estate in the suit properties on 23rd January, 1930, was also made a party to the suit on 25th September, 1930. The 4th defendant to the suit is the Official Assignee of Madras.

In their written statements defendants 1 and 5, claiming right to the properties in the manner indicated above denied the equitable mortgage and the sub-mortgage alleged by the plaintiff and their validity and contended that these were not binding on them. They also contended that the alleged mortgages even if true and valid were not binding on the *entire* extent of the suit properties. It was also contended by them that the suit was not maintainable and was barred by limitation and also under O. 2, r. 2, Civil Procedure Code. The other contentions raised by them are not material for this appeal.

As many as 19 issues were raised in the case but in the appeal the appellants question the findings of the lower Court only with respect to six issues, these being issues 1, 2, 8, 9, 10 and 11. Generally stated, issues 6, 7 and 17 raised the question whether the sale to the plaintiff of the suit properties by the Official Assignee of Madras the 4th defendant, on which a decree for possession is asked for by the plaintiff, (*see* paragraph 15 of the plaint) is valid and binding and to

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what extent it will prevail against the sale in favour of defendants 1 and 2. On this point the lower Court recorded a finding against the plaintiff holding that the Official Assignee had no right to any of the plaint properties on the date of the sale by him and though he sold all of them to the plaintiff, the plaintiff can have no title to them. This finding has not been appealed against by the respondent and his learned Counsel has not pressed that claim in this appeal; and so, the only claim of the plaintiff to the suit properties that we are called upon to consider is that which is based on the alleged sub-mortgage of the equitable mortgage in his favour. This forms the subject-matter of issue 8. Issues 1, 2, 8, 9, 10 and 11 referred to above are as follows:—

*Issue* 1: "Whether the plaint mentioned equitable mortgage in favour of 3rd defendant is true and valid in respect of the plaint mentioned properties and is binding on defendants 1 and 2 and 5 to any and to what extent."

*Issue* 2: "Whether the plaint mentioned in sub-mortgage in favour of plaintiff is true and valid."

*Issue* 8: "If not (if the plaintiff's sale referred to in issue 7 is not valid), is the plaintiff entitled to enforce his claim, if any, under the plaint mentioned equitable mortgage to any and what extent against the plaint mentioned properties in the hands of defendants 1 and 2?"

*Issue* 9: "Is the claim set up in issue 8 in time?"

*Issue* 10: "Is the claim set up in suit barred by O. 2, r. 2, C. P. C., by reason of the filing of C. S. No. 3772 of 1922 of the Bombay High Court?"

*Issue* 11: "Is the suit as framed not maintainable?"

On the above issues the learned Subordinate Judge recorded findings in favour of the plaintiff and passed in his favour the decree now appealed against by defendants 1 and 5. Under this decree the plaintiff was held entitled to get a sum of Rs. 1,25,062-4-6 for principal and interest up to the 30th April, 1932 and costs and it was declared that if the amount was not paid in the time fixed by Court the suit properties should be sold.

The issues were framed on 8th November, 1929, but before the case was actually taken up for trial the plaintiff filed in August 1930 I.A. No. 1215 of 1930 for amending his plaint. In paragraph 15 of the plaint the plaintiff stated that:

"He is entitled to a declaration that he is the absolute owner of the plaint schedule properties and is also entitled to be put in possession thereof"

the right being based on the purchase of the property from the 4th defendant the Official Assignee. Accordingly the 1st relief claimed in his plaint (*see* paragraph 18-A) is for

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a declaration that he is the full owner of the plaint-schedule lands. The equitable mortgage in favour of the 3rd defendant by Tawker & Sons and of the sub-mortgage by the latter in his favour were mentioned by the plaintiff in paragraph 3 of the plaint. In paragraph 13 he asserted his own rights as well as the rights of the 3rd defendant to the suit properties based on their respective mortgages as against the claim of the 1st and the 2nd defendants, and in clause (*d*) of paragraph 18 he prayed the Court to give directions in respect of the working out of the relative rights of the respective parties in case the Court should decide that defendants 1 and 2 had as charge-holders "any right to redeem or otherwise in respect of the mortgage in favour of the 3rd defendant and the plaintiff." In the amendment application the plaintiff stated that he should be given relief with respect to the suit properties as the holder of the sub-mortgage which he had alleged the 3rd defendant had given him of the suit properties. He prayed for permission to add a new paragraph to the plaint as paragraph 15-*a* and to amend cl. (*d*) of paragraph 18 by inserting in it suitable words to describe clearly the nature of the relief claimed by him. The new paragraph and the words sought to be introduced in the relief portion are as follows:—

*Para.* 15-A: "In case it be held that the sale by the 4th defendant to the plaintiff does not pass any title the plaintiff is entitled to the mortgage decree for sale of the undermentioned properties for realisation of a sum of one lakh of rupees, being a proportionate part of the mortgage amount due on the under-mentioned properties."

In cl. (*d*) of paragraph 18 he sought to add after the words "in favour of the 3rd defendant and the plaintiff" and the words 'such rights, etc.,' the following:

"The undermentioned properties may be ordered to be sold for realisation of a lakh of rupees out of the mortgage money due on the undermentioned properties together with subsequent interest and costs and such right."

The amendment was opposed but it was allowed by the learned Judge. A petition to revise this order of amendment filed by the present appellants (C. R. P. No. 163 of 1931) was dismissed by the High Court on the 9th February, 1931, with the remark "I see no reason to interfere." The question whether this amendment was proper will be considered by us in dealing with the question whether the suit is maintainable.

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We will now proceed to consider the various questions in order. The first question is whether the plaint mentioned equitable mortgage in favour of the 3rd defendant is true and valid; or in other words, whether there is any equitable mortgage capable of legal proof having regard to the fact that there was a written memorandum (to which reference will be made presently) relating to the matter which was not registered under the Registration Act.

Evidence shows that Tawker & sons had pledged their jewels with various firms and persons. In order to redeem them they entered into an agreement with Nagarseth & Sons, the 3rd defendant, and obtained advances of moneys from time to time. As security for the advances it was agreed that Nagarseth & Sons were to have pledge of the jewels to be redeemed and that immovable properties should also be given as collateral security by way of deposit of title-deeds. On this understanding, which was oral, various sums of money were advanced from the middle of June, 1916, to the Tawkers by the Nagarseths. Ex. XVIII is a letter written by the Tawkers to Nagarseth & Sons on the 17th June, 1916, in which after acknowledging that they have received Rs. 75,000, they agreed to deposit title-deeds relating to immovable properties. Ex. XVIII-A shows that on the 19th June, a sum of Rs. 80,000 was advanced and the Tawkers agreed to give collateral security by deposit of title-deeds. Ex. XVII, a letter dated the 1st July, 1916, refers to these and other payments of Rs. 80,000 (29th June, 1916) and Rs. 5,400 (1st July, 1916) all of which were made between the 17th June, and the 1st July, 1916. On or after 9th September, 1916, a written agreement was executed by Nagarseth & Sons and Tawker & Sons embodying the terms of the oral agreement of June, 1916. (The document bears no date but the stamp on which it is engrossed bears the date 9th September, 1916.) It makes reference to the previous loans and to the deposit of title-deeds as security and states that these loans must be considered to have been made under the terms of this agreement and fixed 11 lakhs of rupees as the limit of the advance. The plaintiff's case is that in pursuance of the oral agreement between the parties in June, these moneys were advanced from time to time and the title-deeds were deposited subsequently and that Ex. H is a subsequent formal document evidencing

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the original understanding. The first deposit of title-deeds was made in June, 1916 and the deposit was completed by the end of June—prior to the 1st July, 1916. The agreement and the deposit of title-deeds before 1st July, 1916, are proved by the evidence of P. Ws. 3, 4 and 5 particularly the evidence of P. Ws. 4 and 5 whose testimony on these points has been accepted by the lower Court for cogent reasons. We have been taken through their evidence and we see no reason to reject the same. P. W. 3 is the broker who negotiated the loan. P. W. 4 was the manager of the third defendant's firm. He is an advocate of the Bombay High Court, a member of the Bombay Municipal Corporation and a member of its Standing Committee and is also the trustee of the City and Bombay Improvement Trust. P. W. 5 is Kasthuribhai Nagarseth, a partner. He states that the agreement of advance was originally oral, that it was subsequently reduced to writing, that the title-deeds were given to him in the last week of June, 1916, and that he handed them to his manager P. W. 4 to put them into the safe. The argument of the appellant on the point is not so much that the evidence of these witnesses should not be believed as that that evidence being oral is inadmissible, having regard to the unregistered written memorandum executed by the parties which for want of registration cannot be accepted in evidence under the Registration Act. The decree in C. S. No. 3772 of 1922 on the file of the Bombay High Court was obtained by the third defendant against Tawker & Sons on the basis of the equitable mortgage. (*See* Ex. L-1.) This no doubt is not evidence against defendants 1, 2 and 5 who were not parties to that suit, but it is an instance in which the right now claimed and set up was recognised by the Court. Apart from the oral evidence, the most direct evidence to prove the equitable mortgage is Ex. D-14.

Ex. D-14 is a memorandum dated 1st July, 1916, given by the Tawkers to Nagarseth & Sons. It runs as follows:—

"We have pledged with you as equitable mortgage as agreed in our writing with you:

(1) Vadavoor village properties, papers worth Rs. 3,00,000.
(2) Pallikarney property, papers worth Rs. 1,00,000.
(3) Bangalore bungalow worth Rs. 45,000.

(Sd.) T. R. Tawker & Sons.
1st July, 1916.

To
Messrs. Nagarseth & Sons, Bombay."

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It is signed 'T. R. Tawker & Sons'. The first item of property referred to in it is the present suit property. Exs. M, M-1 and M-2 are the three title-deeds alleged to have been deposited with Nagarseth & Sons in respect of these properties.

Under S. 58 (*f*) of the Transfer of Property Act, a transaction called a mortgage by deposit of title-deeds can be created by a person by delivering to a creditor or his agent documents of title to immovable property, with intent to create a security thereon. S. 59 provides that:

"Where the principal money secured is one hundred rupees, or upwards, a mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

The equitable mortgage in the present case took place in Bombay and does not require registration under the provisions of the Transfer of Property Act.

Under S. 17 of the Registration Act, registration is required of (*a*) instruments of gift of immovable property; (*b*) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or immovable property. By S. 49 of the Act it is provided that:

"No document required by S. 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall, (*a*) affect any immovable property comprised therein, or (*b*) confer any power to adopt, or (*c*) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

The learned Counsel for the appellant argues that in the present case the memorandum Ex. D-14, is in itself the equitable mortgage, that, having regard to Ss. 17 and 49 of the Registration Act it is void, inasmuch as it was effected by an instrument which was admittedly not registered, and that oral evidence is not admissible as the memorandum constituted the contract between the parties (S. 91 of the Evidence Act). On the other hand the respondent's learned Counsel argues that the act of deposit which constitutes the equitable mortgage was not effected by Ex. D-14, that it is merely a memorandum of the completed transaction of mortgage, that it does not therefore require registration and that in the circumstances oral evidence is admissible to prove the deposit.

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The question we have to consider is whether Ex. D-14 having regard to its construction and the circumstances in which it came into existence, is an instrument, within the meaning of S. 17 of the Registration Act, which purports or operates to create or declare, whether in present or in future, any right, title and interest, whether vested or contingent, in the suit properties, which are admittedly over the value of Rs. 100.

Various cases were brought to our notice to explain the principles that should be applied in deciding this question. We will refer only to a few of the more important of these decisions. In the leading case of *Shaw* v. *Foster*[1], Lord Cairns observed:

" Although it is a well-established rule of equity that a deposit of a document of title without more, without writing or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply, when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed."

In *Kedarnath Dutt* v. *Shamloll Khettry*[2], Couch, C. J., said:

" The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository, and the appropriate evidence, of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within S. 17 of the Registration Act."

In *Pranjivandas Jagjivandas Mehta* v. *Chan Ma Phee*[3], the Privy Council laid down the law as follows:

" The law upon this subject is beyond any doubt: (1) Where titles of property are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where, however, titles are handed over accompanied by a bargain, that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of the security."

Applying the principles laid down in these cases, Lord

1. (1872) 5 H.L. 321 at 340.
2. (1873) 11 B.L.R. (O.C.J.) 405.
3. (1916) 31 M.L.J. 155: L.R. 43 I.A. 122: I.L.R. 43 Cal. 895 at 900 (P.C.).

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Carson said in *Subramanian* v. *Lutchman*[1], the test is:

" Did the document constitute the bargain between the parties, or was it merely the record of an already completed transaction?"

As observed by Sir Walter Schewabe, C.J. (with whom Ramesam, J., concurred) in *Krishnayya* v. *Ponnuswami Aiyar*[2]:

" If it constitutes the bargain, then, on the well-known rule that, where contracts are reduced to writing, you cannot give parol evidence of their contents. In order to prove the mortgage, the plaintiff would have to attempt to put in as evidence the document and, if it is a mortgage document, he would be precluded from so doing by the Transfer of Property Act and under the Registration Act. The question in each case, which it is difficult to decide, is whether or not the document does constitute the bargain, or is merely a record of a completed transaction."

In affirming the judgment of this Court, the Privy Council in *Sundarachariar* v. *Narayana Aiyar*[3] referred to *Subramanian* v. *Lutchman*[1] and observed as follows:

" While their Lordships do not think that the language of Lord Carson conveys or was intended to convey the meaning that no memorandum relating to a deposit of title-deeds can be within S. 17 of the Registration Act, unless it embodies all the particulars of the transaction of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section *unless on its face it embodies such terms* and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that, so far as the deposit is concerned, it constitutes the agreement between the parties." (The Italics are ours.)

Shortly stated, the question we have to consider is, does Ex. D-14 constitute the agreement with respect to the deposit between the parties, or is it simply evidence of a fact from which the mortgage could be inferred? The document states that the executants have pledged as agreed upon in their writings, papers relating to the properties mentioned in it. The question arises, when was the pledge made, was it contemporaneous with the execution of the document or was it before or after. It appears to us having regard to the language used, that the pledge must have been made at a date anterior to the execution of the document; in other words, the deposit as agreed to must have been made before the document Ex. D-14 was executed; otherwise, the expression used would not have been "we have pledged". The agreement of deposit must have been therefore a prior one. In *Krishnayya* v. *Ponnuswami Aiyar*[2], the learned Judges pointed out that

1. (1922) 44 M.L.J. 602: L.R. 50 I.A. 77: I.L.R. 50 Cal. 338 (P.C.).
2. (1923) 46 M.L.J. 295: I.L.R. 47 Mad. 398.
3. (1931) 60 M.L.J. 506: L.R. 58 I.A. 68: I.L.R. 54 Mad. 257 (P.C.).

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when one looks at the cases the easiest guide in determining the question whether the document constitutes the bargain or not, is the question whether or not money was paid before the making of the document, because if the money is handed over contemporaneously with or in exchange for the document or after the document it will be very difficult to establish that the document did not contain the terms of the bargain between the parties. If we apply this test to the present case we find that the understanding was that advances were to be made from time to time and the moneys were as a matter of fact advanced before Ex. D-14 was executed. The contract therefore must have been before Ex. D-14 and the document can only be the record of a transaction that was completed sometime before in the past. Except the fact that a pledge has been made, it is clear that the document does not on its face embody, to use the language of their Lordships of the Privy Council, "the particulars of the transaction of which the deposit forms a part", or in other words, the contract with respect to the deposit. It is argued that the statement contained in the document "as agreed upon in the writings with you" amplifies its scope and thereby introduces into the document the terms of the bargain between the parties. We cannot accept this argument. The writings referred to are Exs. XVIII and XVIII-*a*. Shortly stated, in these documents already referred to, the executants merely state that with respect to the moneys borrowed, Rs. 75,000 under Ex. XVIII on the strength of certain hundies and Rs. 80,000 under Ex. XVIII-*a* on a promissory note, they agree to deposit title-deeds with the lenders creating equitable mortgages and Ex. D-14 says that in pursuance of this agreement to deposit the title-deeds (that is, as agreed to in the writings) the deposit has already been made of the title-deeds of properties mentioned in it. The references to these documents does not thereby introduce into Ex. D-14 and the terms of the bargain between the parties. These words "as agreed upon in the writings" can only mean this and nothing more, namely:

" We have agreed to deposit the title-deeds and we have deposited the following title-deeds as agreed in the writings referred to."

In our opinion the words are not adequate enough to incorporate the whole of those documents in this one document. Even assuming that everything stated in those documents is

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incorporated in Ex. D-4, still the document says that the deposit has already been made; about that there can be no doubt. If so, the equitable mortgage was completed before Ex. D-14 was written and is a past transaction. Ex. D-14 is, therefore, only a memorandum of a completed transaction. In whichever manner we examine the document, it seems to us that it refers to a past act of deposit and the equitable mortgage thereby created was complete without this memorandum.

For helping us in construing the expression "we have pledged" appearing in Ex. D-14 our attention was invited to numerous cases of equitable mortgages wherein Courts were called upon to construe expressions of similar import like the one we are considering. These are *Kedarnath Dutt* v. *Shamloll Khettry*[1], *Oo Noung* v. *Moung Htoon Oo*[2], *Muthiah Chetti* v. *Kothandaramaswami Chetti*[3], *Vadamalai Pillai* v. *Subramania Chettiar*[4], *Subramanian* v. *Lutchman*[5], *Krishnayya* v. *Ponnuswami Aiyar*[6], *Bhuban Mohan* v. *Co-operative Bank*[7], *Ramakrishna Doss* v. *Kesavalu Chetti*[8], *Kshetra Nath* v. *Harasukdas*[9], *Ralli Brothers* v. *Punjab National Bank*[10], *Jagannadham Pillai* v. *The Official Assignee of Madras*[11], *Sundaracharìar* v. *Narayana Aiyar*[12], *Surendramohan Ray Chaudhuri* v. *Mahendranath Banerji*[13], *Kalidas Chandra* v. *Jugalkishore Datta*[14], *Krishnaswami Aiyangar* v. *Gouriamma*[15] and *Moti Ram* v. *Bharat National Bank*[16]. A few of these containing general principles have already been noticed (*Kedarnath Dutt* v. *Shamloll Khettry*[1], *Subramanian* v. *Lutchman*[5], *Krishnayya* v. *Ponnuswami Aiyar*[6] and *Sundaracharìar* v. *Narayana Aiyar*[12]) the rest we have read; but we do not think any useful purpose will be served by discussing them as the decision in each case must necessarily depend upon the construction of the terms contained in the memorandum dealt with in that case in the light of its special circumstances.

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1. (1873) 11 B.L.R. (O.C.J.) 405.
2. (1886) I.L.R. 13 Cal. 322.
3. (1916) 31 M.L.J. 347.
4. (1922) 16 L.W. 936.
5. (1922) 44 M.L.J. 602: L.R. 50 I.A. 77: I.L.R. 50 Cal. 338 (P.C.).
6. (1923) 46 M.L.J. 295: I.L.R. 47 Mad. 398.
7. A.I.R. 1925 Cal. 973.
8. (1927) 53 M.L.J. 179.
9. A.I.R. 1927 Cal. 538.
10. (1930) I.L.R. 11 Lah. 564.
11. (1930) 60 M.L.J. 309.
12. (1931) 60 M.L.J. 506: L.R. 58 I.A. 68: I.L.R. 54 Mad. 257 (P.C.).
13. (1931) I.L.R. 59 Cal. 781.
14. (1935) I.L.R. 62 Cal. 998.
15. A.I.R. 1936 Mad. 256.
16. A.I.R. 1921 Lah. 253.

The circumstances already adverted to, show that the moneys were advanced on various dates in June, the deposit of title-deeds was completed towards the end of that month; and it was after these were done, that Ex. D-14 was executed as memorandum. As already stated, in our opinion it is only a record of a completed transaction and there is nothing in the circumstances connected with its coming into existence which requires us to give a different meaning. We hold that Ex. D-14 does not require registration and affords along with other evidence complete proof of the equitable mortgage in question. If Ex. D-14 does not require registration, it has not been shown how the equitable mortgage is invalid. In our opinion the oral evidence of the witnesses already referred to, Ex. D-14 and the decree in the Bombay suit prove to our complete satisfaction that the alleged equitable mortgage is true.

Before we leave this question we may mention that it was argued in the lower Court that Ex. D-14 was got up subsequent to Ex. H and was ante-dated and should on that account alone be thrown out of consideration, but the learned Judge held that this suggestion was not proved; *see* paragraphs 11 and 12 of the judgment. No special ground has been taken against that finding in the memorandum of appeal and the learned Advocate-General after alluding to the point in the earlier part of his argument, abandoned it altogether and so we do not consider it in this judgment.

The next question is whether the plaint mentioned sub-mortgage in favour of the plaintiff is true and valid (issue 2).

[His Lordship discussed the evidence and concluded.]

On a consideration of the evidence as a whole, both direct and circumstantial, we hold that the suit sub-mortgage is true.

The next question is whether the equitable sub-mortgage, which we have found to be true, is valid in law. It will be observed that the suit sub-mortgage was created by a re-deposit by the Nagarseths with the plaintiff of the very title-deeds, Exhibits M, M-1 and M-2, deposited with them originally by Tawker & Sons. It is argued that since it is the mortgagee's interest that is being sub-mortgaged, a sub-mortgage of such interest by depositing the title-deeds can be created only by depositing the title-deed evidencing the title of the mortgagee, and, since admittedly no such document has been deposited as

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none such is in existence, the mere re-depositing of the title-deeds of the original mortgagor cannot in law create a valid equitable sub-mortgage. Shortly stated, what is urged is that while a sub-mortgage by deposit of title-deeds of a mortgage effected by a registered deed is valid, such a sub-mortgage of a mortgage itself created by deposit of title-deeds is invalid because there is no document evidencing his own title for the mortgagee to make the deposit. It is contended that this must follow from the definition of 'mortgagee by deposit of title-deeds' in S. 58 of the Transfer of Property Act. No authority in support of this contention has been brought to our notice. On the other hand, there is an authority in the Indian Reports directly against it, wherein the relevant English authorities have been referred to—see *Gurnam Kaur* v. *R. K. Banerjee*[1]. In that case Mosely, J., with whom Ba U, J., concurred, dealt with the contention as follows:

"A mortgage of immovable property is itself an interest in immovable property and can be itself mortgaged. The transaction is called a sub-mortgage. It would appear *prima facie* that such a sub-mortgage can be made by deposit of title-deeds in exactly the same way as an original mortgage can. Admittedly in England (where the corresponding terms are 'equitable mortgage' and sub-mortgage) equitable sub-mortgages of equitable mortgages can be made, *vide Hildyard*, Re: Ex parte *Smith*[2]. *See also* Fisher's Law of Mortgage, 6th edition, p. 18, paragraph 30; Halsbury's Laws of England, Volume 23, 2nd Edn. p. 238 and Bower, Volume II, p. 924, paragraph 1485."

Then after referring to some judgments of the Indian Courts to show that they do not affect the above position, the learned Judge stated:

"I can see no reason why a sub-mortgage by deposit of title-deeds in the case where the original mortgage has been by deposit of title-deeds should not be valid. This appears to be clearly in accordance with law, nor has any reason of practice or convenience been argued against it."

We entirely agree with the above opinion of the learned Judge. If in law a mortgagee's interest in property can be created by the mere deposit to him of title-deeds of the mortgagor, we see no reason why the mortgagee's interest thus created cannot be sub-mortgaged by depositing the very title-deeds the deposit of which with him created his interest in the property. We cannot find anything in S. 58, cl. (*f*) of the Transfer of Property Act against the validity of an equitable sub-mortgage of a mortgage created by deposit of title-deeds.

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1. (1936) I.L.R. 14 Rang. 522.
2. (1842) 11 L.J. (Bktcy.) 16.

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In England there never was a doubt about the validity of such a sub-mortgage. In our opinion the suit sub-mortgage is true and valid in law.

The equitable mortgage and the sub-mortgage having been found to be true and valid, the question arises, to what extent these are capable of enforcement against defendants 1 and 2; *see* issues 1 and 8. The melwaram right in all the 58 acres of Vadavoor village excepting the right in a small portion was acquired by the Tawkers under Exhibit M-1. The learned Judge is not strictly right when he says that under the document the Tawkers obtained the melwaram right of all the lands. Under the same document they also obtained the kudivaram right over some of the lands. The kudiwaram right in respect of the other lands were obtained by them under Exs. M-2 and VII and XVI. In the view that we take of the arguments advanced before us it is not necessary to discuss the exact extent of the melwaram and the kudiwaram interest obtained by the Tawkers under the abovementioned documents. Suffice it to say that it is freely conceded by the respondents that there are certain lands in which the Tawkers own melwaram and certain lands in which they own kudiwaram which are not included in Exs. M-1 and M-2. In other words, all the title-deeds respecting the entire interest which the Tawkers have in the suit properties have not been deposited by them with the Nagarseths. As the learned Judge points out, the fact that Exs. VII to XVI were produced by the defendants indicates that all the documents under which they obtained all the rights which they owned in the properties were not deposited with the Nagarseths. In the suit the claim is made against the entire interest of the Tawkers in the suit properties. As all the documents relating to their entire right over the suit properties were not deposited by them with the Nagarseths, it is argued that no equitable mortgage was obtained of the entire interest of the Tawkers in the properties and the equitable mortgage and the sub-mortgage are effective only to a limited extent. We cannot accept this argument. Evidence makes it clear that the intention of the parties was that the entire right which the Tawkers had over the suit properties should be mortgaged to secure the loans advanced to them by the Nagarseths. In Ex. S the Tawkers state that '*lands at Vadavoor*' (the italics are ours) 'are now with the Nagarseths as security'. In

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Ex. T, the mortgage executed to Chathurbhoojadoss Kusaldas by the Tawkers, it is stated that the mortgage over the schedule B properties which include the lands in the Vadavoor village is a second mortgage. The evidence bearing on the question which properties the Tawkers intended to mortgage, is considered by the learned Subordinate Judge in paragraph 18 of the judgment. It was not seriously contended, nor do we think it can be contended in the circumstances of the case, that it was not the intention of the parties to mortgage the entire Vadavoor properties belonging to the Tawkers. We accept the finding of the learned Judge on this point: and we know that all the documents mortgaged with the Nagarseths were sub-mortgaged by them to the plaintiff. There is ample authority both in England and in India to show that a deposit of some of the title-deeds relating to a property is enough to create a valid equitable mortgage over the entire property if it was the intention of the parties that the mortgage should be in respect of the entire property to which the documents of the title relate. *Wetherell*, Ex parte[1], is authority for the position, that equitable mortgage with respect to the entire security could be created from a deposit of part of the title-deeds if from the evidence it can be gathered that the object of the parties was to create a security upon the whole property. In *Lacon* v. *Allen*[2], it was held that

> "It is not necessary to create an equitable mortgage, that all the title-deeds or even all the material title-deeds should be deposited; it is sufficient if the deeds deposited are material evidence of title and proved to have been deposited with the intention of creating a mortgage."

See also *Roberts* v. *Croft*[3], where it was held that to constitute a good equitable mortgage it is not necessary that the deeds deposited should show a good title in the depositor. In that case a solicitor made an equitable deposit of the title-deeds of his estate to his client, committing the conveyance to himself. He afterwards deposited the latter as a security, with his bankers. It was held that the client had priority over the bankers. (*See* the headnote.) The Indian authorities are also to the same effect. In *Bhupendra Nath Basu* v. *Mt. Wajihunnissa Begum*[4], it was pointed out that:

> "There is no technical rule that in an equitable mortgage all the title-deeds should be deposited. It is merely a question of intention,"

1. (1805) 32 E. R. 1141.
2. (1856) 61 E.R. 1024.
3. (1857) 53 E. R. 343.
4. (1917) 2 Pat.L.J. 293.

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whether the mortgage was of the entire property. See also *V.E.A.R.M. Chettyar Firm* v. *A.K.R.M.M.K. Chettyar Firm*[1], *Ramakrishna Doss* v. *Kesavalu Chetti*[2] and *Ralli Brothers* v. *Punjab National Bank*[3]. For the above reasons we hold that though the title-deeds deposited were only Exhibits M-1 and M-2 the equitable mortgage took effect over the entire suit properties as the parties intended that the entire interest of the Tawkers in the properties should be mortgaged. The same is the case with the sub-mortgage also.

The next question is, is the plaintiff's claim to enforce the equitable mortgage barred by time? This is raised in both issues 9 and 18. The equitable mortgage to the 3rd defendant was in June, 1916. The plaint in the present suit was filed on 8th December, 1928. Under Art. 132 of the Limitation Act, the article applicable to the case, the suit should be filed within 12 years from June, 1916. Admittedly, it has been filed more than 12 years subsequent to the date of the mortgage and is therefore barred by time. But the plaintiff in order to save limitation relies on an acknowledgment of the mortgage debt contained in Exhibit S under S. 19 of the Limitation Act. In 1924 Tawker & Sons executed a mortgage, Exhibit T, in respect of Vadavoor, the present suit properties, and other properties to Chathurbhujdoss Khusaldoss & Sons, Madras. Before the execution of the deed they gave to Chathurbhujdoss Khusaldoss & Sons a letter, Ex. S. In it the Tawkers state:

"In consideration of withdrawing the suit pending now and also to cover up any deficiency in all the claims and accounts we hereby give you a lien on the following undermentioned properties *now with Messrs. Nagarseth & Sons* of Bombay as collateral security." (The italics are ours.)

The list of the properties mentioned in it contains 'Lands at Vadavoor in Trichinopoly' as item 5. The date of this letter is the 12th February, 1922. The plaintiff relies on this to show that the Tawkers admitted the mortgage right in favour of the Nagarseths in respect of the suit lands. If this document is admissible in evidence, it clearly amounts to an acknowledgment of the existence of the mortgage. We may also mention that in Ex. T the Vadavoor lands are described as having been given as second mortgage to Chathurbhujdoss

1. (1928) I.L.R. 7 Rang. 28. 2. (1927) 53 M.L.J. 179.
3. (1930) I.L.R. 11 Lah. 564.

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Khusaldoss & Sons. The Tawkers herein admit the subsisting liability of the mortgage in favour of the Nagarseths. Ex. S is an unregistered document and on that ground objection is taken that it is not admissible in evidence. In our opinion, even if registrable, as the document is relied on only as evidence of a collateral fact, namely, an acknowledgment by the Tawkers, it can be admitted in evidence under S. 49 of the Registration Act. There is abundance of authority in support of the position that a compulsorily registrable document, though unregistered and inadmissible as evidence of a transaction affecting immovable property may be admitted as evidence of a collateral fact or for any collateral purpose. In *Varada Pillai* v. *Jeevarathnammal*[1], the Privy Council pointed out with reference to certain petitions filed in the Court of the Collector reciting the fact of a gift in that case that

> "although the petitions . . . . are not admissible to prove the gift, they may nevertheless be referred to as explaining the nature and character of the possession . . . . ."

See also *Mugniram* v. *Gurmukh Roy*[2], *Venkataratnam* v. *Subba Rao*[3] and *Davindar Singh* v. *Mt. Lachhmi Devi*[4].

The admission of the equitable mortgage contained in Ex. S is of the year 1922, before defendants 1, 2 and 5 acquired any right in the properties. It is within 12 years after the date of the mortgage and within 12 years before suit. We hold therefore that the suit is not barred by time. (Apart from these documents the debt and the mortgage were clearly set out in the schedules to their insolvency petition which Tawkers filed in 1925.)

The next question for decision is, is the claim set up in suit barred by O. 2, r. 2, Civil Procedure Code, by reason of the filing of C. S. No. 3772 of 1922 in the Bombay High Court?

[His Lordship discussed the evidence with reference to the relevant provisions of law and concluded.]

In the light of the circumstances adverted to above we have no doubt that the suit of the present plaintiff is not barred by reason of the suit C. S. No. 3772 of 1922 filed in the Bombay High Court.

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1. (1919) 38 M.L.J. 313: L.R. 46 I.A. 285: I.L.R. 43 Mad. 244 (P.C.).
2. (1899) I.L.R. 26 Cal. 334.
3. (1926) 51 M.L.J. 410: I.L.R. 49 Mad. 738.
4. A.I.R. 1930 Lah. 985.

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The last question for consideration is, is the suit as framed not maintainable? It will be observed that by the time the plaintiff filed the suit he had, with the previous permission of this Court sitting in insolvency, obtained the sale of the suit properties from the Official Assignee. Having thus become the owner of the equity of redemption he could no longer sue to enforce his mortgage by the sale of the properties. The suit was originally filed, therefore, for possession of the lands. On the 15th November, as already stated, the plaint was amended by the addition of an alternative prayer for a mortgage decree for sale in case it should be held that the conveyance of the land by the Official Assignee to the plaintiff did not pass any title. We have already referred to the amendment application and the order passed thereon. The objection urged by the appellants to the frame of the suit is that the suit which the Act of Bombay permitted the plaintiff to file was a suit on the mortgage, that under the terms of that Court's order he was bound to file a suit within the 10th December, 1928, but that he did not in effect file it till the 15th November, 1930, when the amendment just mentioned was allowed to be made to the plaint. We do not think that this objection should be allowed to prevail. We think that the suit as originally filed includes an alternative claim based on the plaintiff's mortgage right. *See* paragraphs 12 and 13 of the plaint the relevant portions of which are as follows:—

*Para.* 12: " . . . . he (plaintiff) is informed that the claim of the 1st defendant is based upon a charge over the plaint schedule properties alleged to have been created in his favour by Messrs. Tawker & Sons in the month of July, 1923, in the course of the execution proceedings in C. S. No. 196 of 1921 on the file of the High Court of Judicature at Madras to which the plaintiff was not a party."

*Para.* 13: "The plaintiff states that any claim of the 1st defendant whether based upon the said charge created in the year 1923 or otherwise cannot prevail against the rights of the plaintiff and can only be subject thereto. Both the mortgages in favour of the plaintiff as well as in favour of the third defendant (Nagarseths) having been earlier in date to the date of the alleged charge are entitled to priority and any claim of the first and second defendants cannot prevail against the claims of the plaintiff or the third defendant. The plaintiff is not bound by either the alleged charge in favour of the first defendant or the proceedings pursuant to the said charge culminating in the purchase of the plaint schedule lands by the first defendant, etc."

Then in the prayer portion, paragraph 18 (*d*), we have a definite indication of the plaintiff's alternative claim as

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follows:—

"The plaintiff therefore prays for judgment that if this Hon'ble Court should decide that on the charge claimed by defendants 1 and 2 they had as representing the Tawkers . . . . any right to redeem or otherwise in respect of the mortgage in favour of the third defendant and the plaintiff", such rights "if any may also be determined by this Hon'ble Court and appropriate directions given by the Court in respect of the working out of the relative rights of the respective parties."

On this pleading we are of opinion that even without the amendment it was open to the Court to treat this suit in the alternative as a suit for sale by a prior mortgagee against a person claiming under a title derived from a subsequent mortgage. Apart from this, it is clear that even if it is not prayed for in the plaint the Court can grant a relief which is not inconsistent with the facts of the case, provided the defendant is not placed at any disadvantage in the course of the trial by reason of the defect in the pleadings.

The plaintiff's suit for a relief on his sub-mortgage being thus maintainable even according to the original plaint, there was no need for amending the plaint by the addition of an alternative prayer for a mortgage decree for sale. That the plaint was understood in the way in which we have interpreted it becomes clear when we examine the issues. Issue 8 states:

"Is the plaintiff entitled to enforce his claim, if any, under the plaint mentioned equitable mortgage, etc.?"

This issue shows clearly that even before the amendment it was clearly understood by the Court that the plaintiff did claim relief on the basis of his equitable mortgage. And in paragraph 18 (*d*) he asks that the relative rights of the parties, that is, the right of defendants 1 and 2 to redeem and of the plaintiff to bring the properties to sale, may be worked out. By amending the plaint the plaintiff wanted to bring out in full relief his right to sell the suit properties based on the grant of the sub-mortgage. In the circumstances we do not think that by the amendment the plaintiff was setting up a new case or asking for a relief not originally asked for in the plaint. In this connection reference may also be made to the order of amendment passed by the learned Judge. For the above reasons we overrule the objection that the suit as framed is not maintainable.

No other points were argued before us. For the reasons given above, on the points argued we accept that the opinion of the learned Subordinate Judge who has dealt with all the points in the case very ably and clearly in his judgment. Before we conclude, we may say that no personal decree against defendants 1 and 5 is contemplated under the decree except for costs. In the result the appeal is dismissed with costs. We certify costs for two counsel for the respondents.

B. V. V. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

S. N. V. R. Narayanan Chetti .. *Appellant** (*Plaintiff*)

*v.*

S. Pr. Al. Periappan *alias* Ramanathan Chettiar minor by mother and guardian Sivagami Achi, and others .. *Respondents* (*Defendant*).



*Court-Fees Act—Suit for account—Valuation of suit by plaintiff—Dismissal of suit—Appeal by the plaintiff—Subject-matter of appeal same as that of suit—Plaintiff appellant if can change his valuation in appea .*

When the subject-matter of the appeal is the same as in the trial Court, an appellant in an appeal against the decree dismissing his suit for an account cannot change the valuation adopted by him in the trial Court.

Where therefore a suit was filed in the lower Court for taking of the accounts of a dissolved partnership and the plaintiff valued his relief at Rs. 16,500 and paid the court-fee on that basis, it is not open to him, when an appeal is filed against the decree dismissing the suit with regard to the whole subject-matter of the suit to reduce the valuation put by him in the plaint.

*Faizullah Khan* v. *Mauladad Khan,* (1929) 57 M.L.J. 281: L.R. 56 I.A. 232: I.L.R. 10 Lah. 737 (P.C.), discussed and explained.

Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in O. S. No. 61 of 1930 (O. S. No. 68 of 1929, Sub-Court, Devakottah).

*A. V. Viswanatha Sastri* for Appellant.

*M. Patanjali Sastri* and *N. G. Krishna Aiyangar* for Respondents.

*The Government Pleader* for the Crown.

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Leach, C. J.

The order of the Court was made by

*The Chief Justice.*—The question which we are called upon now to decide in this case is whether the memorandum of appeal has been properly stamped. The suit out of which the appeal arises was filed in the Court of the Subordinate Judge of Sivaganga for the taking of the accounts of a dissolved partnership. The plaintiff valued his relief at Rs. 16,500 and paid the court-fee of Rs. 1,004-15-0. The trial Court dismissed the suit on the ground that it was barred by law of limitation. The plaintiff then appealed to this Court and in his memorandum of appeal valued the relief at Rs. 1,000 paying the corresponding court-fee of Rs. 112-7-0. In consequence of the decision of this Court in *Nukala Venkatanandam,* In re[1], this valuation was accepted by the officer whose duty it was to check the stamping of the memorandum of appeal. But that case has recently been overruled by a Full Bench in *Dhanukodi Nayakkar,* In re[2]. The respondents have in consequence contended that the appellant should value his relief in accordance with the figure at which it was valued in his plaint. The appellant contends that, notwithstanding the fact that *Nukala Venkatanandam,* In re[1], has been overruled, the case is governed by *Faizullah Khan* v. *Mauladad Khan*[3] and that the memorandum of appeal is properly stamped.

The question resolves itself into this:—Can the appellant in an appeal against a decree dismissing a suit for an account change his valuation, although the subject-matter of the appeal is the same as in the trial Court? S. 7 (4) of the Court-Fees Act requires a suit for accounts to be stamped "according to the value at which the relief is valued in the plaint or memorandum" and adds:

"In all such suits the plaintiff shall state the amount at which he values the relief sought."

It is said, that, as there is a reference in this clause to the memorandum of appeal, the appellant is allowed to value the relief on appeal at whatever he likes, notwithstanding that he valued it in the trial Court at a higher figure and that the cor-

1. (1932) 64 M.L.J. 122: I.L.R. 56 Mad. 705.
2. (1938) 1 M.L.J. 628: I.L.R. (1938) Mad. 598 (F.B.).
3. (1929) 57 M.L.J. 281: L.R. 56 I.A. 232: I.L.R. 10 Lah. 737 (P.C.).

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rectness of this course is expressly recognised in *Faizullah Khan* v. *Mauladad Khan*[1].

It was held by a Full Bench of this Court in *Ramiah* v. *Ramaswami*[2] and by another Full Bench in *Arunachalam Chetty* v. *Rangaswami Pillai*[3] that a plaintiff in a suit of this nature is entitled to value his relief at what he likes, it being no objection to his valuation that it is an arbitrary one; and these decisions have not been challenged before us. We, therefore, start with this. The plaintiff may in his plaint value the relief at his own figure. But having made the valuation for the purpose of the litigation, can he reduce it when he comes to appeal? It has always been considered in this Court and in the other High Courts in India that he cannot. Until *Nukala Venkatanandam, In re*[4], was decided, a plaintiff appealing against a decree dismissing a suit for an account was required in this Court to stamp his memorandum of appeal according to the full amount of the valuation on his plaint. Of course he could if he so desired waive some of the relief which he claimed in the trial Court and in this case he would stamp his memorandum of appeal accordingly.

The Court will not change a long-established practice unless it is shown that the practice is opposed to law. Before we can hold that the practice which has been followed in this Court until the decision in *Nukala Venkatanandam, In re*[4] and throughout in other Courts should be altered, it must be shown that the practice is inconsistent with the provisions of S. 7 (4) (*f*) of the Court-Fees Act. It must be remembered that the valuation of the relief in the plaint decides the forum—for instance whether the suit shall be filed in the District Munsiff's Court or the Subordinate Judge's Court—and the valuation effects the forum of the appeal. In this case, if the appellant had valued his relief in the plaint at Rs. 1,000, the figure at which he values it in the memorandum of appeal, the suit would have been filed in the District Munsiff's Court, and the appeal would be to the District Court. As the result of valuing his relief in the plaint at Rs. 16,500, he has had the advantage of an appeal direct to this Court.

1. (1929) 57 M.L.J. 281: L.R. 56 I.A. 232: I.L.R. 10 Lah. 737 (P.C.).
2. (1913) 24 M.L.J. 233 (F.B.).
3. (1914) 28 M.L.J. 118: I.L.R. 38 Mad. 922 (F.B.).
4. (1932) 64 M.L.J. 122: I.L.R. 56 Mad. 705.

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In (*Dhanukodi Nayakkar*, In re) Second Appeal No. 393 of 1937*, the Court held that where a defendant appeals from a preliminary decree for accounts, he must value his relief according to the value stated in the plaint. If the appellant's contention here is correct, it would mean that he could value his memorandum at what he likes but the defendants could not. It certainly could not have been the intention of the legislature to make any distinction between the plaintiff and the defendant in this respect.

The doctrine that a party cannot approbate and reprobate has been applied to application for leave to appeal to the Privy Council. In *Mahendranarayan Ray Chaudhuri* v. *Janakinath Ray*[1], Rankin, C.J. and Ghose, J., held that this doctrine applied to a case where a party appealed to the lower Court upon a valuation inconsistent with the valuation upon which he sought a certificate to enable him to appeal to His Majesty in Council and that a party who sued or appealed in a Court which would have no jurisdiction if the value exceeded Rs. 10,000 would debar himself from claiming at a later stage to have the subject-matter of the suit in the Court of first instance treated for the purposes of an appeal to the Privy Council as exceeding Rs. 10,000. The principle governing this decision was stated by their Lordships of the Privy Council in *Muthusawmi Jagavera Yettapa Naicker* v. *Venkateswara Yettia*[2] and has been applied by this Court in *Alagappa Chetty* v. *Nachiappa*[3] and by the Bombay High Court in *Lallubhai Pragji* v. *Bhimbhai Dajibhai*[4]. We see no reason why the doctrine referred to should not apply to a case like the present one.

In *Arogya Udayan* v. *Appachi Rowthan*[5], Benson and Bhashyam Aiyangar, JJ., held that a plaintiff could not change his valuation in the trial Court although he applied for leave to do so. This was a case in which the plaintiff had sued for an account. He obtained a preliminary decree and the account was taken, the result being that he was entitled to a larger sum than that claimed in his plaint and in respect of which he had paid court-fee. When the report of the Commissioner who had taken the account was made, the plaintiff applied for leave to amend his plaint and

* (1938) 1 M.L.J. 628: I.L.R. (1938) Mad. 598.
1. (1930) I.L.R. 58 Cal. 66.
2. (1865) 10 M.I.A. 313.
3. (1922) 43 M.L.J. 728.
4. (1929) I.L.R. 53 Bom. 552
5. (1901) 12 M.L.J. 35: I.L.R. 25 Mad. 543.

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leave was granted. The District Munsiff then ordered that the plaint should be returned to the plaintiff for presentation in the proper Court. The Division Bench which heard the appeal held that this was wrong and that the suit had to remain in the District Munsiff's Court for the purpose of the passing of the final decree.

Although there are all these indications that it was not the intention to allow a plaintiff to change his valuation on appeal, the learned advocate for the appellant has argued, as I have already indicated, that the Judicial Committee has decided that he can. In *Faizullah Khan* v. *Mauladad Khan*[1], the plaintiff-appellants stamped their memorandum of appeal at a higher sum than at which they stamped their plaint. They sued for an account valued at Rs. 3,000. Their claim was dismissed by the trial Court and a decree was passed against them for Rs. 19,991. On appeal they asked that the decree against them should be set aside and they valued their relief at Rs. 19,991, but they did not pay court-fee on their own claim for Rs. 3,000. The appellate Court allowed the appeal and remanded the case for re-trial, but inasmuch as the appellants had not stamped their memorandum of appeal sufficiently to cover their own claim order that they should not have a decree for any sum which might be found due to them and to that extent held that the appeal was barred by limitation. The Privy Council held that the memorandum of appeal had been sufficiently stamped. This was a case in which the appeal was from the final decree and, therefore, their Lordships were not considering the question of an appeal from a preliminary decree. The question now before us was never under discussion. For these reasons, we are unable to agree that *Faizullah Khan* v. *Mauladad Khan*[1] declares that the practice of the High Courts in India with regard to the stamping of appeals like the present appeal is contrary to law.

In our opinion the scheme of the Act in this respect is to allow a plaintiff to value his relief at the figure he chooses, but it does not allow him to change that valuation. He is allowed to value for the purpose of the litigation and when he has done so his valuation governs the forum of trial and of appeal. There is no objection to an appellant abandoning on appeal a

1. (1929) 57 M.L.J. 281: L.R. 56 I.A. 232: I.L.R. 10 Lah. 737 (P.C.).

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portion of the relief claimed in the lower Court or saying that he does not claim relief beyond the figure corresponding to the value of the stamp, but unless he does this we are of opinion that he is bound by the valuation fixed by himself at the commencement of the litigation.

Accordingly we hold that the memorandum of appeal in this case has been insufficiently stamped and if the appellant wishes to continue the appeal, he must value his relief here in accordance with his valuation in the Court below and pay the corresponding stamp fee. We will allow him time until the 5th of January, 1938, in which to pay the additional court-fee. If the additional fee is paid by that date, the appeal will be placed in the ordinary list for hearing. If it is not paid by that date, the appeal will be rejected. It follows, of course, that if the appellant wishes to limit his relief on appeal to any figure less than Rs. 16,500, he can do so provided the memorandum of appeal is stamped sufficiently.

S. V. V. —— *Reference answered.*

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD THANKERTON, LORD ROMER, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Nathu Ramu Mahajan and others .. *Appellants**

*v.*

Gangabai .. *Respondent.*

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Nathu Ramu Mahajan v. Gangabai.

*Will—Construction—Hindu testator—Intention to confer life estate on widow—Absolute estate conferred on brother after widow's lifetime—Authority to adopt conferred but not acted upon—Inference.*

A Hindu testator who was anxious that his estate should devolve on members of his family or on his brother *R* provided by his will that if a son was born to him he should succeed to his entire estate. He also directed that if his wife who was then *enceinte* did not give birth to a son, or the son if born died issueless, she might take a boy in adoption but she was forbidden from adopting any person other than a son of *R*. The testator further provided that if *R* had no such son as could be given in adoption or if his wife did not take any boy in adoption she should enjoy the income of the estate during her lifetime, and it was only after her death that *R* was to get the estate as full owner. On the testator's death the widow and *R* took possession of the estate to carry on the administration of the property, but *R* was allowed to actually manage the estate. The widow neither gave birth to a son nor availed herself

* P. C. Appeal No. 58 of 1936. 17th June, 1938.

of the authority to adopt conferred on her. The widow having sued *R* to enforce her right to be in possession of the property for her lifetime,

*Held*, that the intention of the testator was that the widow should as provided by Hindu law be in possession of the estate during her lifetime and she was therefore entitled to succeed.

*Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*, (1857) 6 M.I.A. 526 at 550-551, relied on.

Appeal from a judgment and decree of the High Court of Judicature at Bombay.

*P. V. Subba Row* for Appellants.

*T. J. Strangman, K.C., Sir Hari Singh Gour* and *Charles Bagram* for Respondent.

17th June, 1938. Their Lordships' judgment was delivered by

Sir Shadi Lal.

SIR SHADI LAL.—This appeal arises out of an action brought by the respondent, Gangabai, for the recovery from her brother-in-law, Ramu Ganpat, of the possession of her husband's estate; and also for an account of the management of that estate. The husband, Dhanaji Dula Mahajan, died on the 24th June, 1907, leaving a will made by him on the 21st June, 1907. The Courts in India have concurred in holding that the will propounded in this case was duly made by the testator; and that he had, at that time, a disposing mind.

It appears that after the death of her husband, Gangabai and Ramu Ganpat took possession of the estate, but that the latter alone was in charge of its management. He, however, fell out with his sister-in-law, with the result, that she brought the present suit as stated above. The Trial Court dismissed the suit, but against the decree dismissing her claim, Gangabai, preferred an appeal to the High Court. During the pendency of the appeal Ramu Ganpat died, leaving only minor children; and the executors appointed by him to administer his own estate were impleaded in the appeal as his legal representatives.

The learned Judges of the High Court have decided that "the plaintiff is entitled to have an account from the date of the notice in 1927"; and have also directed the executors to deliver possession of the property claimed by her. From the decree granted by the High Court the executors have brought this appeal to His Majesty in Council; and the question which requires determination is whether the widow is entitled to obtain possession of the estate left by her husband. The answer

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to this question depends upon the construction of the will made by him. In determining the construction, what the Court has to look to, is the intention of the testator:

"The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption." (*Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[1].)

In view of these principles, their Lordships have to decide what was the intention of the testator as gathered from the language used by him in his will. Now, the language of the will leaves no doubt that the testator was anxious that his estate should devolve upon the members of his family or on his brother Ramu Ganpat. He had no male issue, but his wife Gangabai was *enceinte*. He directed that if a son was born to him, he would succeed to his entire estate. But if she did not give birth to a son, or the son, if born, died issueless, he authorised her to adopt a boy, but the boy to be adopted should be a son of Ramu Ganpat. Indeed, she was forbidden to adopt any other boy. Now, Gangabai neither gave birth to a son, nor availed herself of the authority conferred upon her by her husband to adopt a boy. There was, therefore, no son, natural or adopted, who could succeed to the estate. This contingency was foreseen by the testator, who provided in the will that if Ramu Ganpat "has no such son as can be given in adoption, or if Gangabai does not take any boy in adoption, then Gangabai should enjoy the income of my estate during her lifetime". And it was only after her death, that Ramu Ganpat was to get the estate as "full owner".

On the death of her husband, the widow along with Ramu Ganpat actually took possession of the estate, as the will directed her to "carry on administration in respect of the property in consultation with Ramu Ganpat". Indeed,

1. (1857) 6 M.I.A. 526 at 550-551.

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she allowed him to manage the estate; and probably she would not have brought her action to dispossess him, if he had not quarrelled with her.

As the will gave her the right to "enjoy" the income of the estate during her lifetime, it was evidently contemplated that she should, as provided by the Hindu law in the case of a widow, be in possession of the estate and realise its income. She was, no doubt, to consult Ramu Ganpat in managing the estate, but he died during the pendency of the appeal, and his executors have no right to represent him in the management. Nor is there any provision in the will associating any other person with her in carrying on the management.

For these reasons, their Lordships consider that the widow is, in the circumstances, entitled to the possession of the estate and also to manage it. They will, therefore, humbly advise His Majesty that the judgment of the High Court should be affirmed and that this appeal should be dismissed with costs.

Solicitors for Appellants: *Harold Shephard.*

Solicitors for Respondent: *T. L. Wilson & Co.*

R. C. C. *Appeal dismissed.*

B. V. V.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMY AIYANGAR.

Karuppasami Goundan .. *Appellant**
*(Plaintiff's L.R.)*

*v.*

Ovala Kondama Naicker Aiyan and others .. *Respondents*
*(Defendants 2, 3 and 1).*

Karuppasami Gounda *v.* Kondama Naicker.

*Lessor and lessee—Lease of agricultural land—Rent in kind—Paddy to be harvested, etc., in lessor's presence and paddy to be given as rent—If covenant to pay out of the crops implied therefrom—If lessor entitled to a charge for rent on the produce.*

Where a lease deed provided that when the crops are fit to be harvested, the lessee shall give the lessor information, harvest them under his supervision and thrash them at the thrashing floor chosen by him, etc. and measure out at his (lessor's) door a certain quantity of paddy fixed as rent in respect of the lease and further deliver a certain number of bundles of straw,

*Held*, that there is no covenant in this case either express or implied that the rent would be paid in *kind out* of the crops. The undertakings given by

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* L. P. A. No. 78 of 1935. 20th April, 1938.

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the lessee are only given by way of an assurance that the rent would be paid. The words do not amount to a charge on the produce of the land for the amount of the rent.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Varadachariar, dated 6th March, 1935, in S. A. No. 226 of 1931 preferred to the High Court against the decree of the Court of the Subordinate Judge of Dindigul in A. S. No. 47 of 1928 (O. S. No. 582 of 1926, District Munsiff's Court, Palni).

*R. Krishnaswami Aiyangar* for Appellant.

*S. Nagaraja Aiyar* for Respondents.

Leach, C. J.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The appellant sued in the Court of the District Munsiff of Palni to recover a sum of Rs. 990 claimed to be due by the third respondent as the equivalent of rent in kind of certain agricultural land. He also claimed a decree for this amount against the 1st and 2nd respondents on the ground that he had a charge on the produce of the land for the amount due for rent and that they had wrongly removed the produce in collusion with the 3rd respondent. The District Munsiff held that the appellant was entitled to a decree against all the respondents and this decision was concurred in by the Subordinate Judge of Dindigul on appeal. A second appeal followed to this Court and the case came before Varadachariar, J., who held that the appellant was not entitled to a decree against the 1st and 2nd respondents, as in his opinion there was no charge. The appeal depends entirely on the construction to be placed on the lease, Ex. B, which is dated 1st September, 1925. I will quote the relevant passages in the lease:—

"As I have taken on lease the undermentioned nanja land belonging to you, for a period of three years commencing from this date, agreeing to deliver 60 (sixty) salagais of paddy of peria samba or Nellore samba per year, each salagai consisting of 40 vallams calculated on the basis of your vallam containing Madras Pucca 3¼ measures, I shall plough in proper seasons and cultivate the said nanja and irrigate the same whenever water is required therefor. After the crops are fit to be harvested, I shall give you information, harvest them under your supervision, thrash them at the thrashing floor chosen by you, winnow them free from moisture, chaff, etc., measure out at your door good and dry paddy in respect of the said lease before the 30th Masi of every year without there being any need on your part to remeasure it and obtain receipt from you. I shall also deliver 30 bundles of straw and obtain receipt. I shall myself bear the cart hire for carrying the said lease paddy, that is, 60 salagais of paddy and 30 bundles of straw from

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the thrashing floor to your house . . . . . . . . . If I thrash the crops without your permission or your watchmen according to the said terms, I shall be liable criminally and for loss on the civil side."

It is conceded, as it must be conceded, that there is here no separate covenant that the rent would be paid in kind out of the crops, but it is said that reading the document as a whole the undertakings of the tenant do amount to a covenant to pay out of the produce of the land. I find myself unable to read the lease in this way.

That it was expected that the rent would be paid out of the produce of the land cannot be disputed. This is expected in all cases where land is let on a rental payable in kind. The form of lease in this case is the form which is commonly used in certain parts of the Madras Presidency, and what the 3rd respondent undertook to do was to cultivate the land, reap the crop and deliver to his landlord the stipulated amount of paddy. But this does not mean that the lessee covenanted that the rent would be paid out of the crop actually reaped by him. I regard the undertakings given by the lessee as being given by way of assurance that the rent would be paid.

The learned advocate for the appellant has been unable to point to any authority in support of his contention, that the words used amounted to a charge. Leases of this nature being common and having been used for many years it is significant that there is no authority to be found for the proposition now advanced. The learned advocate has referred us to a line of cases which say that if a man undertakes to make payment out of a particular fund there is a charge on that fund, and that line of cases might apply if the 3rd respondent had covenanted to make payment out of the paddy grown on this land. There was no such covenant and therefore there can be no charge. I agree entirely with the view of Varadachariar, J. and would dismiss this appeal with costs in favour of the 1st and 2nd respondents.

Krishnaswami Aiyangar, J.

*Krishnaswami Aiyangar, J.*—I agree.

S. V. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—MR. MADHAVAN NAIR, *Officiating Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

H. M. Ebrahim Sait .. *Appellant** (*Defendant*)

*v.*

The South India Industrials, Limited .. *Respondent* (*Plaintiff*).

Ebrahim Sait *v.* South India Industrials, Ltd.

*Original Side Rules, O. 7, r. 7 (2)—Leave to defend—Unconditional order when given.*

In order to entitle a defendant to ask for leave to defend without any condition the defence must be a *bona fide* one and not a mere attempt to prolong or delay the case. It is not necessary that the Court should enter fully into the merits of the case and decide. But it should be satisfied that the defence raised shows that there is a fair issue to be tried before a competent tribunal.

*Saw* v. *Hakin*, (1888) 5 T.L.R. 72 and *Jacobs* v. *Booth's Distillery Co.*, (1901) 85 L. T. 262, followed.

*Sundaram Chettiar* v. *Valli Ammal*, (1934) 68 M.L.J. 16: I.L.R. 58 Mad. 116, explained.

On appeal from the order of the Hon'ble Mr. Justice Gentle dated the 29th day of April, 1938, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 439 of 1938 in Application No. 2317 of 1937 in C. S. No. 167 of 1937.

*V. Ramaswami Aiyar* and *S. Narasinga Rao* for Appellant.

*V. Rajagopalachariar* and *K. P. Raman Menon* for Respondent.

The judgment of the Court was delivered by

Madhavan Nair, Offg. C.J.

*The Officiating Chief Justice*.—This is an appeal against the order of Gentle, J., confirming the order of the Master giving the appellant (defendant in C. S. No. 167 of 1937) leave to defend on his furnishing security for a sum of Rs. 25,000 within a period of two months from the date of his order. The security has not been furnished. The appellant contends that leave to defend the suit should have been given to him unconditionally.

The circumstances are these. The respondent (plaintiff) is the South India Industrials, Ltd. The suit has been filed by its Managing Director. The appellant is another Managing Director. The claim against the appellant is for a sum of

* O. S. A. No. 50 of 1938. 10th August, 1938.

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Rs. 2,83,878-6-11—the amount overdrawn by him from the company previous to the year 1928. There is no contest regarding this amount owing by the appellant to the company. In defence, the appellant raised various contentions, the most important of which is that the suit has not been filed with proper authority, inasmuch as the plaint purports to be signed by the Managing Director. His case on this point is that there is nothing to show that he has been properly authorised to file the suit on behalf of the company. So far as the merits of the claim are concerned, the defence are two fold. The appellant seeks to set-off against the amount claimed a considerable sum of money—we are told that it would amount to a little over a lakh of rupees—owing to him by the company in respect of unpaid bonus declared some years ago. He claims also to set-off another amount, namely, the amount which he as a shareholder might receive upon the winding up of the company. The third point raised is that the suit is barred by limitation.

On behalf of the company it is alleged that the proceedings of the Board of Directors will show that the Managing Director who has signed the plaint is authorised to institute suits on behalf of the company, that there is no substance in the two claims to set-off made by the appellant, for he has waived his right to claim the bonus, and that a shareholder cannot claim to set-off what he might eventually receive on a winding up of the company against the amount which he owes to the company. It is also urged by the respondent that the plea that the suit it barred by limitation cannot stand having regard to the letter written by the appellant acknowledging his liability to pay the amount claimed.

Both the Master and the learned Judge were not impressed with the defences raised, but as they did not desire to shut out altogether an opportunity for defending the suit the appellant was given permission to defend it provided he furnished security for the sum of Rs. 25,000. As already stated it is urged before us that in the circumstances of the case the Court is bound to grant the appellant permission to defend unconditionally.

O. 7, r. 7 (2) of the Original Side Rules says that:

"Leave to appear and defend may be given unconditionally, or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Master thinks fit . . . . ."

O. 14, r. 6 of the Rules of the Supreme Court says:

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"Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the Judge may think fit."

According to both the rules the Court has discretion to decide whether leave to defend should be given unconditionally or subject to terms. The important English decisions bearing on the question are referred to in the note to O. 14, r. 6, in the Annual Practice. According to these decisions it may be stated that:

"As a general rule where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend." (See *Saw* v. *Hakin*[1] and other cases referred to in the note.)

In *Jacobs* v. *Booth's Distillery Co.*[2], it is laid down that where there is a triable issue, though it may appear that the defence is not likely to succeed the defendant should not be shut out from laying his defence before the Court either by having judgment entered against him, or by being put under terms to pay money into Court as a condition of obtaining leave to defend. From this one is apt to understand as has been argued before us that all that is required to entitle the defendant to claim the privilege of being allowed to defend without any condition is (a mere allegation of facts which might amount to a defence); but that it is not so, is clear from the following observations of the Lord Chancellor (Halsbury):

"There are some things too plain for argument, and where there were pleas put in simply for the purpose of delay which only added to the expense, and where it was not in aid of justice that such things should continue, O. 14 was intended to put an end to that state of things and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights."

In other words, triable issues must be such as would show that the defendant has a *bona fide* defence. This aspect of the question is sometimes apt to be forgotten. Further it must be remembered that:

"In deciding whether the defence set up is a real defence or not, all the circumstances must be looked at." (Per Bowen, L.J., *Blaiberg* v. *Abrahams*[3].)

The decision in *Jacobs* v. *Booth's Distillery Co.*[2] is followed in the decision in *Sundaram Chettiar* v. *Valli Ammal*[4] strongly relied upon by the appellant but it appears to us that

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1. (1888) 5 T.L.R. 72. 2. (1901) 85 L.T. 262.
3. 77 L.T. J.O. 255 C.A.
4. (1934) 68 M.L.J. 16: I.L.R. 58 Mad. 116.

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in stating the rule the learned Judges, if we may say so respectfully, have not sufficiently emphasised the qualification that in order to bring the defendant within the rule which entitles him to ask for leave to defend without any condition the defence should be a *bona fide* one and not a mere attempt to prolong or delay the case, although it may be said that this aspect cannot be said to have been altogether overlooked because reliance has been placed by them on the decision of this Court in *Periya Miyana Marakayar* v. *Subramania Aiyar*[1], where the following observations occur:

> "By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is, and must as a rule bring something more before the Court to show that it is a *bona fide* defence, and not a mere attempt to gain time by getting leave to defend."

We do not understand the decision in *Sundaram Chettiar* v. *Valli Ammal*[2] as laying down the broad proposition that the mere setting up of a defence, with the possibility of the defendant proving it, would by itself and without regard to other considerations, be enough to entitle the defendant to claim that leave should be given to him to defend the suit unconditionally. As we have pointed out the decision in *Jacobs* v. *Booth's Distillery Co.*[3], itself makes this point clear. All the cases cited before us indicate that the defendant's case should be a *bona fide* one and should raise a triable issue which would show that he has a fair defence to put forward against the plaintiff's claim. It is not necessary that the Court should enter fully into the merits of the case and decide, but it should be satisfied that the defences raised show that there is a fair issue to be tried by a competent tribunal before leave to defend is given unconditionally.

We will now examine whether with respect to the contentions put forward by the appellant he has a fair case to set up against the respondent. Having regard to the facts the only point which appears to be of some importance is whether the suit has been properly filed on behalf of the company. The plaintiff-respondent is only one of the directors of the company. It is argued that neither cl. 69 (*k*) of the Articles of Association which relates to the powers of the directors to institute suits nor the resolution passed by the company at its meeting of 31st July, 1937, that a

1. (1923) 46 M.L.J. 255.
2. (1934) 68 M.L.J. 16: I.L.R. 58 Mad. 116. 3. (1901) 85 L.T. 262.

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—
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"lawyer's notice be sent to Mr. H. M. Ebrahim Sait (defendant-appellant) demanding payment of his dues with interest within 15 days otherwise to file a suit against him for the recovery of the amount,"

authorises the plaintiff-respondent to institute this suit. Admittedly notice of the meeting which passed the resolution referred to was not given to the appellant by the directors, but having regard to another proceeding it is not necessary for the respondent to rely on the resolution to show that he had authority to institute the suit. Cl. 69 (*k*) of the Articles of Association gives power to the directors of the company to institute, conduct, defend, compromise and abandon any legal proceedings, etc., etc. It is true that under this provision all the directors should join to validly institute a suit, but under cl. 69 (*d*):

"The directors may from time to time entrust to and confer upon a managing director for the time being such of the powers exercisable under the Articles of Association of the company by the directors as they may think fit. . . ."

It is argued for the respondent that the directors have entrusted him with full powers to institute suits on behalf of the company by himself. The proceedings of the directors dated 7th June, 1918, to which the present appellant along with others was a party show that it was

"resolved that the Chairman M. Mohammad Hashim Sait (respondent) and M. Hajee Ebrahim Sait (appellant) be appointed Managing Directors of the company on a remuneration of Rs. 2,000 per mensem each to manage the business of the company either jointly or severally."

It follows that the two persons mentioned have power either *jointly or severally* to "manage the business of the company". It appears to us that managing the business of the company would include institution of suits as well, when it becomes necessary in the course of management to recover moneys due to the company. The present one is a case of this kind. No authority has been quoted to show that institution of legal proceedings would not fall within the meaning of the expression "to manage the business of the company". As such management as has been delegated to them by the directors can be conducted by either of them the suit instituted by the respondent would certainly be a validly instituted suit. We are told that as a matter of fact in the past both the respondent and the appellant have instituted suits on behalf of the company each by himself and this practice is relied on as lending additional support to the respondent's contention. We have no

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doubt that the resolution mentioned above read with cls. 69 (*k*) and 69 (*d*) of the Articles of Association enables the respondent to institute suits validly on behalf of the company. In this view it is not necessary to canvass the question whether the respondent can rely on the special resolution of the company dated 30th July, 1937, authorising the company to file a suit against the appellant in support of his argument. However, we may point out that in law, a meeting of directors is not duly convened unless due notice has been given to all the directors (*see* 5 Hals. 337) and if this is so, the resolution cannot be called in aid to support the respondent's position as admittedly no notice of the meeting was given to the appellant. But as we have stated, the other proceeding referred to give sufficient power to the respondent to institute the suit validly.

On the merits, the contentions of the appellant have no force at all. He may have a claim for a portion of the undistributed bonus but this claim amounting at best only to Rs. 1,00,000 and odd, has been given up by him by letter dated 8th June, 1927, wherein he says:

"I find that there is absolutely no chance of recovering all or any portion of the bonus and dividends due to me and as such I hereby release my right to the same."

It is true that owing to some legal formalities not having been complied with it was resolved that the acceptance of this surrender might not be given effect to till the said legal formalities have been complied with, but we know nothing as to whether these have been complied with or not. The other directors also have surrendered their claims to bonuses and suitable entries have been made in the company's books in all cases. In the circumstances the appellant can have no right to set-off his claim to bonus as against the claim made by the company. With regard to the other claim to set-off, no authority has been shown that a shareholder is entitled to set-off what he might receive on a winding up against moneys due by him. The contention appears to be a novel one. Surely, the company cannot be expected to await the winding up for the recovery of the moneys due to it from the shareholders.

The plea of the bar of limitation stands on an equally slender basis. The appellant has acknowledged his liability to pay the amount and the letter Ex. A dated 18th November, 1934, will save the suit from this plea.

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It is not necessary for us to go into the merits of the appellant's case, but from the facts which appear from the affidavits and the papers filed before us it is clear that these pleas are vexatious and not *bona fide*. He admits the correctness of the amount due from him and acknowledges also his liability to pay it. He knows full well that as managing director he or the respondent can institute suits validly each by himself as they have done in the past. He also knows that he surrendered his right to claim the bonus. In the circumstances, the pleas urged by him in defence of the suit cannot be considered to be *bona fide* but must be considered as being urged simply to gain time. For these reasons we confirm the order passed by Gentle, J. and dismiss the appeal with costs.

Time for furnishing security is extended for three weeks from this day.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

G. Anantachari and others .. *Appellants** (*Accused 1 to 3*).

Anantachari *In re.*

*Criminal breach of trust—Abetment of—Circumstances under which conviction possible—Omission of an officer to bring to the notice of higher authorities—Knowledge of offence, whether amounted to abetment—Indian Penal Code, S.* 109.

The mere omission to bring certain facts within the knowledge of a public servant to the notice of the higher authorities does not itself constitute abetment as defined in the Indian Penal Code, unless the omission is one which can be said to be an illegal omission or involves one which can be said to be an illegal omission, that is, involves a breach of duty imposed by law, and not merely a breach of a departmental rule of conduct or discipline. It cannot be said that the mere omission to bring to the notice of the higher authorities offences committed by other persons amounts to an abetment of those offences.

Where in certain defalcation proceedings of a public institution it was found that a collection manager (1) was aware that another officer of the same institution was systematically issuing private cheques without having adequate funds in the bank, (2) omitted to bring to the notice of the higher authorities that such cheques as mentioned above were dishonoured with the deliberate idea of suppressing an enquiry thereunto, and (3) aware that the other officer was utilising the funds of the public institution for his own private purposes.

*Held*, that the above findings did not support the conviction for a criminal breach of trust. The cheques never went to him before they were paid and he did nothing to show that he instigated any one to make any payment.

* Crl. Apps. Nos. 271 and 314 of 1937. 28th April, 1938.
Crl. R. C. No. 222 of 1937.

The presentation of a cheque at the counter necessarily involves a request for payment of cash and this request to pay money on worthless cheques out of public funds must amount to a criminal breach of trust by a public servant. It will be covered by S. 109 of the Indian Penal Code. The law does not require that instigation should be in a particular form or that it should be only in words and may not be by conduct. Whether there was instigation or not is a question of fact in each case. It is however not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetted was the instigation, and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abetter.

Appeal against the judgment of the Court of the Third Presidency Magistrate, Egmore, Madras, dated 18th May, 1937, and passed in C. C. No. 1506 of 1936, etc.

*Nugent Grant* for *V. T. Rangaswami Aiyangar, K. Narasimha Aiyangar, K. S. Jayarama Aiyar, C. S. Rajappa* and *V. Rajagopalachariar* for Appellants.

*The Crown Prosecutor* on behalf of the Crown.

The Court delivered the following

JUDGMENT.—These cases arise out of a defalcation discovered some time in the middle of 1936 in the treasury of the Corporation of Madras after an audit by a firm of chartered accountants. There appears to have been a practice in the corporation treasury, the only purpose of which was to receive collections and to remit them to the Imperial Bank of India, to cash cheques, originally only pay cheques of the corporation officials, later on cheques signed by corporation officials and finally any cheques which the Assistant Revenue Officer thought fit to pass. The case for the prosecution is that this practice which is described by one of the Magistrates as a "pernicious and obviously illegal practice" was availed of by the appellant in Criminal Appeal No. 271 of 1937, Ananthachari, for the purpose of using corporation money for his own profit by having the use of corporation money from time to time. The *modus operandi* followed is described in paragraph 5 of the judgment of Mr. Tremenhere and it is unnecessary to repeat what he has said. Further, that paragraph contains a correct statement of the facts elicited in the evidence. In brief, Ananthachari used to issue cheques himself, though sometimes they were issued by his friends, and the cheques were presented for encashment at the corporation treasury either by himself or by

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his servant, and thereby moneys were obtained from the corporation treasury even when the persons who drew the cheques had no funds to meet those cheques and many of the cheques so cashed were dishonoured subsequently. The case for the prosecution is that this money which was obtained from the corporation treasury was taken for the purpose of Anantachari's private business. The scale on which these operations were carried on was so large that Anantachari was able to cash cheques for one lakh, eleven thousand and odd rupees, and over Rs. 4,500 of corporation money still remains to be made good out of the money so taken out.

The prosecution in its eagerness to rope in as many as possible threw a wide net in order to catch almost everyone connected with the defalcation, even though in a remote way. Besides Anantachari, the collection manager Chinnaswami Aiyar, appellant in Criminal Appeal No. 314 of 1937, Thiruvengadathan Chetty, the head cashier, and the Assistant Revenue Officer, S. C. John, were all prosecuted besides the Head Accountant Srinivasa Aiyar. The cases against the last three mentioned individuals resulted in discharge, and only Anantachari and Chinnaswami Aiyar have been convicted, the former by the Third Presidency Magistrate and the latter by the Chief Presidency Magistrate, the cases having been tried by different magistrates because the case against Anantachari was transferred from the Chief Presidency Magistrate's file at the request of Anantachari. The Crown Prosecutor has filed a revision petition in respect of the order of discharge relating to the head cashier; but this petition has not been seriously pressed before me, and the whole argument in these cases has proceeded on the basis that the head cashier personally acted honestly, and that in any case he did not know that the cheques which he cashed were going to be dishonoured or that the cheques were presented for payment with the intention of making wrongful gain for those who cashed the cheques. The revision petition has not been argued and I have no doubt that the order of discharge is right. It is enough therefore to dismiss that petition.

I shall first deal with the case against Chinnaswami Aiyar. I may deal with it very briefly because I am of opinion that on the findings of fact recorded by the Chief Presidency Magistrate in his judgment the conviction cannot be supported. The

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learned Magistrate was of opinion that he had to decide the following three points, namely:

"(1) Whether Chinnaswami Aiyar was aware that Anantachari was systematically issuing private cheques without having the necessary funds in the bank, (2) whether Chinnaswami Aiyar omitted to bring to the notice of the higher authorities the fact that Anantachari's cheques were being dishonoured with the deliberate intention of suppressing any inquiry into the matter, and (3) whether he was aware that Anantachari was utilising the funds of the corporation illicitly for his own private purpose."

On these points the findings were all in the affirmative. But these findings do not suffice to support a conviction for abetment of criminal breach of trust. On the charges of conspiracy and falsification of accounts this accused has been acquitted by the learned Magistrate. The only charge in respect of which he was convicted is the charge of abetting criminal breach of trust by a public servant. The mere omission to bring certain facts within the knowledge of the accused to the notice of the higher authorities does not itself constitute abetment as defined in the Indian Penal Code, unless the omission is one which can be said to be an illegal omission, that is, involves a breach of a duty imposed by law, and not merely a breach of a departmental rule of conduct or discipline. It cannot be said that the mere omission to bring to the notice of the higher authorities offences committed by other persons amounts to an abetment of those offences; to take a concrete case, if a clerk does not report to the superior authorities what is known to him about his fellow clerks' taking bribes such omission does not amount to abetment of bribery. It may form the foundation for disciplinary action against him in a departmental way, but it cannot in law amount to abetment of the offence committed by his fellow clerk. It is admitted that Chinnaswami Aiyar had nothing to do with the payment of the cheques in question and it was the payment of the cheques, that is to say, the payment out of the corporation treasury, that is alleged to constitute criminal breach of trust in the present case. The cheques never went to him before they were paid and he had nothing to do with cheques of this kind before they were paid. It is therefore impossible to say that he did anything which facilitated the cashing of the cheques, and there is nothing to show that he instigated any one to make the payment. On this ground alone it is obvious that the conviction of Chinnaswami Aiyar cannot be sustained. It is therefore unnecessary to go further

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into the matter and consider whether the findings of the learned Magistrate are supported by the evidence or not. On the assumption that the findings are supported by the evidence the conviction cannot stand. It is therefore set aside and the sentence also; and this appellant Chinnaswami Aiyar is acquitted. The fine, if paid, will be refunded to him.

Then remains the case of the appellant Anantachari. Mr. Grant who appeared for him did not make any serious attempt to question the correctness of the findings of the learned Magistrate. His argument was that the offence disclosed by the evidence might be one of cheating but cannot amount to any abetment of criminal breach of trust. The evidence clearly shows that cheques were being presented either by Anantachari himself or caused by him to be presented for payment. There can be no doubt that he must have got the cheques cashed for his own wrongful gain and known at the time that such payment by the head cashier out of the corporation money would be criminal breach of trust by a public servant. The learned Magistrate is of the opinion that the abetting by Anantachari was by instigation, and after careful consideration I am of opinion that the learned Magistrate's view is right. The presentation of a cheque at the counter necessarily involves a request for payment of cash and this request to the head cashier to pay money on worthless cheques out of public funds must have been known to Anantachari to be criminal breach of trust by public servant; and there can be no doubt that such payment would have amounted to that offence if the head cashier had the same knowledge and intention as Anantachari had. This is therefore a case which is covered by S. 109 of the Indian Penal Code. The law does not require that instigation should be in a particular form or that it should be only in words and may not be by conduct; for instance, a mere gesture indicating "beat" or a mere offering of money by an arrested person to the constable who arrests him may be regarded as instigation, in the one case to beat and in the other to take a bribe. Whether there was instigation or not is a question to be decided on the facts of each case. The only point of difficulty in the case is that even though there was instigation to make payment out of corporation money the actual reason which led the head cashier to make the payment might have been, as argued by Mr. Grant, not the instigation by Ananta-

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chari, but the initials of the Assistant Revenue Officer on the cheques. It is however not necessary in law for the prosecution to prove that the actual operative cause in the mind of the person abetted was the instigation, and nothing else, so long as there was instigation and the offence has been committed or the offence would have been committed if the person committing the act had the same knowledge and intention as the abetter. It is impossible for any human tribunal to decide exactly how much the instigation actually weighed in the mind of the person abetted when he committed the act or offence. I am therefore of opinion that this argument does not really help the appellant Anantachari. There is no doubt that his conduct amounted to instigation to do an act, namely, to make payment out of the corporation treasury for the wrongful profit of himself and that such payments were actually made by the head cashier honestly or without a dishonest intention. The ingredients of the offence are in my opinion established in this case, and there would be no justification for interference with the conviction. The sentence does not appear to be too severe. His appeal is dismissed. He must surrender to his bail and serve the remainder of the sentence.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Vaiyapuri Chettiar .. *Petitioner** (*Accused*)

*v.*

The Municipal Commissioner, Salem .. *Respondent* (*Complainant*).

Vaiyapuri Chettiar *v.* Municipal Commissioner, Salem.

*District Municipalities Act (V of 1920), Ss. 176, 177 and 339—Contract with Municipality—Terms not complied with—Application of sections—Circumstances when.*

S. 177 of the District Municipalities Act, far from restricting the action to the present owner, clearly intends to have application only against the person who entered into the contract with the Municipality under S. 176. If by reason of parting with the ownership an accused person to whom notice has been sent under S. 177 is unable to comply with the order, then on general principles, a Criminal Court would doubtless refuse to convict; but the petitioner must show that he was actually prevented from complying with the terms laid down by the Municipality.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise

*Crl. R. C. No. 885 of 1937. 4th May, 1938.
Crl. R. P. No. 829 of 1937.

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the judgment of the Court of the Sub-Divisional First Class Magistrate, Salem, dated the 31st day of August, 1937 and passed in C. A. No. 66 of 1937 preferred against the judgment of the Court of the Second Class Magistrate, Salem Town, in Calendar Case No. 223 of 1937.

*R. S. Srinivasachari* and *K. V. Rajagopalan* for Petitioner.

*A. S. Sivakaminathan* for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioner has been convicted under Ss. 177 and 339 of the District Municipalities Act, in that he failed to carry out the order of the Municipality of Salem to connect the roads on a plot which originally belonged to him with the Trichinopoly main road and to fill up pits in a certain road.

Under S. 176 of the District Municipalities Act the Municipality can grant permission for the construction of private streets and it may lay down conditions under which that permission is accorded. Under S. 177 it is prescribed that if any person makes or lays out any street referred to in S. 176 otherwise than in conformity with the orders of the Council, the Municipality may issue a notice calling upon him to carry out his agreement within a certain specified reasonable time. If he fails to do so, the Municipality can take action under S. 177 (2). S. 339 makes punishable any neglect or refusal to do an act in compliance with any proper order of the Municipality; so that reading S. 177 with S. 339 a person can be punished who, like the petitioner, has been given sanction under S. 176 to construct a private road and who has not complied with the conditions laid down by the Municipality when that sanction was accorded.

It is argued that S. 177 can apply only to the present owner and not to a person who long ago parted with his rights; for it cannot be expected that any person should do work to property in which he no longer has an interest. Far from S. 177 restricting the action to the present owner, it clearly intends to have application only against the person who entered into the contract under S. 176. If by reason of parting with the ownership an accused person to whom a notice has been sent under S. 177 is unable to comply with the order, then on general principles a Criminal Court would doubtless refuse to convict; but the petitioner has not shown in the

present instance that he has been prevented in any way from complying with the terms laid down by the Municipality. Moreover, I think the earned Public Prosecutor is right when he says that although the petitioner has sold all the house sites, yet he is still the owner of the roads.

The learned Advocate for the petitioner has rightly pointed out that in the original notice issued under S. 176 the petitioner was not called upon specifically to erect a culvert as he was in the notice under S. 177. If however the petitioner had connected in a reasonable manner all his private roads with the main road in accordance with the terms of his contract, then he might be in a position to plead that he could not be called upon to erect the culvert. However that question does not arise in the present application.

It has further been contended that the action against the petitioner was barred by limitation under S. 347, as under that section a charge must be brought within three months of the commission of the offence. The petitioner received his first notice Ex. D on 15th August, 1936; but it appears that in response to that notice he sent a petition on 2nd September, 1936, to the Municipality, presumably protesting against the terms of the notice. A reply Ex. E was then sent to him and the latter part of that reply is of the nature of a notice, for the petitioner was directed to comply with the conditions of the licence granted to him within a month of the receipt of that order (namely, Ex. E dated 9th September, 1936). In default a prosecution was threatened. The offence was committed on 9th October, 1936, when the month which was allowed to him under Ex. E had expired; and the prosecution was launched in December—well within the three months allowed by S. 347.

Finally, it has been argued that the Criminal Court should have refused to convict in view of the fact that the prosecution was launched as long as eight years after the notice under S. 176 was issued. Although I do not think that the explanation which the learned Public Prosecutor has thought fit to give on behalf of the Municipality is altogether satisfactory, yet undoubtedly the petitioner did deliberately disobey the terms of the agreement entered into by him and continued to disobey the order throughout the many years that had intervened between the date of the order under S. 176 and the

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launching of the prosecution. I do not consider therefore that the petitioner was entitled to any special consideration.

The petition is therefore dismissed.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

W. K. Devaraja Mudaliar .. *Petitioner* (Accused).*

Devaraja Mudaliar, *In re.*

*Motor Vehicles Act (VIII of 1914), S. 15-A—Lorry overloaded—Conviction under—Burden of proof on prosecution to show knowledge of accused.*

In order to convict a person under S. 15-A of the Motor Vehicles Act the burden of proof is upon the prosecution to show that the accused knew that the lorry was overloaded.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Second Presidency Magistrate of the Court of the Presidency Magistrates, George Town, Madras, in M. V. No. 905 of 1937.

*K. V. Eswaran* for Petitioner.

*K. V. Ramaseshan* for *The Crown Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioner is the owner of a lorry that was overloaded; and he was convicted under S. 15-A of the Motor Vehicles Act of suffering the lorry to be overloaded.

The wording of S. 15-A and the general plan of the Act show that the burden was on the prosecution to show that the accused knew that the lorry was overloaded. Such knowledge could be proved by adducing evidence that, for example, the lorry had just left the owner's premises or that all the goods on the lorry had come from there. All we know in the present case, however, is that the lorry was overloaded. It is stated at the bar that the lorry was actually on its way from Conjeevaram to Madras. If so, it is unlikely that the accused knew that the lorry was overloaded.

The prosecution did not therefore prove its case. The petition is accordingly allowed, the conviction set aside and the fine ordered to be refunded.

K. C. —— *Petition allowed.*

* Crl. R. C. No. 132 of 1938. 4th May, 1938.
Crl. R. P. No. 129 of 1938.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Muhammad Yusuf Sahib .. *Petitioner** (*Accused*).

Muhammad Yusuf Sahib *In re.*

*Penal Code (Act XLV of 1860), S. 341—Offence under—Proof of.*

Where the accused was shown to have twice stopped the complainant by force, catching hold of his bandy bull,

*Held,* that the facts found were sufficient to warrant a conviction under S. 341, Indian Penal Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Chidambaram dated 25th January, 1937, and passed in C. A. No. 2 of 1937 preferred against the judgment of the Court of the Second Class Magistrate of Porto Novo dated 17th November, 1936, and passed in Calender Case No. 132 of 1936.

*K. Bhashyam Aiyangar* and *J. R. Gundappa Rao* for Petitioner.

*A. S. Sivakaminathan* for *The Public Prosecutor* (*V. L. Ethiraj*), on behalf of the Crown.

The Court made the following

ORDER.—The question of the propriety of the conviction under S. 341 of the Indian Penal Code is the only point argued before me. The facts found are that the petitioner twice stopped the complainant by force, catching hold of his bandy bull. This is quite enough to sustain the conviction under S. 341 of the Indian Penal Code. This petition is accordingly dismissed.

B. V. V. —— *Petition dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

P. Rami Reddi and others .. *Petitioners†* (*Accused 1 to 4, 7 and 5*)

*v.*

Chintha Chinna Narasi Reddi .. *Respondent* (*Complainant*).

Rami Reddi *v.* Narasi Reddi.

*Penal Code (XLV of 1860), S. 160—Affray—What constitutes.*

To constitute affray there must be a fight and it is not a fight when one side is aggressive and the other side passive.

* Crl. R. C. No. 509 of 1937. 24th February, 1938.
Crl. R. P. No. 477 of 1937.

† Crl. R. C. No. 9 of 1938. 8th August, 1938.
Crl. R. P. No. 9 of 1938.

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For beating others the accused can be certainly charged and punished, but if the prosecution deliberately chooses to amend the charge and rest the case entirely on the ground of affray, the accused will have to be acquitted.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First Class Magistrate of Jammalamadugu in C. A. No. 42 of 1937 preferred against the judgment of the Court of the Special Third Class Magistrate of Jammalamadugu in C. C. No. 1 of 1937.

*P. Chandra Reddi* and *R. Ramalinga Reddi* for Petitioners.

*The Public Prosecutor* on behalf of the Crown.

Respondent not represented.

The Court made the following

ORDER.—The petitioners in this case have been convicted of affray and sentenced to pay fines. The convictions and sentences were confirmed on appeal by the Sub-Divisional Magistrate, Jammalamadugu.

The only question argued in this case is whether one of the ingredients of the offence of affray, namely, fighting by two or more persons, has been established; in other words, when members of one party beat members of another party and the latter did not retaliate or make any attempt to retaliate, could it be said there was fighting between the members of the one party and the members of the other. In this case, what happened was that the petitioners attacked and beat P. W. 2, because he had given evidence against them. When P. W. 1 demonstrated, he also was beaten and he fell down unconscious. P. W. 3 who interceded was hit with stones by two of the accused who have been acquitted. From this account of the offence given by the prosecution can it be said there was fighting by two or more persons, the other ingredients of the offence, namely, that the occurrence was in a public place and that it was likely to cause alarm to the public being established. In a connected case, Horwill, J., said that to constitute an affray, there must be a fight and it is not a fight when one side is aggressive and the other side is passive. It was on this ground that the petitioners in the connected case were acquitted in revision. I am of opinion that fighting connotes necessarily a contest or struggle for mastery between two or more persons against one another. A struggle or a contest necessarily implies that there are two sides each of which is trying to

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obtain the mastery, so that unless there is some violence offered or threatened against one another, there could be no fight but only a mere assault or beating. In these circumstances, I am prepared to follow the view adopted by Horwill, J., in the connected case and find that there was no fighting in the present case. It was merely a case of beating by members of one party of certain members of another party for which no doubt they could have been charged and punished, but as the prosecution deliberately chose to amend the charge, and rest their case entirely on the charge of affray, the case must stand or fall by what the prosecution has done. The offence of affray not having been established, the petitioners were entitled to be acquitted of that charge. Their convictions and sentences under S. 160 of the Indian Penal Code are therefore set aside and they are acquitted. The fines if paid by them should be refunded. *Petition allowed.*

K. C.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

D. Chockalingam Chettiar .. *Appellant** (*Petitioner*)

*v.*

T. S. P. L. P. Palaniappa Chettiar and another .. *Respondents* (*Respondents 2 and 1*).

Chockalingam Chettiar v. Palaniappa Chettiar.

*Insolvency Court—Jurisdiction to go behind the decree of an appellate Court finding a debt—Circumstances of.*

Where on the strength of a judgment and decree passed in appeal, the petitioner sought to prove the amount of the decree debt in insolvency proceedings but the Judge who heard the petition felt that the decree was not binding on the creditors as the debt was untrue, on the question whether the Insolvency Court could go behind the decree,

*Held*, that the Insolvency Court was entitled to go behind the decree of the appellate Court if enforcing the decree was obviously unjust to the creditors represented by the Official Assignee.

Ex parte *Lennox*: In re *Lennox*, (1885) 16 Q.B.D. 315 and In re *Van Laun*: Ex parte *Chatterton*, (1907) 2 K.B. 23, relied on.

*Narasimha Sastri* v. *The Official Assignee of Madras*, (1929) 59 M.L.J. 321, referred to.

Appeal against the order of the District Court of South Arcot dated 24th October, 1933, and made in I. A. No. 306 of 1932 in I. P. No. 10 of 1928.

*S. Nagaraja Aiyar* for Appellant.

*K. R. Rangaswami Aiyangar* for Respondents.

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*C. M. A. No. 278 of 1934. 24th January, 1938.

Chocka-lingam Chettiar v. Palaniappa Chettiar.

The Court delivered the following

JUDGMENT.—The appellant trust, through a former trustee, executed a mortgage bond in favour of the two insolvents and their brother. On this bond a mortgage suit was brought and a decree obtained against the plaint institution. In O.S. No. 8 of 1924 on the file of the Sub-Court, Negapatam, the plaintiff, another trustee, brought a suit to have it declared that the mortgage decree was not binding on the plaint trust and for refund of a certain amount which had been paid under the decree obtained by the insolvents and their brother. He was successful in the trial Court; but the insolvents and their brother, who were defendants 1 to 3 in the suit, filed a joint appeal against the decree in O. S. No. 8 of 1924. During the pendency of the appeal the first and second defendants became insolvents and died before the appeal came on for hearing. The appellate Court, apparently in ignorance of the fact that defendants 1 and 2 had become insolvents, declared that the appeal of defendants 1 and 2 had abated; and so the appeal against them was dismissed. The third defendant, on precisely the same grounds of appeal as defendants 1 and 2 had raised, was successful; and it was held that the mortgage in question was binding on the plaintiff institution. On the strength of this judgment and decree passed in appeal, the appellant has sought to prove for the amount of the decree debt in O. S. No. 8 of 1924 in the Insolvency Court; and the learned District Judge has held that the decree passed in O. S. No. 8 of 1924 and confirmed in appeal as far as the insolvents are concerned—is not binding on the creditors; and he has held that the debt is not a true one. The plaintiff trustee in this appeal contends that the decree was a proper one, free from fraud and collusion; and that therefore the Insolvency Court ought not to have gone behind the decree and, secondly, that in fact the then Official Receiver did have knowledge of the pendency of the appeal and did not take the trouble to come on record; and that he is therefore precluded from claiming that the decree of the appellate Court is not binding on him. The third contention is that if the Insolvency Court goes behind the decree of this Court it should reconsider the whole question whether the mortgage debt is binding on the appellant institution.

It is not denied that in certain circumstances the Insolvency Court can refuse to admit a judgment debt. The leading

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case on the question as to how far an Insolvency Court should consider itself bound by a decree is Ex parte *Lennox*: In re *Lennox*[1] and it will be seen therefrom that no judgment or decree is binding on the Insolvency Court, that the business of an Insolvency Court is to ascertain whether a debt is true or not, and that although the judgment and decree are binding on the parties to it whether the debt is true or false and whatever the judgment and decree might be; yet the Insolvency Court is not so bound; for the Insolvency Court will not and should not ordinarily go behind the decree unless it has reason to believe that the decree was brought about by fraud or collusion or is unjust. As pointed out by Lord Esher in the case above referred to, a judgment is *prima facie* evidence of the correctness of the debt. He says:

"It cannot be doubted that a judgment is *prima facie* evidence of a debt, and that a judgment or order to which a debtor has consented is far stronger evidence against him of the validity of the debt for which it purports to be given than a mere judgment by default. It is very strong evidence against him. Nevertheless, it seems to me that upon certain allegations being brought forward, the Court is entitled to inquire into the alleged debt; and the Court, exercising a judicial authority, is bound to do so upon a sufficient cause being shown."

This principle has been followed in In re *Van Laun*: Ex parte *Chatterton*,[2] in which Cozens-Hardy, M. R., quotes with approval a passage in the judgment of Bigham, J., which was the subject of appeal:

"The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him."

Reference has been made by the learned Advocate for the appellant to *Narasimha Sastri* v. *The Official Assignee of Madras*,[3] a judgment of Ramesam and Cornish, JJ. In that case there was only one creditor and only one debt; and it was contended by the insolvent that the decree was passed *ex parte*. The judgment-debtor, who became insolvent, contended that he was not properly served with summons in the case, and that the debt was a fictitious one. Ramesam, J., in his judgment, states his opinion that it was not a case to which the principles

1. (1885) 16 Q.B.D. 315.
2. (1907) 2 K.B. 23.
3. (1929) 59 M.L.J. 321.

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enunciated in Ex parte *Lennox*: In re *Lennox*[1] and In re *Van Laun*: Ex parte *Chatterton*[2] could be usefully applied; for if the debt was a fictitious one the Official Assignee had no jurisdiction at all. The learned Advocate for the appellant relies not so much upon the decision in this case as upon a remark in the judgment of Lord Esher in In re *Flatau*: Ex parte *Scotch Whisky Distillers*[3] to the effect that

> "That the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition."

Applying the above principles to the facts before us, it seems clear that the Insolvency Court is entitled to go behind the decree of this Court above referred to if it is obviously an unjust decree which could not be enforced without doing injustice to the creditors represented by the Official Assignee. The decree against the insolvents and the 3rd defendant in O.S. No. 8 of 1924 was a joint decree; and there is no difference at all between the cases of the defendants and their brother the 3rd defendant—and in fact they filed a common appeal with common grounds of appeal. It follows therefore that if the legal representatives of the insolvents and the Official Receiver had been on the record they would necessarily have succeeded; so that it is quite clear that an injustice has resulted from the non-appearance on the record of the Official Receiver. The Insolvency Court was therefore entitled to go behind the decree and to say that the judgment debt of the appellant was not a true one.

It is next contended that even if the decree be re-opened the Insolvency Court ought to reconsider the question whether the mortgage debt was really binding on the plaintiff institution and whether the trial Court in O. S. No. 8 of 1924 was not right in giving a decree in favour of the appellant and this Court in appeal wrong. As has been laid down by the authorities cited above, if there is no reason to think that the judgment and decree are wrong, the Insolvency Court is bound to follow that judgment and decree. The Insolvency Court in this case would not be justified in considering whether Venkatasubba Rao and Cornish, JJ., in Appeal No. 361 of 1925 are right or whether the trial Court is right. There is naturally a strong presumption that the appellate Court was right; and

1. (1885) 16 Q.B.D. 315.
2. (1907) 2 K.B. 23.
3. (1888) 22 Q.B.D. 83.

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only if the appellant was able to show that in some way that a miscarriage of justice had been brought about in the appellate Court would the Insolvency Court be bound to consider whether the decision of the appellate Court was right or not. The appellant has not been able to do that; and the lower Court was therefore justified in holding on the strength of the judgments in Appeals Nos. 360 and 361 of 1925 that the debt of the appellant was not a true one.

The present case is slightly different from those that have been quoted before me, in that it is alleged in the affidavits of the appellant filed in the Court below that the Official Receiver was aware of the existence of the proceedings and yet did not take the trouble to get himself brought on record. There is no reason to think that there was a wilful default and that the Official Receiver who had charge of the insolvent's estate at the time of the hearing of Appeals Nos. 360 and 361 of 1925 failed or neglected his duty. Assuming, however, that the Official Receiver did negligently fail to bring himself on record, I cannot say on the principle enunciated above that this would in any way make the case of the appellant any stronger. If the Insolvency Court is entitled to go behind the judgment and decree, it should consider whether the alleged debt is true or not; and it matters not whether the Official Receiver was a party to the appeal or not.

The appeal therefore fails and is dismissed with costs of the 2nd respondent.

K. C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

A. K. A. A. Audiappa Chetti and others .. *Appellants** (*Plaintiffs*)

*v.*

The Taluk Board of Devakottah, through its President and others .. *Respondents* (*Defendant and Nil*).

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*Madras Local Boards Act (XIV of 1920)—Income from money-lending business in Burma—Receipt by agent at Burma and remitting to principal at Devakottah—Principal resident at Devakottah for more than sixty days—If assessable under S. 93—Tax not levied for a half year—If can be levied after the close of that half year.*

Receipt of money within the Local Board area by a person residing within the area out of the income of his foreign business from his foreign agent

* S. A. Nos. 836 to 842 of 1932. 29th March, 1938.

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amounts to receipt of income within such area within the meaning of S. 93 of the Madras Local Boards Act XIV of 1920.

Where certain persons resided in Devakottah for more than 60 days in each half year beginning 1st April, 1928 and ending 31st March, 1929 and received money by means of remittances from their place of business in Burma where they carried on money-lending business, such remittances are assessable to profession-tax under S. 93 of the Madras Local Boards Act XIV of 1920, as "receipt of income from money-lending" or as income from a source which is not " lands or houses inside the local limits of the area ".

*Cheena Pena Rena Perianan Chetty* v. *Taluk Board, Devakottah,* (1932) 63 M.L.J. 148: I.L.R. 55 Mad. 848, followed.

Where the assessees were not assessed for period ending 30th September, 1928 but in January, 1929, towards the close of the second half year the President of the Local Board classified the assessee as having been, for the whole year, in receipt of an uniform monthly income of so much per month and imposed a tax amounting in each case to twice the appropriate yearly tax, the assessment for the first half year is illegal. This is a half yearly tax, it is assessed by the taxing authority at rates proportionate to the monthly income accruing during that half year and is leviable in that half year itself and cannot be levied after the close of the half year.

*Prince of Arcot* v. *Corporation of Madras,* (1929) 57 M.L.J. 536: I.L.R. 52 Mad. 866, followed.

A suit to recover a tax collected by a Local Board and for an injunction restraining the Board from taxing in future a particular kind of income is not of a small cause nature.

Appeal against the decree of the Court of the Subordinate Judge of Devakottah in A.S. No. 100 of 1931, preferred against the decree of the Court of the District Munsiff of Devakottah in O.S. No. 251 of 1929, etc.

*P. R. Srinivasan* for Appellants.

*V. Ramaswamy Aiyar* for Respondents.

These appeals coming on for hearing at the first instance, the Court (*Lakshmana Rao, J.*) made the following

ORDER.—It is necessary for the disposal of these second appeals to decide whether receipt of money within the Local Board area by a person residing within the area out of the income of his foreign business from his foreign agent, amounts to receipt of income within such area, within the meaning of S. 93 of the Madras Local Boards Act, and the Bench decision on the point in *Pena Rina Yena Manickavasagam Chettiar* v. *Union Board of Devakottah, through its President O.R.M.M.S. M. Manickavasagam Chettiar* alias *Sevugan Chettiar*[1], was doubted in C.R.P. No. 1519 of 1931 which for that reason has been referred to a Bench. The second appeals will also be posted before a Bench.

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1. (1932) 63 M.L.J. 741: I.L.R. 55 Mad. 853.

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In pursuance of the above order, the Court (*Burn* and *Stodart, JJ.*) delivered the following

JUDGMENT.—These seven appeals depend on the same issues of law and fact. Plaintiffs are the appellants. The cause of action is that they were assessed to profession-tax in respect of a certain kind of income in the year 1928-1929 by the Taluk Board, Devakottah. The Board is the respondent. The suits were to recover the tax and for a declaration that it was illegally levied and for an injunction restraining the Board from levying it on such income in future. The learned Subordinate Judge, Devakottah, reversing the trial Court's decree dismissed the suits.

It is objected by the learned advocate for the respondent that under S. 102 of the Civil Procedure Code, no second appeal lies, since the suits are of a small cause nature, being merely to recover small sums of money. But the suits are, in addition, and perhaps mainly, for an injunction restraining the Board from taxing in future a particular kind of income which according to the appellants is not taxable as professional income under the Local Boards Act. The same point was raised and overruled in S.A. No. 882 of 1928, *Chockalingam Chettiar* v. *Taluk Board, Devakottah*[1]. We overrule it again.

Admittedly appellants resided in the area of the Local Board for more than sixty days in each half year of the year beginning 1st April, 1928 and ending 31st March, 1929. Admittedly they received money by means of remittances from their places of business in Burma where they carried on the trade of money-lending. On these remittances the appellants were assessed to profession-tax under Ss. 93 and 96 of the Act then in force, namely, the Madras Local Boards Act (XIV of 1920). They contend that this kind of income is not taxable under that Act and the principal question for decision in these appeals is whether the lower appellate Court was wrong in holding that it was. The question has to be decided on a construction of the taxing sections of the Act.

The relevant section is S. 93. It is as follows:—

"If the President of the District Board publishes a notification under S. 77, that a profession-tax shall be levied in any local area, every person who within such area, and for the period laid down in S. 96, exercises a profession, art, trade or calling; or is in receipt of any income from money-lending

1. (1932) 36 L.W. 659.

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or any source other than houses and lands inside the local limits of the area notified under S. 77, bringing him within one or more of the classes specified in Schedule IV, shall pay a half-yearly tax on his professional income, on the scale shown in the said schedule."

The case of the appellants is that the money derived from their money-lending business in Burma is income when it accrues in Burma to their agents or partners there but is not income when it, or part of it, is remitted to the appellants in Devakottah. Therefore, they contend, they are not in receipt of any income from money-lending in Devakottah.

No authority is cited for this position. The remittances on which the appellants have been taxed are admittedly derived from their money-lending business in Burma; and the appellants, in the words of S. 93, are "in receipt" of these remittances when they come into their hands in Devakottah. We think it is plain that these remittances are " income from money-lending ". We do not think it makes any difference that the profits accruing from the business are actually earned elsewhere and pass first through the hands of some agent or partner before they reach the hands of these appellants.

This exact point has already been decided by a Bench of this Court in *Cheena Pena Rena Perianan Chetty* v. *Taluk Board, Devakottah*[1]. The facts in that case were exactly the same as in these appeals. We respectfully agree with that decision. The same argument that income cannot be received as income more than once was raised in that case and negatived. On this ground of appeal therefore the appellants must fail.

Apart altogether from the fact that appellants are liable as being in receipt of income from money-lending it appears to us that they are liable on another ground. S. 93 embraces three classes of persons: (*a*) persons who within such area exercises a profession, art, trade or calling; (*b*) or are in receipt of any income from money-lending; (*c*) or are in receipt of any income from any source other than lands or houses inside the local limits of the area.

Conceding for the sake of argument that in the process of transmission to Devakottah these remittances in some subtle way lose their character of "income from money-lending" they still continue to be income from a certain definite source, which is not:

1. (1932) 63 M.L.J. 148: I.L.R. 55 Mad. 848.

"lands or houses inside the local limits of the area." It appears to us therefore that the appellants are persons who are taxable in respect of those remittances on that ground also.

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Two further objections are raised in these appeals. Both have reference to the method of taxation. The tax is a half-yearly tax. The appellants object that they have not been assessed at all in the first half-year and so are not liable to pay the tax for that half-year; and that they have not been legally assessed in the second half-year. S. 93 after describing the kinds of income which are assessable to the tax, provides that persons in receipt of such income shall pay a half-yearly tax on it on the scale shown in Sch. IV. And S. 9 of Sch. IV is:

> "Persons liable to the profession-tax shall be classified by the President of the Local Board and assessed to the profession-tax on a scale proceeding proportionately to the following maximum scale, or on the maximum scale as the case may be, and the President may from time to time revise such classification."

Then follows the scale. The effect of Ss. 93 and 9 of the schedule, therefore is that persons liable to the tax shall pay a half-yearly tax on their professional income on being assessed to the tax in the manner laid down in Sch. IV, that is to say, when the President has decided in which of the classes enumerated in the scale, each person falls. The tax in these appeals relates to two half-years, namely, the half-year ending 30th September, 1928, and the half-year ending 31st March, 1929. The appellants were not assessed by the President for the first of these periods and their contention is that they are not taxable for that period. What happened was that in January, 1929, that is to say, towards the close of the second half-year the President classified the assessees as having been, for the whole year, in receipt of an uniform monthly income of so much per month, and imposed a tax amounting in each case to twice the appropriate half-yearly tax. The appellants contend that this procedure is illegal. Their case is that they must be assessed to the half-yearly tax within the half-year to which the tax relates; in other words that they cannot be assessed retrospectively. We think that this contention must prevail. The point has been decided in *Prince of Arcot* v. *Corporation of Madras*[1] on a construction of the provisions of the Madras City Municipal Act (IV of 1919) which in our

1. (1929) 57 M.L.J. 536: I.L.R. 52 Mad. 866.

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opinion are similar in principle in this respect to the Madras Local Boards Act (XIV of 1920). That is a very exhaustive judgment and we feel that we cannot add anything useful to the reasoning of the learned Judges Waller and Krishnan Pandalai, JJ., who decided the case. It is contended by the learned Advocate for the respondent Board that Ss. 111 and 113 of the Madras City Municipal Act which are the taxing sections of that Act differ from S. 93 of the Local Boards Act in an important particular, namely, that they require a determination of the tax to be made by the taxing authority before the tax becomes leviable. The relevant words of S. 113 of that Act are:

"If, for sixty days in the aggregate in any half-year, any person exercises a profession, etc., rendering him liable to the profession-tax such person shall become liable for the profession-tax and if the tax due in respect of the half-year is not paid, the Commissioner shall cause a notice to be served on such person to pay it within fifteen days."

And S. 111 is:

"Every person who within the City and for the period prescribed in S. 113 exercises a profession, etc., bringing him within one or more of the classes of persons specified in the taxation rules in Sch. IV shall pay a tax as determined under the said rules."

And Sch. IV is as regards profession-tax:

"Persons shall be assessed by the Commissioner to the profession-tax under the following classes on a scale to be determined by the Council from time to time."

The argument of the learned Advocate for the respondent Board is that under the Local Boards Act a person becomes liable to pay the tax for any particular half-year by the mere fact of his receiving an income which is taxable under S. 93; while under the Municipal Act a person does not become liable until he is assessed by the Commissioner under the taxation rules. We do not think that this distinction can be made. Under S. 93, liability accrues when a person exercises a profession or receives an income "bringing him within one or more of the classes of persons specified in Sch. IV".

And turning to S. 9 of Sch. IV we find that he does not come within any of the said classes till he is "classified" by the President. In other words the President before assessing any one to tax is bound to determine in which class of the schedule he falls, just as the Commissioner under the taxation rules which apply to the city has to do exactly the same thing. In substance we think there is no difference between the two

Acts. The concluding words of the substantive portion of S. 93 of the Local Boards Act, namely:

> "shall pay a half-yearly tax on his professional income on the scale shown in the said Schedule (Sch. IV),"

mean by implication that the President has to determine the assessee's place in the scale and in that manner determine the amount of the tax. We observe also that this determination by the President is not final. An assessee is at liberty under S. 11 of the Schedule to have his place in the scale and therefore the amount of his tax revised by the President on producing his accounts and demonstrating that he should be placed lower in the scale.

But even if for the sake of argument it is conceded that there is this difference between the two Acts does that prevent the principle of the *Prince of Arcot* v. *Corporation of Madras*[1], from applying to the facts of the present cases. The broad facts are that this is a half-yearly tax that it is assessed by the taxing authority at rates proportionate to the monthly income accruing during that half-year, and that it is leviable in the half-year itself. The principle of the case cited is that to allow the tax to be assessed after the close of the half-year is inconsistent with the scheme of the Municipal Act which in these broad aspects, does not differ from the Local Boards Act. Following that decision we must allow these appeals to this extent, namely, that the tax for the first half-year was illegally imposed and is recoverable by the appellants.

Lastly it is urged that even in respect of the second half-year the assessment is illegal inasmuch as there is no separate assessment for that half-year. We think that this objection is one of form and not of substance. The order of assessment in each case stated that the assessee received an income of so much per month during the whole year and that he was assessed to a tax which, on reference to the schedule, is seen to be twice the half-yearly tax appropriate to such monthly income. We think that this clearly means that for the second half-year the assessee received a monthly income of the amount stated and was liable to pay a tax amounting to half of the amount at which he was assessed.

In the result, we allow these appeals to the extent stated, namely, that the appellants are entitled to recover half of the

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1. (1929) 57 M.L.J. 536: I.L.R. 52 Mad. 866.

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tax paid by them for the year 1928-1929, representing the tax for the first half of that year. To that extent the decree of the lower appellate Court is modified. For the rest the appeals are dismissed.

Appellants to receive half their costs throughout from the Local Board respondent and the latter to pay its own costs throughout.

S. V. V. — *Appeals allowed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD THANKERTON, LORD ROCHE, LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Rai Bajrang Bahadur Singh and another .. *Appellants**

*v.*

Rai Beni Madho Bakhsh Singh and others .. *Respondents.*

P.C.

Bajrang Bahadur Singh v. Beni Madho Bakhsh Singh.

Res judicata—*Partition—Plots included in mahal—Holders recorded as having under-proprietary rights—Partition completed—Subsequent civil suit for declaration of right as superior proprietors—Whether barred—Jurisdiction of Civil Court—United Provinces Land Revenue Act (III of 1901), Ss.* 111, 112 *and* 233 (*k*).

Where a question of title affecting a partition which might have been raised in the partition proceedings is not so raised, and the partition is completed, S. 233 (*k*) of the U. P. Land Revenue Act operates to prevent parties to the partition from subsequently raising the same question in a Civil Court. The words 'partition and union of mahals' refer to a process regulated by Chapter VII of the Act the result of which process receives statutory effect. Nothing in the Act leads to the conclusion that "partition" means nothing more than the re-arrangement of land into units of area. That word imports and includes that rights in the units are distributed among the sharers. S. 111 of the Act deals with cases where, in the course of partition proceedings, any objection is made by a recorded co-sharer which raises any question of proprietary title. The principle of *res judicata* can have no application in cases where no objection has been made under S. 111 and the provisions of that section and of S. 112 have accordingly not come into operation. In such a case the partition proceeds upon the entries in the khewat, and the Collector does not function as a Civil Court or have in that or any other capacity to decide as to its correctness expressly or implicitly. *Muhammad Sadiq* v. *Laute Ram*, (1901) I.L.R. 23 All. 291 (F.B.) and *Bijai Misir* v. *Kali Prasad Misir*, (1917) I.L.R. 39 All. 469 (F.B.), approved.

*Ram Rekha Misra* v. *Lallu Misra*, (1931) I.L.R. 53 All. 568, overruled.

Appeal from a judgment and decree dated 7th April, 1932, of the Chief Court, Oudh (the Chief Judge and Kisch, J.)

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*P. C. Appeal No. 77 of 1934. — 27th May, 1938.
Oudh Appeal No. 8 of 1932.

P.C.

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following a decision of the Full Bench (the Chief Judge, Raza and Srivastava, JJ.) dismissing an appeal from a decision of the Subordinate Judge, Rai Bareli, dated 15th November, 1930.

The appellants on 20th February, 1930, brought an action against sixty-nine defendants, of whom No. 69 was joined *pro forma*, for a declaration that the appellants, their co-plaintiffs and defendant 69 were the superior proprietors and not the inferior proprietors of a number of plots of land situated in the village of Nain, pargana Salon, Rai Bareli district. The appellants contended that they were always in possession of the disputed plots as superior proprietors; that Nain was partitioned in 1906, five mahals being created, and that the plots in dispute, being distributed throughout the five mahals, were wrongly recorded as in the under-proprietary tenure of the appellants and others. The defendants denied that the appellants had any title as superior proprietors in the particular plots in dispute, and contended that the action was not maintainable as the plaintiffs had failed to claim superior proprietary rights during the partition proceedings themselves or when the settlement khewats were being prepared, and that the action was barred by virtue of S. 233 (*k*) of the United Provinces Land Revenue Act, 1901. The Subordinate Judge found against the plaintiffs on the issue of their title to superior rights of proprietorship in the plots, and he further held that the action was bad as being one to disturb the partition of 1906 and as being barred by S. 233 (*k*). On appeal to them, the Division Bench referred to the Full Bench *inter alia* the question whether the action was barred by S. 233 (*k*). The Full Bench having answered that question in the affirmative, the plaintiffs appealed to His Majesty in Council.

*H.W. Williams* for Appellants.—Counsel referred to *Shambhu Singh* v. *Daljit Singh*[1], *Kalka Prasad* v. *Manmohan Lal*[2] and to *Bijai Misir* v. *Kali Prasad Misir*[3].

*W. Wallach* for Respondents.

27th May, 1938. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—The question for determination in this case relates to partition proceedings which from the 3rd October, 1903, to the 1st July, 1907, took place under the United Provinces Land Revenue Act (U. P. Act III of 1901) in respect of a village called Nain situate in pargana Salon in

1. (1916) I.L.R. 38 All. 243 (F.B.). 2. (1916) I.L.R. 38 All. 302 (F.B.).
3. (1917) I.L.R. 39 All. 469 (F.B.).

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the district of Rai Bareli in Oudh. The question has been described by the Chief Court of Oudh as of importance, and judicial opinion in the United Provinces has for many years been divided upon the principle to be applied.

The suit out of which the present appeal arises was brought in the Court of the Subordinate Judge of Rai Bareli by the two appellants together with two other persons on the 20th February, 1930, against 68 persons interested in the lands of the village, defendant No. 69 being joined *pro forma* as a person having the same interest as the plaintiffs. The relief claimed by the plaint was a declaration that the plaintiffs and defendant No. 69 were superior proprietors as distinct from under-proprietors of various plots of land specified in list A attached to the plaint. The aggregate area of these plots is about 71 bighas; they are not contiguous but are scattered throughout the various parts of the village. By reason of certain compromises entered into pending this appeal to His Majesty, there remain in controversy only five plots with a total area of 5 bighas 7 biswas 16 biswansis, and the respondent No. 3, Thakurain Chhabinath Kuar (the third defendant), is the only contesting respondent. She is one of the two widows of one Rai Chait Narain Singh, her co-widow being Musammat Seot Raj Kuar. At the time when partition proceedings as already mentioned were begun in 1903 the plaintiffs were recorded as having only under-proprietary right in these five plots. As a result of the partition, these plots were included in the revenue-paying unit or "mahal", comprising 164 bighas, which was given the name of Rai Chait Narain Singh and assessed as at annual revenue of Rs. 51. The plaintiffs were recorded as having an under-proprietary interest therein but as holding them rent free. The superior interest was recorded as belonging to Rai Chait Narain Singh and another. It now stands in the names of his two widows who hold as limited owners under the Hindu law. Musammat Seot Raj Kuar, by registered deed dated the 20th September, 1933, has compromised with the appellants on terms which purport to agree that the latter be recorded as the superior proprietors, that they shall get revenue thereon separately assessed and that she shall not be liable for the payment of such revenue.

At the trial of the suit the learned Subordinate Judge found against the plaintiffs on the issue as to their title to the

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superior right in the suit lands. He also held that their suit was bad as being one to disturb the partition of 1906 and as contrary to S. 233 (*k*) of the Act of 1901. The Division Bench of the Chief Court on appeal referred to a Full Bench two questions:—

1. Is the relief of declaration prayed for by the plaintiffs in the present suit barred by the provisions of cl. (*k*) of S. 233 of the Land Revenue Act, 1901, by virtue of partitions of 1906 and 1910?

2. Is the jurisdiction of the Collector to act under cl. (*c*) of S. 111 (1) of the Land Revenue Act, 1901, ousted when the question of proprietary title alleged to have been decided by him in the partition proceedings mentioned above had already been determined by a Court of competent jurisdiction?

The Full Bench (10th March, 1932), having answered the first question in the affirmative and the second in the negative, the Division Bench on the 7th April, 1932, dismissed the appeal. From this decree the present appeal has been brought pursuant to a certificate granted on the 21st September, 1932, by the Chief Court that the case complies with the requirements of S. 110 and is also fit for appeal to His Majesty under cl. (*c*) of S. 109 of the Civil Procedure Code.

It has been contended for respondent No. 3 (hereinafter called the respondent) that the amount or value of the subject-matter in dispute on this appeal had been reduced to less than Rs. 10,000 by compromise with certain of the defendants effected after the date of the certificate but before the 12th December, 1932, when the appeal was finally admitted, and that the appeal had become incompetent accordingly. Their Lordships are far from holding that this contention would have prevailed apart from the certificate as to fitness under cl. (*c*) of S. 109, but in view of the express reference to that clause in the judgment of the Chief Court they think that the objection must clearly be overruled.

The second of the two questions referred to the Full Bench was apparently propounded in the interest of the plaintiffs. Before their Lordships the negative answer given to it by the Full Bench has not been contested in argument but it is in any view unnecessary that their Lordships should give any decision thereupon.

As the sole question for decision on this appeal is whether the suit is barred by clause (*k*) of S. 233 of the Act of 1901, it is necessary to consider in relation to that clause the nature and effect of partition proceedings taken under chapter VII of

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the Act, to examine the circumstances in which the plaintiffs claim to be entitled to relief, and to ascertain the results which would follow from the grant of the relief claimed.

S. 233, upon which the present case turns, constitutes Part B of chapter XI of the Act. The subject-matter of the chapter is described as "Miscellaneous", and that of Part B as "Jurisdiction of Civil Courts" or as given in the margin of the section "Matters excepted from the cognisance of Civil Courts". These matters are stated in thirteen clauses (*a*) to (*m*), of which the most important for the present case is (*k*):

233. No person shall institute any suit or other proceeding in the Civil Court with respect to any of the following matters:—

(*k*) partition or union of mahals except as provided in sections 111 and 112.

Other matters excepted from the cognisance of Civil Courts by the section are the liability of any land, not excepted under S. 58, to be assessed to revenue; the claim of any person to engage for the payment of revenue; the amount of revenue assessed on any mahal or portion of a mahal; the amount to be paid to a proprietor by an inferior proprietor when that amount has been fixed by the Settlement Officer; claims connected with or arising out of the collection of revenue.

The words "partition and union of mahals" which appear in clause (*k*) appear earlier in the Act as the heading to chapter VII. They had stood at the head of the corresponding provisions of the previous Acts (XIX of 1873 and XVII of 1876). The usual meaning of mahal is that given in clause (*a*) of S. 4—"any local area held under a separate engagement for the payment of land-revenue". Though the definition includes "any revenue-free area for which a separate record of rights has been framed" and certain other cases mentioned in the section, the root idea is unit of area for revenue purposes. In chapter VII the Act does not provide any special definition of "union of mahals" which is a simple matter dealt with by Ss. 139 and 140. But it is otherwise with "partition" which is defined by S. 106:—

106. "Partition" means the division of a mahal or of a part of a mahal into two or more portions, each consisting of one or more shares.

In "imperfect partition" the several portions remain jointly responsible for the revenue assessed on the whole mahal.

In "perfect partition" the whole mahal is divided and the several portions become separate mahals, each severally responsible for the revenue distributed thereon.

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The procedure prescribed in this Chapter shall be followed in all partitions, whether imperfect or perfect, except where it is otherwise expressly declared.

The chapter provides that an application for partition may be presented by one or jointly by two or more of the recorded co-sharers of a mahal (S. 108) but that the Collector may at any stage stay the partition and order the proceedings to be quashed (S. 109). On receiving an application the Collector is to issue a proclamation to all the other recorded co-sharers to appear and state their objections if any to the partition; any other recorded co-sharer may join in applying for partition (S. 110). If the partition is not to be made by the parties themselves or by arbitrators but by the Collector or an Assistant Collector, a partition proceeding (*tarz-i-taqsim*) is to be drawn up declaring the nature and extent of the interests of the persons applying for the partition and of any other persons who may be affected thereby, detailing how partition is to be made, and deciding all disputed questions that may have arisen in connection therewith (S. 114). This proceeding bears some analogy to what in a suit before a Civil Court would be called a preliminary decree for partition. It is prior to this stage that Ss. 111 and 112—both of which are mentioned in clause (*k*) of S. 233—apply to the case and enable an objection by a recorded co-sharer involving a question of proprietary title to come before a Civil Court at first instance or on appeal if it has not already done so:

111.—(1) If, on or before the day so fixed, any objection is made by a recorded co-sharer, involving a question of proprietary title which has not been already determined by a Court of competent jurisdiction, the Collector may either—

(*a*) decline to grant the application until the question in dispute has been determined by a competent Court, or

(*b*) require any party to the case to institute within three months a suit in the Civil Court for the determination of such question, or

(*c*) proceed to inquire into the merits of the objection.

(2) When the proceedings have been postponed under clause (*b*), if such party fails to comply with the requisition, the Collector shall decide the question against him. If he institutes the suit, the Collector shall deal with the case in accordance with the decision of the Civil Court.

(3) If the Collector decides to inquire into the merits of the objection, he shall follow the procedure laid down in the Code of Civil Procedure for the trial of original suits.

112. All decrees passed under sub-S. (3) of the preceding section shall be held to be decrees of a Court of Civil Judicature of the first instance, and shall be open to appeal to the District Judge or High Court or the Judicial

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Commissioner, as the case may be, under the rules applicable to appeals to those Courts, and the appellate Court may issue a precept to the Collector, desiring him to stay the partition pending the decision of the appeal.

The remaining sections of Chapter VII contain many provisions as to the principles to govern the division of the land into different portions to be allotted to the various sharers—a matter which in cases of perfect partition affects the revenue directly. These sections cover such matters as lands already held by a co-sharer in severalty, buildings of one sharer on the land allotted to another, garden lands, wells and so forth. They provide that if the holding of any tenant is divided the rent is to be apportioned, and in all cases the revenue of the mahal is to be distributed over the several portions (129, 130). There is provision for appeals from the Assistant Collector to the Collector, and for appeals to the Commissioner from the Collector's orders on a partition proceeding or disallowing partition. S. 131 is important:—

131. A partition shall not be complete until the Collector has passed an order confirming it.

When the partition has been confirmed, the Collector shall issue a proclamation thereof, and the partition shall take effect from the first day of July next following the date of such proclamation.

In the present case the provisions of Chapter VII were applied to the village of Nain. They began with an application (S. 107) on the 3rd October, 1903, by certain co-sharers of the village for a perfect partition to be made of the lands of the village which at that time was a single mahal. Proclamation was duly made calling upon the other co-sharers to appear and state objections if any (S. 110). The plaintiffs-appellants were recorded as co-sharers of the village apart altogether from their interest in any of the plots in suit. As such they received due notice of the application for partition, and on the 12th March, 1904, they filed an application in respect of their recorded interest as superior proprietors agreeing to partition [S. 110 (2)] but asking that their interest be included in a particular mahal. With reference to the plots in suit the plaintiffs were recorded as under-proprietors and not as having the superior right; though their claim now is that they were entitled to the superior interest and that the record was erroneous. They say that in 1876 their right had been established by the decree of a Civil Court, but they have to admit that in 1903 the record was against them. They made no claim to the superior interest in these plots or any of them in the course of

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the partition proceedings. Their interest in the plots in suit was treated as a rent-fee but under-proprietary interest with the result that by the partition their interest in the village lands as superior proprietors was included in one mahal while the five plots now in dispute were included in another, the plaintiffs being shown as under-proprietors in the khewat of under-proprietors of that mahal. The village was divided into five mahals, the fifth being a residuary mahal comprising the lands of those who did not seek partition. The partition proceeding (S. 114) was approved by the Collector on the 16th September, 1904, and the partition was confirmed on the 28th September, 1906, with effect from the 1st July, 1907 (S. 131). The various plots originally claimed by the plaint were distributed over all five of the new mahals; the five plots still in controversy were included in the second which was given the name of Rai Chait Narain Singh. As representing a 1 anna 5 pie share in the village this mahal included 164 bighas and was assessed to revenue at Rs. 51. No objection or appeal was taken by the plaintiffs at any time between 1903 and 1907. In 1909 an imperfect partition of the residuary mahal was carried out, but as the five plots now in dispute were not in that mahal it need not be further referred to. The plaintiffs remained in possession of the suit lands as of old, paying neither revenue nor rent till 1929. In that year proceedings under S. 107 of the Oudh Rent Act (Act XXII of 1886) were taken against them before the Assistant Record Officer by the proprietors of different mahals including the mahal Rai Chait Narain Singh. On the 25th June, 1929, the Assistant Record Officer assessed them to rent notwithstanding their claim to be proprietors—a claim then set up, so far as appears, for the first time since some date before 1903. The plaintiffs on the 20th February, 1930, filed the present suit for a declaration that they are the superior proprietors of the lands specified in the plaint and not inferior proprietors.

If the plaintiffs be granted the relief claimed it is plain that the result of the partition of 1903-7 will be substantially altered. All the Courts in India are agreed as to this. It is no answer to say that the plaintiffs could be declared to be joint proprietors of a mahal along with the persons to whom it was allotted at the partition. Such a declaration would produce a result contrary to the very purpose of the applicants

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for partition (namely, to separate their shares) and a highly unjust result, in respect that failure by the plaintiffs to pay their share of revenue would compel the present proprietors to pay it in order to avoid a sale of the entire mahal. That alone would convert the partition of 1906 into something which was not intended by the Collector or by any party thereto and which might well be intolerable. But the declaration would also mean a reduction in the assets of the mahal and a disturbance of the arrangements for the payment of the revenue, and indeed an extensive disturbance if the original plaint with its 68 defendants be regarded.

All the Courts in India—the Assistant Record Officer in the rent case, and the judges in the trial Court and Chief Court—have been satisfied that the plaintiffs' suit is in these circumstances barred by virtue of the partition of 1906, but the judgments in the Chief Court disclose a difference of opinion as to the principle applicable under the Act of 1901 to the case. Though the first question referred to the Full Bench had reference to clause (*k*) of S. 233 the learned Chief Judge answered it by saying that the suit was barred by virtue of the previous partitions but not by the provisions of clause (*k*). He considered that it was barred by the general principle of *res judicata*, the Collector being regarded by him as a Court of exclusive jurisdiction. The other members of the Full Bench held that the suit was barred by clause (*k*) but that the principle of *res judicata* did not apply. This difference of opinion is but the reflection of a divergence in the previous authorities; the matter seems indeed to have been constantly before the Courts in Agra and in Oudh; from time to time it has appeared to be settled, only to become unsettled by subsequent decisions.

With all respect to the learned judges in *Ram Rekha Misra* v. *Lallu Misra*[1], their Lordships think that to approach the construction of S. 233 of the Act by first forming a view upon the disputable question of *res judicata* is a mistake in method. Upon an independent examination of the provisions of the Act of 1901 their Lordships have arrived at the same construction as was put upon the previous Act (XIX of 1873) by the Full Bench of the High Court at Allahabad in *Muhammad Sadiq* v. *Laute Ram*[2], and upon the present Act

1. (1931) I.L.R. 53 All. 568. 2. (1901) I.L.R. 23 All. 291 (F.B.).

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by Banerji and Tudball, JJ., in *Bijai Misir* v. *Kali Prasad*[1]. If a question of title affecting the partition which might have been raised in the partition proceedings is not so raised and the partition is completed, S. 233 (*k*) in their Lordships' opinion debars parties to the partition from raising the question subsequently in a Civil Court. This proposition is wide enough to cover the present case and it is unnecessary to consider whether it might not be framed more widely.

As was well said by Strachey, C. J., in the former case:—

"The Legislature intended to give to co-sharers raising questions of title a limited opportunity and a limited time for having such questions determined by a Civil Court, and in effect provided that such questions might only be so determined if raised at such a time as to avoid the inconvenience . . . arising where interference with an actually completed distribution is sought." (P. 300.)

As against this view of S. 233, clause (*k*), there is the narrower interpretation to be collected from the dissenting judgment of Richards, C. J., in *Bijai Misir* v. *Kali Prasad*[1] and the judgment of Bennet, J., in *Ram Rekha Misra* v. *Lallu Misra*[2]. Proceeding upon the basis that partition means the opposite of union of mahals, Richards, C. J., considered that these words refer to units of area which the revenue authorities create in the course of partition proceedings. He did not agree that the expression partition means or includes the actual division as between the parties and the determination of their title:

"If the plaintiff in this suit was successful the property would remain in the same unit in which it was placed by the Revenue Court notwithstanding the plaintiff's decree for possession. The unit would not be affected though the ownership of the property in it would be. . . . If the legislature intended to prevent questions of title being reopened after partition it would have been simpler, fairer and less calculated to do injustice if the rules of *res judicata* as laid down in the Code of Civil Procedure had been incorporated."

The narrower view of S. 233 (*k*) was thus expressed by Bennet, J.:—

"The section only bars suits which would alter the partition in regard to the amount of shares in any mahal or sub-division of a mahal. We consider that this view of S. 233 (*k*) is the correct view and that no advantage accrues from adding an additional interpretation of S. 233 (*k*) in the wider sense to make it co-extensive with the rule of *res judicata*."

In the present case the learned Chief Judge presiding over the Full Bench rested his view that clause (*k*) did not bar the

1. (1917) I.L.R. 39 All. 469 (F.B.). 2. (1931) I.L.R. 53 All. 568.

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plaintiffs' suit upon the definition of "partition" contained in S. 106 of the Act:

> "As already stated, partition, according to S. 106, means the division of a mahal or part of a mahal into two or more portions each consisting of one or more shares. I feel no difficulty in saying that having regard to the defined sense of the word partition the present suit is not a suit with respect to partition."

Their Lordships think this line of reasoning to be unsound, and that the phrase "partition and union of mahals" refers to a process regulated by Chapter VII of the Act and the result thereof which is given statutory effect. The words occur at the head of the chapter as a statement of its subject-matter. Definitions may be more or less successful and it is not always safe to take an abstract word in its most abstract sense. For the purposes of the Act it is not possible to say on the strength of the definition that "partition" means nothing more than the re-arrangement of the land into units of area. It imports and includes that rights in these units are distributed among the sharers. This indeed in the case of imperfect partition is the main feature and almost the whole of the operation. The amount of revenue imposed depends upon the "unit"—that is, the amount of land brought under one assessment; this depends mainly upon the person or persons interested and their relations with one another. When S. 106 states that a mahal is divided into two or more portions each consisting of one or more shares, it refers to distribution among the sharers according to their rights—not merely to a division of the land into units of area. An "application for partition" (S. 107), is surely an application for a change to be made in the form or method in which the applicant's interest is held: to have a certain amount of land allotted to the applicant in severalty and in such wise that he shall be responsible for such revenue only as is attributable to his own land. When S. 114 speaks of the partition proceeding "detailing how the partition is to be made and deciding all disputed questions that may have arisen in connection therewith", it surely refers to the principles upon which the various portions are to be allotted—not merely the principles on which their size and position is to be determined. S. 118 and the following sections are clear to this effect. But S. 233, clause (*k*), itself contains words which show that partition is not used in that clause in the narrow sense of mere arrangement into units of area.

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The words "except as provided in Ss. 111 and 112" are inconsistent with the construction contended for. These sections provide means whereby objections involving a question of proprietary title can be brought before the Civil Courts. The exception is made in their favour by clause (*k*) because otherwise the sections would conflict with the clause—that is because suits raising questions of proprietary title are hit by the prohibition against instituting suits with respect to partition of mahals. The exception makes it exceedingly difficult to maintain that the only thing excluded from the cognisance of the Civil Court by clause (*k*) is the schematic arrangement of the land into units of area and that no question of proprietary right comes within the prohibition of access to the Civil Court. This is not a new point: it was before the Court in *Bijai Misir* v. *Kali Prasad*[1] and is referred to by Richards, C. J.:—

> It is said that the words "except as provided by Ss. 111 and 112" show that the expression "partition" means or at least includes the actual division as between the parties and the determination of their title. It may possibly be that the framers of the section hoped the introduction of these words would prevent subsequent questions of title being raised. Another explanation might be to obviate some contradiction or inconsistency between Ss. 111-112 and S. 233 (*k*).

This passage shows that the argument was appreciated; but in their Lordships' opinion it was not answered. Moreover, in order to provide that a Civil Court dealing in the ordinary course with titles to land should not make any order which would alter the "units of area", it seems to be at once ineffective and excessive to enact that no person shall institute in the Civil Court any suit *with respect to* partition. In order to divide a mahal into shares, which is the meaning of partition as defined by S. 106, a number of important steps have to be taken to arrive at a result effective in accordance with S. 131. These steps are detailed in the intervening sections. A suit is brought with respect to the partition if it is brought to impugn the distribution which by partition has been effected under the Act.

The question of *res judicata* has been much considered in connection with S. 233 (*k*), and in the present case though no question was referred to the Full Bench as to *res judicata* the learned Chief Judge based his decision entirely upon that

1. (1917) I.L.R. 39 All. 469 at 476 (F.B.).

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ground. What the position would be in such a case as the present apart from any special statutory provision is a question difficult and not to be lightly decided, but their Lordships agree with Srivastava and Raza, JJ., the other members of the Full Bench, in holding that the principle of *res judicata* would not apply where, as in the present case, no objection was made under S. 111 with the result that Ss. 111 and 112 did not come into operation. In such a case the partition proceeds upon the entries in the khewat; the Collector does not function as a Civil Court, and does not have in that or any other capacity to decide as to its correctness expressly or implicitly. To hold that the right to a decision from the Civil Court is ousted by the mere fact that the Collector proceeded upon the footing of the record is not in their Lordships' view sound doctrine so far as regards the principle of *res judicata*. Their Lordships on this point are in agreement both with Richards, C.J., in *Kalka Prasad* v. *Manmohan Lal*[1] and with Banerji, J., in *Bijai Misir's case*[2].

The facts of the present case raise no question as to the rights of anyone to bring a civil suit pending the partition proceedings, or as to the rights of a person who is not a recorded co-sharer or was not a party to the proceedings, or as to any case between persons whose interests were not opposed for the purpose of the partition. A considerable number of decisions have been given upon such cases but their Lordships have not had occasion to hear argument upon them and do not deal with them—more especially as their Lordships consider that their decision upon the point arising in the present case is in confirmation of the main current of authority in India.

Since this appeal to His Majesty was brought, agreements of compromise have been entered into between the appellants and three sets of respondents. While entitled to assume that these respondents are competent to deal with their own interests in the land of the village, their Lordships are not in a position to make certain that the agreements as they stand are unobjectionable from the standpoint of the revenue authorities and (in the case of the agreement with Musammat Soet Raj Kuar) compatible with all the rights of the contesting respondent Thakurain Chhabinath Kuar. They will humbly advise

1. (1916) I.L.R. 38 All. 302 at 310 (F.B.).
2. (1917) I.L.R. 39 All. 469 (F.B.).

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His Majesty that the appeal should be dismissed and that the order to be made on this appeal should record that, as against the respondents other than Thakurain Chhabinath Kuar, the dismissal is directed by reason of the said agreements; but they are not prepared to advise that there should be any direction that the said agreements should be carried into effect. If any question should arise as to the carrying out of any of the compromises it must be dealt with in proceedings to be instituted in India in accordance with law. The appellants must pay to Thakurain Chhabinath Kuar her costs of this appeal.

Solicitors for Appellants: *Nehra & Co.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

R. C. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMY AIYANGAR.

The Official Assignee, Madras .. *Appellant** (*Applicant*)

*v.*

P. Suryakanthammal and another .. *Respondents* (*Respondents*).

*In the matter of* B. G. Sundaram Naidu, *Insolvent.*

Official Assignee, Madras v. Suryakanthammal.

*Presidency Towns Insolvency Act (III of 1909), S. 58 (5)—Wife and son of insolvent obstructing delivery of immovable property of insolvent to Official Assignee—Contempt of Court—Letters Patent, cl.* 15.

On the question whether an Insolvency Court was right in refusing to pass an order for contempt against the agents of an insolvent on the ground that its powers were of a very limited nature by S. 58 (5) of the Presidency Towns Insolvency Act,

*Held*, that the Court had power to commit for contempt an insolvent who wilfully obstructed the Court and had inherent power to commit a person who with full knowledge deliberately obstructed the Court on behalf of the insolvent in the matter of delivery of immovable property of the insolvent to the custody of the Official Assignee.

*Seaward* v. *Paterson*, (1897) 1 Ch. 545, relied on.

The order passed by the Court refusing to commit for contempt was a judgment within the meaning of cl. 15 of the Letters Patent.

On appeal from the judgment of the Hon'ble Mr. Justice Wadsworth, dated 9th August, 1937, and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 246 of 1937 in I.P. No. 417 of 1936.

*M. S. Vaithianatha Aiyar* and *K. P. Mahadeva Aiyar* for Appellant.

* O. S. A. No. 65 of 1937. 4th May, 1938.

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Leach, C. J.

*A. S. Nataraja Aiyar* for Respondents.

The judgment of the Court was delivered by

*The Chief Justice.*—This appeal raises a question with regard to the right of the Court to commit to prison for contempt persons who have deliberately aided an insolvent in defying an order of the Court lawfully passed in the exercise of the insolvency jurisdiction.

On the 15th September, 1936, one B.G. Sundaram Naidu was adjudicated insolvent. His assets included a house No. 45, Guruvappa Chetti Street, Chintadripet, in which he, his wife and his son were living. This property was mortgaged to one Lakshmi and in the course of the administration of the estate the Official Assignee sold the property to the mortgagee. At the time of the sale the insolvent and his family were occupying the upper floor of the house and the room downstairs were in the occupation of tenants. On the 3rd May, 1937, the learned Judge sitting in Insolvency (Wadsworth, J.) passed an order requiring the insolvent to vacate the premises on or before the 7th of that month. The tenants vacated the room which they were occupying and the insolvent and his family vacated the upper floor, but immediately he installed his wife, his mother and his son in the rooms downstairs. On the 8th June, 1937, the Official Assignee complained of this fact in a report to the Court. On the 19th July, 1937, Wadsworth, J., held that the insolvent was playing with the Court and gave him 24 hours to vacate the premises. He failed to comply with this order and on the 20th July, 1937, he was committed to jail for two weeks for contempt of Court. The insolvent appealed to this Court but his appeal was dismissed on the 27th July, 1937. On the 30th July, 1937, the Official Assignee presented a petition to the learned Judge stating that the insolvent's wife and others were in possession of the house as the agents of the insolvent, and asking for an order of the Court directing the bailiff to remove them from the premises. This application was heard by Wadsworth, J., on the 2nd August, 1937. After the case had been called, the learned Advocate who now appears for the respondents, the insolvent's wife and son, appeared in Court and having entered an appearance on their behalf asked that one week's time be given to him to file an affidavit in opposition to the order which the Official Assignee was seeking.

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The time asked for was granted and within the time allowed the insolvent's wife filed an affidavit in which she alleged that there had been an agreement between her and Lakshmi Ammal under which she was to be allowed to reside in the house until a sum of Rs. 3,000 which she alleged she had advanced to Lakshmi Ammal had been repaid. The learned Judge dealt with the application of the Official Assignee on the 9th August, 1937. He did not believe this story and in his order stated that he had no doubt that the wife was acting at the instigation of the husband. He held, however, that he had no power to commit her for contempt of Court. He considered that his powers of committing an agent for contempt were limited to the powers conferred by sub-S. 5 of S. 58 of the Presidency Towns Insolvency Act which only refers to the delivery up to the Official Assignee of monies and securities. On this ground he dismissed the Official Assignee's application, and the present appeal is from the order of dismissal.

Before I discuss the law and the merits of the case I will first deal with an objection taken by the learned Advocate for the respondents that no appeal lies. He has cited the case of *Abdul Gaffor* v. *The Official Assignee*[1] in which a bench of the Rangoon High Court held that S. 8 of the Presidency Towns Insolvency Act does not allow an appeal from an order passed in insolvency unless the order comes within O. 43, r. 1 of the Code of Civil Procedure or is a judgment within the meaning of the Letters Patent. This decision has been criticised and it is in conflict with the decision of the Bombay High Court in *Mahomed Haji Essack* v. *Shaik Abdool Rahiman*[2], where a much wider view was taken on the question of the right of appeal from an order passed in insolvency. It is unnecessary for the purpose of this case to consider which opinion ought to be accepted, because it is clear that the order here passed was a judgment within the meaning of cl. 15 of the Madras Letters Patent. The learned Advocate for the respondents has also said that the Official Assignee is not an aggrieved party within the meaning of S. 8 of the Presidency Towns Insolvency Act. I have been unable to follow up why he should not be regarded as an aggrieved party. He made an application to the Court in a matter which concerned the

1. (1925) I.L.R. 3 Rang. 605. 2. (1915) I.L.R. 40 Bom. 461.

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administration of an estate in insolvency. The Court refused to pass an order on the ground that its powers were of a very limited nature and the powers which it had were not sufficient to commit an agent where the contempt was of an order relating to the delivery to the Official Assignee of immovable property. The Official Assigneé says that the learned Judge had power to pass an order against the respondents and if this is so he certainly is an aggrieved party.

The learned Judge erred in his conclusion that his powers of committing for contempt an agent were limited by S. 58 of the Presidency Towns Insolvency Act. The Court has the power to commit an insolvent who wilfully obstructs the Court and I have no doubt that it has inherent power to commit a person who with full knowledge deliberately obstructs the Court on his behalf. When exercising insolvency jurisdiction the Court is still the High Court. In *Seaward* v. *Paterson*[1], the Court of Appeal in England held that the Court has undoubted jurisdiction to commit for contempt a person who is not included in an injunction or who is not a party to the action but who knows of the injunction and aids and abets a defendant in committing a breach of it. Rigby, L.J., observed (p. 558 of the report):

> "That there is a jurisdiction to punish for contempt of Court is undoubted. It has been exercised for a very long time—far longer than any of us can remember—and it is a punitive jurisdiction founded upon this, that it is for the good, not of the plaintiff or of any party to the action, but of the public, that the orders of Court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of Court. It is astonishing to me to find that jurisdiction questioned at this date."

There can be no doubt in this case that the insolvent's wife and his son are deliberately obstructing a lawful order of the Court and are doing so at the instigation of the insolvent. The son who is the second respondent in this appeal is not mentioned in the learned Judge's order, but he is exactly in the same position as his mother and has relied on his mother's affidavit. As both respondents have with full knowledge of the position acted in deliberate defiance of the Court's order I am of opinion that they are liable to be committed for contempt. In view of the fact that the learned Judge did not pass an order against them, I think, however, that they may be given a short period

1. (1897) 1 Ch. 545.

to vacate the premises. My learned brother agrees with the views I have expressed and we pass this order: The respondents will vacate the premises known as No. 45, Guruvappa Chetti Street, Chintadripet, Madras, by Monday, the 9th May, 1938, failing which they will be committed to prison for a fortnight for contempt of Court. The Official Assignee is entitled to his costs, which we fix at Rs. 100.

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K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

Varadanarayana Aiyangar .. *Appellant** *(2nd Defendant)*

*v.*

Vengu Ammal and others .. *Respondents (Plaintiff and Defendants Nos. 3 and 4).*

Varadanarayana Aiyangar *v.* Vengu Ammal.

*Hindu Law—Adoption—Authority to adopt—Husband's direction in will to adopt—Refusal of widow to adopt—Right to enter into possession of estate.*

A Hindu widow cannot be compelled to adopt a son however strong the directions of her husband might have been. Where in such a case she refuses to adopt she is entitled to be put in possession of the deceased husband's estate. And the executors of the will of her husband cannot claim to remain in possession on the ground that the widow might subsequently change her mind and take a son in adoption in pursuance of the directions contained in her deceased husband's will.

*Bamundoss Mookerjea and Mussamut Raj Lukhee* v. *Mussamut Tarinee,* (1858) 7 M. I. A. 169; *Uma Sunduri Dabee* v. *Sourobinee Dabee,* (1881) I.L.R. 7 C. 288; *Shamavahoo* v. *Dwarkadas Vasanji,* (1887) I.L.R. 12 Bom. 202 and *Vanama Akkayya* v. *Vanama Lakshmamma,* (1927) 55 M.L.J. 517: I.L.R. 51 Mad. 849, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in O. S. No. 22 of 1929.

*C. Narasimhachariar* and *M. E. Rajagopalachariar* for Appellant.

*P. N. Appuswami Aiyar* for Respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—This appeal arises out of a suit filed by the first respondent to recover from the appellant and the second and the third respondents her deceased husband's estate. The first respondent is the widow of one Tirumala Aiyangar, who died on the 23rd February, 1921, having made a will four days previously. The appellant and 2nd and 3rd respondents are the executors under the will. By his will the testator directed his widow to adopt his nephew Srinivasan and stated Leach, C.J.

* Appeal No. 38 of 1932. 30th September, 1937.

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that if Srinivasan's father refused to give his son in adoption she should adopt another boy. The will provided that the executors should remain in possession of the property during the minority of the adopted son, but on his attaining majority they should hand over the estate to him. The will also directed that Rs. 10 a year should be spent on the expenses of his annual ceremony, Rs. 10 towards the expenses of the annual ceremonies of his two deceased wives and a sum of Rs. 3 on the annual ceremony of his deceased *guru*. The will was drafted and executed on the assumption that the first respondent would fulfil the testator's direction and adopt his nephew Srinivasan or failing him another boy. The first respondent refused to carry out her husband's wishes. She alleged that the will had been executed while her husband was of unsound mind and was, therefore, invalid. On the 4th July, 1921, she instituted O. S. No. 405 of 1921 in the District Munsiff's Court of Srivilliputtur for a declaration to this effect and for the recovery of possession of the properties. The District Munsiff held that the testator was of sound mind and that the will was a valid one, but he refused to give the first respondent possession of the properties on the ground that the first respondent might change her mind and adopt a son to her deceased husband. In that suit it was alleged by the executors that the testator had in fact adopted Srinivasan before he died, but this was held not to be true. An appeal followed to the Court of the Subordinate Judge of Ramnad, who reversed the decree passed by the District Munsiff and ordered the estate properties to be delivered to the 1st respondent as the widow of the testator. This decision followed a finding that the authority to adopt had been given to the executors and, therefore, was not a valid authority. The learned Subordinate Judge agreed, however, with the District Munsiff that there had been no adoption of Srinivasan. The matter was carried to this Court (S. A. No. 597 of 1926). This Court held that the Subordinate Judge was wrong in holding that the power of adoption had been given to the executors. The power had been given to the widow. The appeal was accordingly allowed and the parties were left to their respective rights on the basis that the will was genuine.

On the 29th September, 1928, the first respondent filed the present suit in the Subordinate Judge's Court for a declaration

that she was entitled to the estate, having refused to adopt a son to her husband and for possession of the properties with mesne profits. The learned Subordinate Judge held that as she had refused to adopt she was entitled to the estate and that the executors were, therefore, bound to hand the properties over to her. This decision is challenged on three grounds:— (1) that the decision in the previous suit operated as *res judicata*; (2) that the will created a trust in favour of the executors and they were entitled to remain in possession because the first respondent might change her mind; (3) that on a proper construction of the will Srinivasan was entitled to the properties as the legatee.

The plea that the previous litigation operated as *res judicata* cannot be maintained in view of the judgment of this Court in S. A. No. 597 of 1926. In the previous appeal there was much argument on the question of what were the rights of the first respondent under the will. The Court, however, did not consider that it was necessary to go into that question, because the first respondent's claim was against the will and not under it. This having been pointed out by the Court the learned Advocates agreed that there should be no adjudication of the first respondent's claim under the will. So far as that was concerned the question was left open. There having been no decision on questions arising under the will the doctrine of *res judicata* can have no application here.

Coming now to the second point, it is quite clear that the will does not create any trust. It directs that the executors shall remain in possession of the properties and the income during the minority of the adopted son, but it is conceded that if a son had been adopted they would be bound under its terms to hand all the properties over to him on his coming of age. It is also conceded that on this event happening the duty of fulfilling the testator's directions with regard to the annual ceremonies would devolve on the adopted son, and the executors would have no further duties to perform. But it is said that because the widow has refused to adopt it does not mean that she will persist in her refusal. She may change her mind, and that pending this uncertain event the executors are in law entitled to remain in possession. I might mention here that the executors also happen to be the reversioners. The argument amounts to this. The properties

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must remain in the hands of the executors until the death of the first respondent, because until the breath had departed from her body she may change her mind. But a widow cannot be compelled to follow her husband's wishes in the matter of adopting a son—*Bamundoss Mookerjea and Mussamut Raj Lukhee* v. *Mussamut Tarinee*[1]. Now, as a Hindu widow cannot be compelled to adopt, however strong the direction of her husband might have been, is she to be deprived of her widow's interest in his property because she may at some later stage decide to follow his behest? The answer to my mind must be in the negative. If she says "I refuse to adopt", she is entitled to be put in possession of her deceased husband's estate and it was decided so in a case which resembles in many respects this case, *Uma Sunduri Dabee* v. *Sourobinee Dabee*[2]. In that case the husband directed by his will that if his wife (who was *enceinte* at the time the will was made) did not give birth to a son, or if she did and the son died, she was to adopt a son. She refused to comply with his direction. It was held that she was entitled to do so and the fact that she did refuse made the direction under the will for all legal purposes non-existent. Cunningham, J., observed:—

"We think, however, that the observations of the Sadr Court must be accepted as favouring the proposition that such a legal obligation cannot be created; and the remarks of Peacock, C.J., in *Prasannamayi Dasi* v. *Kadambini Dasi*[3] are an authority for the view, that the widow's refusal to comply with such a direction is no ground of forfeiture as regards her rights of inheritance.

"We cannot, therefore, regard the language of the testator as having created a trust which the widow is legally bound to carry out. She is at liberty to comply with her husband's directions or not as she pleases; and her omission or refusal to do so is no bar to her rights of inheritance. Accordingly, the contingency for which the will provides not having occurred, and there being no gift over, the testator must be regarded as intestate, and his widow as heiress-at-law entitled to succeed."

In the case before us there is no gift over. A similar decision was given by Sargent, J., in the case of *Shamavahoo* v. *Dwarkadas Vasanji*[4] and by Devadoss, J., in *Vanama Akkayya* v. *Vanama Lakshmamma*[5]. There is, therefore, ample authority in support of the decision of the trial Court. As I have mentioned, the will was drawn up and executed on the basis that she would adopt. She has refused to adopt, and

1. (1858) 7 M.I.A. 169.
2. (1881) I.L.R. 7 Cal. 288.
3. (1868) 3 Beng.L.R. (O.J.) 85 at 90.
4. (1887) I.L.R. 12 Bom. 202.
5. (1927) 55 M.L.J. 517: I.L.R. 51 Mad. 849.

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therefore she is entitled to receive the properties as on intestacy.

The argument that the testator did use words in his will which warrant the Court holding that Srinivasan was named as his heir is based on this passage:

"In accordance therewith, I have hereby authorised the said executors to have the said Srinivasan, son of Govindam Aiyangar, adopted after my life-time and to have my funeral rites performed by him."

There is here, however, nothing to support the argument and the matter is put beyond all doubt by the next passage which is as follows:

"In case the said Govindam Aiyangar raises any objection to give his son in adoption in the said manner, the executors are authorised to seek for a proper son elsewhere and to get him adopted."

Srinivasan got nothing under the will unless the adoption took place, and the appellant's third argument must therefore fall to the ground.

A further point has been taken which has nothing to do with the other arguments, namely, that the learned trial Judge was wrong in only allowing the executors a sum of Rs. 516-10-0 as costs of the previous litigation. The executors say that they should be allowed a sum of Rs. 1,085-5-0, which is the amount actually spent by them in this litigation. The learned Subordinate Judge has given very good reasons why he did not allow the full claim. In the previous suit the executors, as I have indicated, set up a case that Srinivasan had, in fact, been adopted by the testator before his death. This was found to be untrue and as they had put forward a false plea the learned Subordinate Judge held that they were not entitled to all that they had spent in the litigation. I consider that this is a proper decision. The objection to the decree in this respect must, therefore, also be dismissed.

As the appeal fails it must be dismissed with costs in favour of the first respondent.

Madhavan Nair, J.

*Madhavan Nair, J.*—I entirely agree, but as the point of Hindu Law argued before us is of some importance and as there has been no express decision by any Bench of this Court I wish to add a few words. Adoption by a Hindu widow is a power which she exercises in her own right, but she exercises that power under direction from her husband or by obtaining the consent of the nearest sapindas. But this power she cannot be compelled to execute. The fact that a boy to be adopted is

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mentioned in the will of her husband does not, in my opinion, affect the question. In this connection a passage from Mayne's Book may be usefully referred to. The learned author says:

> "It is no doubt upon the same principle that an express authority, or even direction, by a husband, to his widow to adopt, is, for all legal purposes absolutely non-existent until it is acted upon."

I think, it may now be taken that the law is well settled that a Hindu widow cannot be compelled to adopt, nor will a suit lie to enforce her to do so. The reason is obvious. Adoption is not a compulsory religious obligation whatever the moral obligation on the widow may be. This being the position, what would be the result if a Hindu widow who was enjoined by her husband to adopt refused to adopt. The texts of Hindu Law are silent on this point; but there are a few decisions on the question, and as these have been referred to by my Lord in his judgment it is not necessary for me to refer to them again. Of course, the position would be different if a trust had been created by the husband in his will. There is no foundation for the argument put forward in this case that a trust has been created under the will. The chief argument urged in favour of the view that the widow is not entitled to get the properties from the executors is, what will happen if the widow adopts at some later stage? The answer is, if she adopts she will then be deprived of the properties and they will vest in the adopted son. The purpose for which the will has been executed by the husband has not been found to be enforceable. In my opinion the property would, on the refusal of the widow to adopt, vest in her. I agree with the order passed by my Lord the Chief Justice. On the subsidiary points also I entirely agree with him and have nothing to add.

B. V. V. —— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE VENKATA-RAMANA RAO.

Thazhepeedikayil Veerankutti Haji .. *Prisoner* (Accused)*

*v.*

The Crown.

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*Evidence—Inquest reports—Admissibility in evidence—Use for cross-examining prosecution witness—Evidence Act (I of 1872), S. 145.*

* R. T. No. 157 of 1937. (Crl. A. No. 641 of 1937). 4th February, 1938.

Statements contained in the inquest reports do not constitute evidence in the case. Such statements cannot be used to discredit the evidence of the Sub-Inspector of Police given at the trial unless they are put to him under the provisions of S. 145 of the Evidence Act.

Retrial ordered on the ground of wrongful admission in evidence of inquest reports.

Trial referred by the Court of Session of the South Malabar Division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 55 of 1937 and appeal by the prisoner against the said sentence.

*B. V. Ramanarasu* for Accused.

*The Public Prosecutor* (*V. L. Ethiraj*) on behalf of the Crown.

The judgment of the Court was delivered by

Burn, J.

*Burn, J.*—The appellant has been convicted and sentenced to death by the learned Sessions Judge, South Malabar, for the murder of a Moplah woman and her son, a child of seven, on the 9th July, last.

The woman whose name was Beema Umma had come to the house of the appellant in order to attend upon his wife during her confinement. The evidence for the prosecution was to the effect that the woman and her child went to bed in the house of the appellant on the night of the 9th July, and the next morning they were missing. Their dead bodies were discovered on the 22nd July buried in the compound of the appellant's house near the well. The lady doctor (P. W. 1) who made the *post mortem* examination on the 23rd was unable to say what the cause of death had been in either case owing to the advanced stage of de-composition which both bodies had reached. There was however no difficulty about the identification of the bodies.

The evidence against the appellant was partly direct and partly circumstantial. The direct evidence was given by his own son Mamad Koya examined as P. W. 13. He is a boy of 16 years of age and he said that on the night of the 9th July, he woke up hearing a cry and saw his father by the side of Beema in the courtyard tightening a cloth round her neck. When Beema ceased to cry out and lay motionless, his father, P. W. 13 says, then took Beema's son to the yard and strangled him to death. Afterwards P.W. 13 under the instructions of his father helped to carry the body of Beema to a side room in the south of the house. The father carried the corpse of the little boy to the same room and the appellant locked up that

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room. Next morning P.W. 13 says that again under the instructions of his father he sold two gold manikathilas belonging to the deceased Beema to a goldsmith P.W. 6. On the following day, the 11th July, he says that he sold six gold manikathilas to a shroff in Calicut who has been examined as P.W. 7. The money received for these jewels, he says, he gave to his father. On the Saturday, the 10th July, he says that his father buried the bodies in a pit in front of the house and four days later his father dug a fresh pit near the well and re-buried them there. The appellant's wife was examined as P.W. 11 and she said that Beema had gone to sleep in the house on the night of the 9th July, and that after midnight she heard some cry uttered by Beema and in the morning Beema and her son were not to be seen.

The statement of P.W. 13 is corroborated to some extent by P.Ws. 6 and 7 although P.W. 6's evidence was not very satisfactory regarding the date on which he purchased the two gold manikathilas. In his chief examination he said that he had bought them on Saturday, the 10th July. That would correspond with the evidence of P.W. 13 but in cross-examination he admitted that he did not keep accounts for his trade and said that he remembered the date because it was the day after a kuri draw on the 20th Mithunam. The 20th Mithunam was 5 days before the death of the woman and the child, because the 9th July, 1937, corresponds to the 25th Mithunam. Another goldsmith P.W. 9 gave evidence regarding the purchase of gold chittus from P.W. 13 on the 29th March, 1937. This was more than three months before the murder and it is only important because the motive put forward by the prosecution in this case is that the appellant had borrowed the chittus from the woman in March, that she had been demanding the return of them and that since the appellant was unable to return them he had killed her. It is necessary to point out here that the evidence regarding the motive was inadmissible. The only evidence that the woman was demanding the return of these jewels consists in statements alleged to have been made by Beema herself to P.Ws. 10, 11 and 14. Those statements are inadmissible since they are statements made by a deceased person not falling within S. 32 of the Indian Evidence Act. (See *Venkatasubba Reddi, In re*[1].)

1. (1931) 61 M.L.J. 608: I.L.R. 54 Mad. 931.

The circumstantial evidence is to the effect that the appellant showed the place in his compound where the bodies were buried and admitted to the Sub-Inspector P.W. 3 that he had killed Beema and her son and that with the assistance of his son he (P.W. 13) had buried the bodies in the compound. This evidence is of course of the greatest importance. The statement of P.W. 3 is corroborated by that of the Adhigari P.W. 2 and that of a neighbour P.W. 15 who both said that the appellant pointed out the place where the bodies were buried and dug them up. It is not however possible to accept at its full value the evidence of the Sub-Inspector and P.Ws. 2 and 15. The reports of the inquests held on the dead bodies have been filed in this case as Exs. D and D-1. Both these reports were prepared by the Sub-Inspector P.W. 3 and both of them contain statements not consistent with the evidence given by the Sub-Inspector at the trial. In both cases there is a statement in the inquest report that the dead body was found at 11 A.M. on the 22nd July, at a place pointed out by Veerankutti Haji, that is, the present appellant, and his son Mamad Koya (P.W. 13). Both reports moreover contain a statement that death was due to beating with a heavy stick and the heavy stick was produced and marked M. O. 1. In the case of the woman the inquest report says in answer to question 9 that she had been:

> "Buried after being done to death with a heavy stick. The portion of about 1½ cubits long stick of rosewood produced by Mamad Koya is a sawn piece smoothened at one part. He says that it was used to beat the deceased to death and the remaining portion was burnt to ashes."

The answer to question 10 in the same inquest report (Ex. D) is that death was due to violence "as said above with hewn piece of wood", and the answer to the question whether any person or persons were suspected is that the murder is suspected to have been done by Veerankutti Haji and his son Mamad Koya as they pointed out the place of burial after murder. In the case of the child there is a statement that he had been:

> "Killed with a heavy stick applied to the neck. Mamad Koya, son of Veerankutti Haji, produced a heavy stick 4 inches thick and about 1½ cubit long, partly burnt, and made of hewn rosewood smoothened at one end."

In Ex. D-1 also the death is said to be the result of beating. Now these statements in the inquest reports, as the

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learned Public Prosecutor very rightly contended, are not evidence in the case. But these inquest reports have been filed and they have been written by P.W. 3. It is therefore clearly incumbent upon P.W. 3 to explain the difficulties which arise. The statements in the inquest reports are statements reduced to writing by P.W. 3 immediately after the discovery of the bodies. P.W. 3 therefore ought to have been cross-examined with regard to the differences between them and the evidence given in the Court. The evidence of P.W. 13 does not indicate death caused by beating with a stick but it indicates death by strangulation both in the case of the woman and in the case of the child and it is clear that if the place of burial was pointed out by the son as well as by his father, it will be very doubtful whether the statement which the appellant is said to have made to P.W. 3 will be admissible under S. 27 of the Indian Evidence Act.

Since the statements in the inquest reports cannot be used to discredit the evidence of the Sub-Inspector unless they are put to him under the provisions of S. 145 of the Indian Evidence Act, it is necessary to order a re-trial. As the learned Sessions Judge has observed, the evidence of the son P.W. 13 must be regarded practically as the evidence of an accomplice and therefore the statement said to have been made by the appellant to the Sub-Inspector that he killed Beema and her son on Friday night becomes of the utmost importance. If it is admissible, it corroborates sufficiently the evidence of P.W. 13. If it is not, there is very little, if any, corroboration of P.W. 13's evidence. Since a re-trial is being ordered, it is not desirable to say more about the merits of the case.

The conviction and sentence are therefore set aside and the case must go back to the present Sessions Judge for re-trial.

We are informed that the appellant's son P.W. 13 has not yet been tried although there is a case pending against him under S. 201, Indian Penal Code. This is very remarkable, seeing that the appellant's trial was over before the end of October last. The Sessions Judge will be asked to explain the delay. It is very undesirable that anything should be done to give rise to a suspicion that the son is going to get off scotfree if the father's conviction is confirmed.

It is not at all clear from the records why the appellant and his son were not charged and tried together. As we have noticed already, the result of the inquest was an opinion that the murders had been committed by both and the police First Information Report was made accordingly on 22nd July. It is not explained how the son came to be exculpated of the offence of murder in the charge-sheet. And certainly the disposal of the dead bodies is alleged to have been the joint act of both for which normally they should be tried together.

B. V. V. ——— *Re-trial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE STODART.

Putti Ramachar and others .. *Appellants** (*Plaintiffs*)

*v.*

P. V. Venkata Row and others .. *Respondents* (*Defendants 1 to 6*).



*Hindu Law—Religious endowments—Dedication of properties by will to temple—Direction that son of founder should manage—Effect—Heritable trusteeship whether created.*

A testator provided by his will as follows: "I have set apart the undermentioned lands for charity, for the cost of building Hanumantharayan's temple, for the worship and daily upkeep of the same; for the purpose of conducting this charity my second son *V* has been appointed to the management. . . . . Whereas I have appointed *V* my second son as manager to administer the charities out of the dedicated properties if the said properties be not conducted properly the leading persons in the village shall intervene and conduct the said charity properly. My sons *K*, *V* and *R* shall have no right whatever in the properties dedicated to the said charities."

*Held*, that the effect of the will was to confer a heritable trusteeship on *V*. In appointing him to the office, though he did not make any express provision for the succession after the son's death, the testator must be held to have prescribed a line of succession in that son and his heirs.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 76 of 1929.

*S. Ramaswami Aiyar* for Appellants,

*T. V. Muthukrishna Aiyar* and *K. G. Srinivasa Aiyar* for Respondents.

The judgment of the Court was delivered by

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* Appeal No. 259 of 1932. 9th December, 1937.

Putti Ramachar *v.* Venkata Row.

Stodart, J.

*Stodart, J.*—Plaintiffs are the appellants. Their grandfather Ramachar had three sons. In 1891, he died leaving a will in which he founded a religious trust and appointed his second son Venkatasubbarayar to carry out its object, namely, the building of a temple, the installation in it of certain idols and the regular conduct of worship of the said idols. Venkatasubbarayar died in 1924 having performed the duties of trustee and was succeeded by his three sons defendants 1 to 3 who have continued in office till 1929 when this suit was filed. Plaintiffs are the sons of the youngest son of the founder. They seek to be declared trustees on the ground that the appointment by testator of Venkatasubbarayar was only for his life, that on Venkatasubbarayar's death in 1924 the office became vacant and the trusteeship vested in all the heirs of the founder, namely, themselves, defendants 1 to 3 and defendants 5 and 6 who are sons of Ramachar's eldest son, and who now support the plaintiffs. The lower Court held that the appointment of Venkatasubbarayar was for himself and his heirs. The appeal therefore is that the lower Court is wrong in its interpretation of the will. Other questions have been raised but this is the principal question which we have to decide.

The relevant clauses of the will are:—

"I have set apart the undermentioned lands for charity; for the cost of building Hanumantharayan's temple; for the worship and the daily upkeep of the same. For the purpose of conducting this charity my second son, Venkatasubbarayar has been appointed to the management" and again, "Whereas, I have appointed . . . . . . . . Venkatasubbarayar my second son as manager to administer the charities out of the dedicated properties if the said charities be not conducted properly the leading persons in the village shall intervene and conduct the said charity properly. The Madhwas (testator was a Madhwa Brahmin) shall take an interest in the affairs of this charity and see that the puja and other duties to the God are performed by Madhwas alone . . . . . My sons Venkatarayar, Venkatasubbarayar, and Venkataramanachar shall have no right whatever in the properties dedicated to the said charities, the properties given as stridhanam to my daughters and the properties set apart for the puja of Lakshminarayanaswami and Hanumantharayaswami."

Appellants' case briefly is that according to the law as established by the leading cases of the High Courts in India the appointment of a trustee without indicating how the trust is to devolve after his death confers on him a trusteeship only for life. It will be necessary therefore for us to examine the authority cited in support of this proposition. The learned Subordinate Judge in construing the will observes that if the

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testator had wished his eldest and youngest sons to participate in the management of the trust after Venkatasubbarayar's death he might well have made a provision to that effect in the will itself. We might add that he might also have made a similar provision in favour of his existing grandsons the present 5th and 6th defendants—then aged 12 and 7 respectively—since in the natural course they were likely to survive their uncle. We think these omissions do lend support to the inference that the testator intended the heirs of Venkatasubbarayar to be his successors in the office of trustee. Moreover in the clause in which the testator makes provision for the conduct of the trust in the event of Venkatasubbarayar's misconduct, the omission of the testator's eldest and youngest sons is we think significant. The duty of intervention is cast on the leading men of the village. It may be inferred that if the testator had intended his two other sons to be trustees on Venkatasubbarayar's death he would have thought them fit to supersede Venkatasubbarayar in the event of the latter's misconduct. If however the will as it stands creates a lawful and well-recognised mode of devolution we are not at liberty to draw these inferences. The testator must be held to have intended the legal effect of his words.

It may also be surmised that on Venkatasubbarayar's death 1st plaintiff and 5th defendant at least were not very certain of their right to succeed him in the office of trustee. For, 1st plaintiff within six weeks of Venkatasubbarayar's death set up an alleged will Ex. H in which Venkatasubbarayar is made to appoint his nephews as well as his own sons to be trustees after his death. The 5th defendant appears as an attestor of this will. First plaintiff sent it to the Collector for safe custody—a novel method of publishing it—but after that no one has attempted to enforce its terms up to the time of this suit when it is put forward by plaintiffs in support of their case. The lower Court has found it to be a forgery and that decision has not been appealed against. If 1st plaintiff and 5th defendant thought that they had a clear right to share in the trusteeship why did they fabricate this will?

It remains to examine the cases which the appellants have cited in support of their case. *Raj Krishna Dey* v. *Bipin Behari Dey*,[1] cited in the lower Court and also before us does

1. (1912) I.L.R. 40 Cal. 251.

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not in our opinion help the appellants. The trust there was founded by the members of a Hindu family at the time of partition. In the partition deed and in a trust deed drawn up twelve years later there were provisions which showed that the family as a body intended to retain control of the trust. Nor was it contended by any party to the suit that after the death of the Shebait who was first appointed the office devolved on his heirs. So far as we can see that case is only relevant to the present discussion because it reiterates a rule laid down in 1899 by the Judicial Committee in *Gossami Sri Gridhariji* v. *Romanlalji Gossami*[1] which is:

"According to Hindu law, when the worship of a Thakur has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution." (*See* page 20 of the Report.)

Another case cited here on appellant's behalf is *Sital Das Babaji* v. *Pratap Chandan Sharma*[2]. There the rule is laid down that where the established line of succession fails the management of the trust reverts to the representative of the founder. *See* page 12 of the report:

"The representatives of the founder have, from 1813, exercised control, direct or indirect, over the management of the endowment, and it is difficult to appreciate how it can be seriously contended that they have no right to intervene when it is found that the succession to the office of trustee has wholly failed."

According to the first of these cases therefore the trusteeship vests in the founder's heirs when the mode of its devolution has not been laid down by its founder and is not governed by some usage or course of dealing. According to the second case the trusteeship vests in the founder's heirs when the mode of devolution prescribed by the founder fails by reason of the line of succession dying out. *Kunjamani Dasi* v. *Nikunja Behari*[3] is an example of the first rule. The testator left the property to the idol appointing as executors in succession his widow, his youngest son, and lastly an elder son Brojendra. He did not provide for the devolution of the office after Brojendra's death. The Calcutta High Court held that on that event the trusteeship vested in the founder's heirs. But the question in the case now under appeal is whether in appointing his son to the office, though he did not make any express

1. (1889) L.R. 16 I.A. 137: I.L.R. 17 Cal. 3 (P.C.).
2. (1909) 11 C.L.J. 2.
3. (1915) 22 C.L.J. 404.

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provision for the succession after that son's death, the testator must be held to have prescribed a line of succession in that son and his heirs.

Learned Counsel for the respondent contends that this is the proper interpretation of the will and that his view is fortified by the decisions of the Privy Council. We think he is right. *Sethuramaswamiar* v. *Meruswamiar*[1] dealt with the case of a grant for charitable purposes by the then Rajah of Tanjore to his family priest. Plaintiff was one of the natural heirs of the last Guru and he claimed to be entitled as such to participate in the management of the charities. The Judicial Committee held that having regard to the nature of the charity and the manner in which the office of trustee was dealt with by the British Government on the cessation of the Tanjore Raj, the grant devolved on that one of the heirs who was the holder of the priestly office for the time being. It is clear that the Judicial Committee would have decided in the plaintiff's favour, if it had not felt compelled to construe the grant in the sense stated. It sets out first the general proposition in the following words:

"With regard to what are called private charities such as endowments for the support of the family idol, the law as laid down by various decisions in India and apparently accepted in one case by the Privy Council (*Ramanathan Chetty* v. *Murugappa Chetty*[2]) is that if there is no contrary provision in original grant the right of management passes to the natural heirs of the original grantee."

Then the Committee states briefly its reason for not applying this rule to the case before it:

"The devolution of the management to the heirs of the original donee was inconsistent with the purpose of the founder when he created the endowments."

It is contended for the appellant that this was a case where the endowment had already descended from father to son several times and was admittedly hereditary. But there is no doubt that the Privy Council were considering the terms of the original grant which was "to my Royal Priest Sethubhavasami". We would observe parenthetically that the expression "private charity" in the passage first quoted above means a charity founded by a private person. *Ramanathan Chetty* v. *Murugappa Chetty*[2], cited by the Privy Council as an example of such an endowment relates to the founding of

1. (1917) 34 M.L.J. 130: L.R. 45 I.A. 1: I.L.R. 41 Mad. 296 (P.C.).
2. (1903) 13 M.L.J. 341: I.L.R. 27 Mad. 192.

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a public temple as in the case we are now considering. It is reported as *Ramanathan Chetty* v. *Murugappa Chetty*[1].

Then there is the case *Tripurari Pal* v. *Jagat Tarini Dasi*[2], than which nothing could be more decisive against the appellant's case. As here, the trust was founded by a will; as here the testator provided that his son should be shebait (though not before attaining his majority); and as here, the testator made no provision for the devolution of the office in succession to his son. It was held in the High Court of Calcutta that:

"The will nowhere gives the son an absolute right to the shebaitship on attaining majority. We consider that he had only under the will a right to the shebaitship for his life."

In the Judicial Committee the judgment is:

"Their Lordships are of opinion that the decision of the High Court cannot be supported. There is in their Lordships' view an absolute gift of the shebaitship to the son, Mukunda Murari Pal."

The plaintiff in that suit was the son of Mukunda Murari Pal, and he claimed to be entitled on the death of his father, and his claim succeeded.

The case of Kunjamani Dasi in the Calcutta High Court was decided after the foregoing decision in the Privy Council; but the learned Judges who decided it did not in terms explain how the facts before them differed from the facts in *Tripurari Pal's case*. There is obviously a difference. The succession prescribed was to the testator's widow then to his youngest son and lastly to an elder son Brojendra. Nothing was said as to the succession on Brojendra's death. And the learned Judges who decided the case held that on that event the Shebait vested in the heirs of the testator. At the end of their judgment however referring to *Tripurari Pal's case*, they observed:

"Precisely the same result follows if we hold, on the authority of *Tripurari Pal* v. *Jagat Tarini Dasi*[2], that the shebaitship vested absolutely in Brojendra and on his death devolved on his heirs, namely, his four surviving brothers."

For it so happened that the heirs of Brojendra were also the heirs of the founder.

Learned Counsel for the appellant has also relied on certain observations made by a Bench of this Court in *Venkataraya Prabhu* v. *Vasudeva Prabhu*[3]. By a compromise in a partition

1. (1903) 13 M.L.J. 341: I.L.R. 27 Mad. 192.
2. (1912) L.R. 40 I.A. 37: I.L.R. 40 Cal. 274 (P.C.).
3. (1928) M.W.N. 127.

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suit which was embodied in the decree two brothers Upendra and Ramakrishna set apart some properties for religious purposes and agreed that Ramakrishna was to be the trustee. In the event of his misconduct, it was prescribed that the younger brother Upendra should take possession of the endowed property and perform the duties of the trust and moreover that he was at liberty to do this by way of execution of the decree itself. Ramakrishna made default and Upendra proceeded in execution to recover the properties. Before he had completely done so he died. But before he died he executed a trust deed and a will in favour of his son Venkataraya appointing him trustee and empowering him to continue the execution. On an application in execution by Venkataraya the Courts held that he was not entitled to be trustee and not entitled as such to proceed with the execution. In the course of that decision Kumaraswami Sastri and Wallace, JJ., said:

"The general rule of law is that the founder of a trust or his heirs have got the right to appoint trustees in case of failure of trustees, or where the deed of trust does not make provision for the appointment of trustees to succeed the incumbents mentioned in the deed."

Stress is laid by the learned Counsel for the appellants on the last clause. But the respondents' case is that where the deed confers the trusteeship on the founder's son without further words, it does, by implication, make provision for the appointment of trustees to succeed him. It confers the office on his heirs after him.

The strongest case relied on for the appellant is *Gopal Lal Sett* v. *Purna Chandra Basak*[1] a decision of the Privy Council. A Hindu testatrix appointed her grandson Udoy Chand to perform the worship of an ancestral idol out of the income of certain Government securities, and the worship of another ancestral idol out of the income of a certain garden, purchased in the idol's name and of two houses which by the will were gifted to Udoy Chand himself. Their Lordships of the Privy Council held that the will was most obscure but agreed with the Calcutta High Court that no heritable shebaitship was established by it. There is no indication in this judgment that the facts were regarded as the same as the facts

1. (1921) 43 M.L.J. 116: L.R. 49 I.A. 100: I.L.R. 49 Cal. 459 (P.C.).

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in *Tripurari Pal's case*[1] or that the rule laid down in that case was intended to be modified. All we can say is that without knowing more of the details of the will by which the trust was founded and of the reasons which induced the Calcutta High Court to interpret that will in the way it did, we are unable to hold that this case helps the appellants.

We do not think it necessary to refer to the other cases which with considerable learning have been expounded by learned counsel on both sides. On the merits we think this appeal must fail. The appointment of Venkatasubbarayar amounted to a grant of a heritable trusteeship.

Before concluding there are some other points of the lower Court's decision which we must briefly notice. Plaintiffs in addition to the main relief, namely, the declaration of their right, prayed that a scheme should be framed for the future management of the trust and that defendants 1 to 3 might be directed to render account of their management. But these latter reliefs cannot be obtained in an ordinary suit since the suit temple is governed by the Madras Hindu Religious Endowments Act. S. 73 of that Act, sub-S. 3 provides that no suit in respect of the administration or management of a religious endowment shall be instituted except as provided by this Act. And under sub-S. (1) it is the Hindu Religious Endowment Board itself or some person having interest and having obtained the Board's consent who is competent to institute a suit to obtain a decree directing accounts and enquiries. As for the framing of a scheme of management that is governed by Ss. 62 and 63 of the Act.

Nevertheless it is contended by learned counsel for the appellants that in a private suit for the office of trustee the plaintiff can obtain a decree settling a scheme so long as the scheme involves only the method in which the plaintiff is to enjoy the office along with existing trustees. It is urged that it is the practice in such cases for the Court to institute a system of rotation. We do not admit the existence of any such practice. To prescribe a scheme by which the existing trustees should be deprived of their office if only for a time is not within the competence of a Civil Court in its ordinary jurisdiction. A trustee can be removed only by a suit under S. 73 of the Hindu Religious Endowments Act. Before that

1. (1912) L.R. 40 I.A. 37: I.L.R. 40 Cal. 274 (P.C.).

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Act he could be removed only by a suit brought under the provisions of S. 92 of the Civil Procedure Code. See *Ramanathan Chetty* v. *Murugappa Chetty*[1]:

"The view that one of several co-trustees is not entitled to ask a Court to partition the duties of the trust between himself and his co-trustees so as to give him the exclusive possession and management for (say) six months in the year putting the other trustees entirely aside . . . . . . is one to which no exception can be taken."

See also *Thandavaraya Pillai* v. *Shanmugham Pillai*[2] and the earlier case *Sri Raman Lalji* v. *Sri Gopal Lalji*[3], which are direct authorities on the point. The Court however will recognise and enforce a system of rotation which by the consent of co-trustees has been in force for many years. See again *Ramanathan Chetty* v. *Murugappa Chetty*[1] and also the recent case *Alasinga Bhattar* v. *Venkatasudarsana Bhattar*[4]. But where no system of rotation exists the only course open to a co-trustee who wishes to have one established is to proceed under the provisions of the Hindu Religious Endowments Act in the case of a religious institution and under S. 92 of the Civil Procedure Code in the case of other charitable trusts.

Lastly we would observe that one finding of the lower Court is wrong. It held that the suit was barred by S. 73 of the Hindu Religious Endowments Act as it was a suit for the appointment of additional trustees. It is not a suit of that nature.

This finding is not supported by learned Counsel for the respondent.

In the result, the appeal is dismissed with costs of respondents 1 to 4.

B. V. V. —— *Appeal dismissed.*

1. (1903) 13 M.L.J. 341: I.L.R. 27 Mad. 192.
2. (1908) 19 M.L.J. 59: I.L.R. 32 Mad. 167.
3. (1897) I.L.R. 19 All. 428.
4. (1935) 70 M.L.J. 424.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Mukkamala Hanumayamma .. *Appellant** (*Plaintiff*)

*v.*

Kasineni Lakshmidevamma and another .. *Respondents* (*Defendants 1 and 2*).

Mukkamala Hanumayamma *v.* Kasineni Lakshmidevamma.

*Guardianship—De facto guardian—Status of—General recognition by family of minor—Power to give discharge of debt due to minor.*

A *de facto* guardian is one who is already a guardian owing to something which has happened previously.

Where a person, who makes an alienation or receives a payment, is, at the time of the transaction, regarded by common consent, in the eyes of the family of the minor and those interested in the welfare of the minor, as the person who is entitled to act on behalf of the minor, and that person so recognised has consented to act as guardian, that person is a *de facto* guardian and it is not necessary to wait for a series of transactions in the capacity of guardian in order to clothe that person with authority to represent the estate of the minor.

*Harilal Ranchhod* v. *Gordhan Keshav*, (1927) I.L.R. 51 Bom. 1040 and *Chinna Alagumperumal Karayalar* v. *Vinayagathammal*, (1928) 55 M.L.J. 861, referred to.

A *de facto* guardian who is validly in charge of the minor's affairs may, for the benefit of that minor, give a good discharge in respect of a debt due to the minor.

*Rajaram* v. *Kothandapani*, A.I.R. 1937 Mad. 280, dissented from.

Appeal against the decree of the District Court of Guntur in A.S. No. 191 of 1931, preferred against the decree of the Court of the Subordinate Judge of Bapatla in O.S. No. 111 of 1924.

*V. Govindarajachari* and *K. Krishnamurthi* for Appellant.

*K. Kotayya* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal raises an interesting question regarding the position of a person who starts to intermeddle with the estate of a minor and involves a decision as to what it is that first gives to that person the status of a *de facto* guardian. The appellant is the plaintiff who sued to recover a legacy of Rs. 1,700 due to her under the will of her deceased husband. The first defendant is the sister of the deceased husband and executrix of his will. The second defendant is the mother of the plaintiff and the alleged *de facto* guardian. The

* S. A. No. 123 of 1934. 2nd August, 1938.

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third defendant is the brother of the deceased husband. The facts as found by the lower Courts are as follows: The plaintiff was 15 years old when her husband died on or about 10th of February, 1918. At that time she had been living with her husband for about a year. Shortly after the death of her husband, her mother, the second defendant who does not contest the suit and has not given evidence, demanded on behalf of her daughter, the plaintiff, the money and lands due to the plaintiff under the will of the husband and at the same time threatened that, if payment was not made at once, the plaintiff would not be allowed to take part in the funeral ceremonies the importance of which was recognised by all parties. Under this pressure an arrangement was made whereby on the 22nd of February, 1918, that is, approximately 12 days after the death of the husband, the first defendant's husband executed a promissory note, Ex. I, for not only the legacy of Rs. 1,700 but also for an amount of Rs. 408 which is described as interest on this legacy, apparently based on the identification of this legacy, with the *katnam* present to the deceased husband paid by the plaintiff's parents at the time of the marriage, interest being calculated from the date of the giving of the present. The promissory note also covered an amount due to the minor for paddy and the promisor undertook to pay interest at 12 per cent. This was on the 22nd of February. At the same time the plaintiff's mother received the lands bequeathed to the plaintiff and gave a receipt in token of the discharge of the legacy in Ex. II. Thereupon the ceremonies went on and the plaintiff stayed in her mother-in-law's house for three months, a period which is more or less obligatory by the custom of the community. Just at the end of this period, two payments were made under Ex. I whereby the debt incurred by the first defendant's husband in discharge of the legacy to plaintiff was wiped off by payment to the plaintiff's mother. It must be observed that the actual discharge of the legacy was not by these cash payments but by the receipt dated 22nd February, 1918, Ex. II. Admittedly after the cash payments had been made, the plaintiff left the house of her mother-in-law and went to live under the protection of her mother, the second defendant, and there she stayed for the rest of her minority. Although the plaintiff is not now living with her mother, it is found by the lower Courts that she only left her

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mother's house mainly for the purpose of the present case and that there is no real conflict between the two. It is also found as a matter of fact that ever since the plaintiff left the house of her mother-in-law, her affairs have been managed by her own mother, the second defendant.

The question is whether, on these facts, the first defendant, having arranged for the discharge of the legacy by delivery of the lands to the plaintiff's mother and by execution of the promissory note in her favour which promissory note was shortly afterwards discharged by the first defendant's husband, can be made to pay the legacy once more to the plaintiff herself. There is no finding of fact that the money paid to the plaintiff's mother has in actual truth been received by the plaintiff herself. Both the learned Judges of the Courts below apppear to have conjectured that this may be so. They however base their decisions on the position that the second defendant was the *de facto* guardian who could give a good discharge to the first defendant and they have given a decree to the plaintiff against her mother only on the footing that the money is or should be with the mother and can be claimed only from her. I have therefore to decide whether the second defendant was on the date when she gave the receipt, Ex. II, that is to say, on 22nd February, 1918, the *de facto* guardian and whether she could give a valid dischage to the executrix in respect of the legacy to the plaintiff.

My attention has been drawn to one case in which a learned Judge of this Court has expressed a doubt as to the capacity of a *de facto* guardian to give a valid discharge on behalf of the minor (*Rajaram* v. *Kothandapani*[1]). With the greatest respect to the learned Judge who made the observation referred to, it seems to me essential to hold that a *de facto* guardian who is validly in charge of the minor's affairs may for the benefit of that minor give a good discharge in respect of a debt due to the minor. There is a long line of authority beginning from *Hunoomanpersaud's case*[2] for the view that a *de facto* guardian of a Hindu minor can do those acts in the interests of the minor which can be done by a *de jure* guardian of that minor; and I am not aware of any infirmity of the position of the *de facto* guardian of the minor—once it has been established that he is the rightful guardian though not

1. A.I.R. 1937 Mad. 280. 2. (1856) 6 M.I.A. 393.

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appointed by any process of law—disentitling him to do those acts which a *de jure* guardian can validly do. The difficulty in the present case however is that it raises the question of the first point of time at which the mother can be said to have begun to be the *de facto* guardian. The phrase "*de facto* guardian", necessarily connotes a guardian who is such a guardian as a result of something which has happened previously. '*De facto*' literally means 'from that which has been done' and this basic conception of past acts resulting in a present status has led to at least two decisions in which it has been laid down that a person becomes a *de facto* guardian as a result of a course of conduct. Each of these cases arose out of an isolated act of alienation of the minor's property purporting to have been done by a person treated as a *de facto* guardian in that particular transaction only. The first case is that of *Harilal Ranchhod* v. *Gordhan Keshav*[1], wherein Crump, J., defines a *de facto* guardian as a person:

> " Who, being neither a legal guardian nor a guardian appointed by Court takes it upon himself to assume the management of the property of the minor as though he were a guardian."

He further observes that the term:

> " Implies some continuity of conduct, some management of the property beyond the isolated act of sale which comes into question."

Following that decision we have the decision of a Bench of this Court in *Chinna Alagumperumal Karayalar* v. *Vinayagathammal*[2], which related to an alienation of a minor widow's property by the widow's mother purporting to act on behalf of her daughter, which transaction was the only act done on behalf of the minor by the mother and it was done at the time while the minor was living under the protection of her husband's step-brother in whose favour the sale impeached was carried out. This was clearly a case in which on the facts there was grave reason to suspect that the mother of the minor had been used to help in a transaction which was not in the interests of the minor. On page 866 of the above report, the learned Judges make certain general observations on the position of a *de facto* guardian. It is said that:—

> " A *de facto* guardian is one who looks after the property of the mino and generally acts in his interests for the time being. A fugitive or an isolated act of a person with regard to the minor's property would not make him a *de facto* guardian of the minor, nor would staying with a minor for a time

1. (1927) I.L.R. 51 Bom. 1040. 2. (1928) 55 M.L.J. 861.

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make him a *de facto* guardian. There must be a continuous course of conduct as guardian of a minor in regard to his property in order to enable one to become a *de facto* guardian. The length of the period required to constitute one a *de facto* guardian would depend upon the circumstances of each case. The first act of intermeddling with the estate of a minor would not be the act of a *de facto* guardian, if he had not become one before the act, nor would the subsequent management of the estate of the minor by such person make the first act, which is one of alienation, the act of a *de facto* guardian."

Now with reference to this last sentence, it must be observed that, on the facts of the case before the Bench, these observations regarding the first of a series of acts of management must be treated as an *obiter dictum* for it appears that in that case there was no subsequent course of conduct from which guardianship could be implied. At the same time it does seem to me that, if the position of a *de facto* guardian rests only on acts of intermeddling, if it is a position which has only to be built up by a series of acts, the first of those acts would, by itself, not be an act of a person who was already in the position of a *de facto* guardian before that act was done. A *de facto* guardian is one who is already a guardian owing to something which has happened previously. To hold otherwise would be tantamount to admitting that a person buying property from a minor's estate or paying debts to the minor's estate can recognise anybody he likes with impunity as the guardian, provided that the person comes to be recognised as the guardian *de facto* of the minor subsequently. At the same time there are obvious difficulties in the way of the application of the dictum, as a literal statement of a rule of law, to such a case as the present. One can conceive of circumstances in which the first formal act of the *de facto* guardion would be one which the courts might rightly recognise as binding on the minor. I refer to a case in which the position of the *de facto* guardian has been recognised in the family and by those mainly concerned before any intermeddling act of a formal nature affecting the minor has been accomplished. Surely the question must be whether in the eyes of the family of the minor and those interested in the welfare of the minor, the person who makes an alienation or receives a payment is, at the time of the transaction impeached, regarded by common consent as the person who is entitled to act on behalf of the minor. If there is such a general recognition, then in my opinion, when once the person recognised has consented to act as guardian, it would not be necessary to wait for a series of transactions in the capacity of

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guardian in order to clothe that person with authority to represent that estate. The question is essentially one of fact. If the intermeddler is, as is contemplated in the case referred to in *Harilal Ranchhod* v. *Gordhan Keshav*[1] a self-constituted guardian who comes into being for no other purpose than to carry out an isolated transaction which transaction is of very doubtful advantage to the minor's estate, then there could be no such general recognition of the alleged guardian as would clothe him with authority and clearly there could be no such course of conduct as might take the place of or supplement the general recognition.

Applying this reasoning to the facts of the present case, I feel some difficulty in following the process by which the learned trial Judge has come to the conclusion that the receipt of the legacy by the mother of the plaintiff was in fact not the first act of guardianship but the third or fourth act. So far as I have been able to gather, the first transaction carried through by the plaintiff's mother on behalf of her daughter was on the 22nd of February, 1918, when she gave a discharge on receipt of the promissory note and on transfer of the land. The fact that the cash due under the promissory note was paid only at a later date was to my mind immaterial, for the discharge of the legacy was given in return for the execution of the promissory note which provided that the payment of the promised amount would be made in due course. Now can it be said that when this receipt (Ex. II) was given, the plaintiff's mother was legally entitled to give a discharge? In dealing with this question, one should remember the relationship of the parties, the age of the plaintiff, the surrounding circumstances and the attitude of the husband's relatives towards the claim of the plaintiff's mother. The plaintiff was a young girl who had not been with her husband for very long and who had been almost completely excluded from the considerable estate left by her husband. Her legal guardian, the mother-in-law, does not appear to have done anything to dispute the right of the plaintiff's mother to protect her interests. The action of the plaintiff's mother in vigorously pressing for payment and for transfer of the land seems to have resulted in the payment of considerably more than could be demanded on the strict terms of the legacy. When payment was demanded by the plaintiff's

1. (1927) I.L.R. 51 Bom. 1040.

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mother, it appears to have been recognised by the family in general that she was the person entitled to make the demand. This is clearly not a case in which there was a conspiracy to defraud the minor. The fact that the plaintiff's mother was regarded as the right person to protect the minor's interest is shown by the way in which immediately after the period of three months during which she had to live with her mother-in-law, she went to live with her mother, stayed with her thereafter and entrusted the whole of the management of her affairs to her mother. I am quite prepared to concede that if the plaintiff's mother was not in the position of the *de facto* guardian at the time when she gave the discharge, any subsequent accession of authority would not clothe her first act with a character with which it was not at the time invested. But I do think we are entitled to look at what happened afterwards in order to come to the conclusion, firstly, as to the state of the mind of the mother in making the demand and secondly, as to the way in which the plaintiff's mother was regarded by the rest of the family, who after all are the persons mainly concerned in the matter of the guardianship. There is nothing in the facts in the case to raise a doubt as to the attitude of the 2nd defendant to her daughter, the plaintiff, nor to suggest that she was not in fact treated as the guardian by the rest of the family. I am of opinion that the materials are sufficient to warrant the conclusion that she was so treated at the time when she made the demand on behalf of her daughter for payment of the legacy and that the payment of this legacy was not merely the first of a series of transactions which eventually constituted her the *de facto* guardian. This seems to be a case in which the position of the plaintiff's mother as *de facto* guardian was recognised by the relatives from the beginning and was not the result of any long course of conduct. It seems to be undesirable to withhold from a person who has reasonably been recognised by the family as entitled to represent the minor, the power to do those acts which are necessary for the minor and beneficial to her. I therefore agree with the lower Courts in holding that the plaintiff's mother was the *de facto* guardian entitled to receive this legacy, though I would rest the decision not so much on the theory that the actual receipt of the money was one of the later instances of a course of conduct which clothed her with the position of the guardian, but rather on the

fact that she was from the beginning after the death of the husband recognised by the family as the *de facto* guardian of the minor and that she had been recognised in that capacity and had assumed that capacity with the consent of all concerned before the payment was made to her.

Mukkamala Hanumayamma *v.* Kasineni Lakshmidevamma.

In this view, I would dismiss this appeal with costs.

Leave to appeal is granted.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

The Rajahmundry Municipal Council represented by the Commissioner, Rajahmundry Municipality .. *Appellant** (*Plaintiff*)

*v.*

Tripurani Mallayya .. *Respondent* (*Defendant*).

*Madras District Municipalities Act (V of 1920), S. 83 (a)—Property-tax—Exemption from levy—Choultry used for other purposes—Dedication to choultry—Proof.*

Rajahmundry Municipal Council *v.* Tripurani Mallayya.

The effect of S. 83 (*a*) of the Madras District Municipalities Act is that anything which is in fact a choultry when the property-tax accrues due is exempt from the tax. If it is not a choultry on that date, being used for other purposes then the tax is leviable even though in the past the property has been a choultry and might become one in future.

The mere use of the income from property as an endowment of a choultry will not clothe the property with the character of a choultry.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry dated 15th February, 1934 and passed in A. S. No. 92 of 1933 (A. S. No. 137 of 1933 on the file of the District Court, East Godavari) preferred against the decree of the Court of the District Munsiff of Rajahmundry in O. S. No. 97 of 1933.

*P. V. Rajamannar* and *K. Subba Rao* for Appellant.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This appeal raises the question of the interpretation of S. 83 of the Madras District Municipalities Act which begins as follows:—

"The following buildings and lands shall be exempt from property-tax—(*a*) places set apart for public worship and either actually so used or used

* S. A. No. 527 of 1934. 8th August, 1938.

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for no other purpose, choultries, buildings used for educational purposes including hostels. . . . . . . ."

We are not concerned with the latter portion of the section.

The established facts are that the suit premises were dedicated for use as choultry, that the Civil Court permitted the trustee of the choultry to let one-third of the premises for rent and use this rent for the upkeep of the premises as a whole, and that under colour of that sanction, approximately one half of the building has now been let for rent to tenants, the remainder being used partly as choultry and partly as the residence of the trustee. The suit was brought by the Municipal Council (the appellant here) to establish its right to levy house-tax and latrine-tax on the portion of the building which has been let out to tenants.

Both the lower Courts have held that the property having been dedicated as a choultry remains a choultry even though used for other purposes and is not taxable by reason of S. 83. The learned District Munsiff bases his decision on the precise words of the section emphasising the fact that the old S. 63 (1-*a*) of Act IV of 1884 contains the clause:

"To the extent to which they are used for public, charitable or religious, but not residential purposes,"

which clause has not been reproduced in S. 83 of the present Act and he argues therefrom that one must infer an intention to exempt choultries from taxation whatever be the nature of their user. This argument would have been stronger had S. 83 been more or less a reproduction of the old S. 69 (1-*a*). Actually it is an entirely different section completely redrafted, though aimed at the same object. The learned Subordinate Judge argues in a different way but reaches the same result. He points out that the property had been dedicated for use as a choultry, that though it has been largely diverted from that use, the dedication remains and that the remedy is for persons interested to sue to put an end to the breach of trust. It seems to me that the remedy which lies open to persons interested to restrain the breach of trust is scarcely relevant to the consideration of the question whether this building is or is not a choultry exempted from taxation.

I do not think it permissible to infer from the various changes which have taken place in the wording of the

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provisions relating to exemption from property-tax of religious and charitable buildings an intention on the part of the legislature to exempt from taxation any building which had once upon a time been dedicated to such a purpose as a choultry, but has entirely ceased to be used for that purpose. To hold so would be to encourage breaches of trust and it would result in the curious position that when a charitable trust has been openly and continuously abused but no one has taken action to restrain the abuse, the person who enjoys the property in breach of trust would also enjoy the privilege in respect of immunity from taxation which he could only claim by virtue of the dedication which he himself has nullified by his conduct. In my opinion, only very clear language in the statute would justify the Court in sanctioning such an immunity. Actually we have nothing in the shape of qualification of the term "choultries" in the provision exempting them from property-tax. The natural interpretation of the section surely would be that anything which is in fact a choultry is exempt from the tax. I see no reason to extend that exemption to a building which once was a choultry, but is no more a choultry, or to a building which is not but ought to be a choultry and might return to the state of being a choultry if and when circumstances change. The obvious course seems to me to be to look at the facts as they are at the time that the right to claim the tax accrues and to exempt from the tax any building which at that time in fact falls within the categories to which exemption is given. If the property is a choultry when the tax accrues due then the tax cannot be levied. If it is not a choultry on that date, being used for other purposes, then the tax is leviable even though in the past the property has been a choultry and might become one again in the future. I need hardly say that the mere use of the income from property as an endowment of a choultry will not clothe the property with the character of a choultry.

In this view I allow this appeal and give the plaintiff a decree for the amount claimed with costs throughout.

B. V. V. —— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Edara Venkayya .. *Petitioner* in all (Defendant in all)*

*v.*

Edara Venkata Rao .. *Respondent in all (Plaintiff in all).*

Venkayya *v.* Venkata Rao.

*Civil Procedure Code (V of 1908), O. 2, r. 2, cl, (3)—Application for leave to omit some reliefs—When to be made—If can be made after filing of the suit.*

There is no reason for insisting on an application for leave to omit certain reliefs under O. 2, r. 2(3), Civil Procedure Code, being made either before or along with the suit wherein the application is made. Leave is not a condition precedent to the jurisdiction of the Court to entertain the particular action, that is, omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked for. It only entails a disability as regards subsequent proceedings. Therefore the application can be made at any time during the pendency of the suit but then the applicant will be running a risk of the application being refused when it will be too late for him to set matters right.

Where therefore a suit was filed for money but by that time certain instalments had accrued due which were not sued for, and later a suit was filed again for recovery of those instalments, when the objection was taken under O. 2, r. 2 (3), Civil Procedure Code, that the relief having been omitted in the prior suit without leave of the Court, the suit was not maintainable and thereupon an application was later filed in the earlier suit for grant of leave under O. 2, r. 2, cl. (3).

*Held*, that the Court had jurisdiction to entertain the petition even at such a late stage, as that earlier suit was then pending.

Petition under Ss. 115 of Act V of 1908 and 107 of the Government of India Act, praying the High Court to revise the order of the District Court of West Godavari at Ellore dated 6th November, 1936 and made in I.A. No. 864 of 1936 in O.S. No. 19 of 1933, etc.

*B. Somayya* for Petitioner.

*V. V. Srinivasa Aiyangar* and *V. V. Ramadurai* for Respondent.

The Court delivered the following

JUDGMENT.—In these revision petitions, the petitioner challenges the validity of four orders passed by the lower Court granting leave under O. 2, r. 2 (3), Civil Procedure Code, to the plaintiff to omit the claim for certain reliefs, in the circumstances to be presently mentioned. The orders have been questioned on two grounds (*i*) that the Court had no power to grant leave at the stage at which the applications

* C. R. P. Nos. 87 and 386 to 388 of 1937. 19th August, 1938.

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were made, and (*ii*) that the circumstances alleged in the application for leave did not justify the grant of leave. The latter question relates to the exercise of the discretion which is vested by law in the lower Court and except in very exceptional circumstances, it is not proper for a Court of Revision to interfere with the way in which the lower Court has exercised its discretion. In the present case, I do not see sufficient reason for interfering with that exercise of discretion.

The question as to the power of the Court to grant leave at the stage at which the applications were made to it is not free from difficulty. The relevant facts are as follow. The plaintiff was entitled to recover a sum of Rs. 20,000 from the defendant in ten annual instalments of Rs. 2,000 each, the first instalment becoming payable on 31st March, 1929. As the first instalment was not paid on the due date, the plaintiff filed a suit for its recovery in April, 1929. Several defences were raised to that suit and the plaintiff apparently waited to see what the decision in that suit would be before he filed his next suit.

But it unfortunately happened that that suit remained pending for a number of years. In 1933 he filed his second suit O.S. No. 19 of 1933. By that time not only the second instalment but some later instalments had also fallen due. But O. S. No. 19 of 1933 sought the recovery of the second instalment only. O. S. No. 17 of 1934 was filed next year for the third instalment and two other suits, namely, O.S. No. 16 of 1935 and O. S. No. 13 of 1936 were filed for the recovery of the later instalment. Luckily or unluckily for the parties, all the four suits beginning from O.S. No. 19 of 1933 remain pending to this date. At some stage, the defendant raised the plea under O. 2, r. 2, Civil Procedure Code, on the ground that as the claim for some of the later instalments had accrued due even before O. S. No. 19 of 1933 was filed, the later suits would be barred by the provisions of that rule. Similar pleas were sought to be raised in the other suits as well. It was at this stage that applications were filed by the plaintiff on 1st October, 1936, for grant of leave under O. 2. r. 2 (3).

On the facts above stated, Mr. Somayya, the learned Counsel for the defendant, contends that on a proper construction of cl. 3 of O. 2, r. 2, leave should have been asked for

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before O. S. No. 19 of 1933 was actually filed or at least at the time the suit was instituted, and that the Court has no power at a late stage to grant such leave. I may mention here that the lower Court has taken care to leave an allied question open, namely, whether the leave granted under the orders now challenged will be effective to obviate the bar under O. 2, r. 2, Civil Procedure Code, in respect of suits that have been already instituted. I do not therefore wish to say anything on that question; not do I wish to be understood as expressing any opinion on the question whether O. 2, r. 2 (3) applies to these suits or not. These are questions to be considered in the suits themselves. The only question dealt with by the Court below and proposed to be dealt with by me here is whether assuming that the bar under O. 2, r. 2 (3) would have applied to each of the later suits, the Court had power to grant leave under that clause at a late stage of the pendency of the earlier suit.

The learned Judge has laid some stress on the fact that in re-enacting this provision in the Code of 1908, the legislature has omitted certain words which were found in the correspon-ding provision in the Codes of 1882 and 1877. In the last clause of S. 43 of the older Codes there occurred in parenthesis the words:

"Except with the leave of the Court obtained before the first hearing" between the words "omits" and "to sue".

The learned Judge understands the reason of the omission to be that it was intended to leave the question of the time for making an application at large, subject only to the power of the Court to decline to grant leave if an application was made too late. Mr. Somayya suggests that that was not the real reason for the omission; he attributes it to a recognition by the legislature of the fact that the words found in the old rule were really inconsistent with the substantive provision that all reliefs arising out of the same claim must be claimed in one and the same suit. He points out that the question of omission or no omission in respect of some reliefs must be settled at the initial stage itself and could not be properly dealt with at later stages of the suit. I am not by any means satisfied that there is any inherent incompatibility of the kind suggested by Mr. Somayya. The older Code obviously contemplated that the application for leave might be made after the institution of the

suit, though it fixed a time-limit by prescribing that leave should be obtained before the first hearing.

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The question whether leave for particular purposes should be obtained before the institution of the suit or could be obtained later will, in cases not governed by any definite statutory time limit, have to be decided according to the bearing of the leave upon the jurisdiction of the Court to entertain the particular suit or its bearing upon the constitution of the particular action or the significance of other considerations. Taking for instance the provision in the Letters Patent that the leave of the Court should be obtained before a suit of a particular kind is instituted in the High Court, it is obviously a provision by way of condition precedent to the jurisdiction of the Court. If, on the other hand, we take the rule relating to the necessity for leave for a suit against a Receiver or for a suit under O. 1, r. 8, Civil Procedure Code, the leave is not one that bears on the jurisdiction of the Court; the requirement as to leave is based on considerations relating to the interests of other persons or the authority of other Courts. The provision as to leave in this latter class of cases rests not so much even on the constitution of the particular suit as upon the expediency of granting relief in that particular suit in a manner that may affect the interests of other persons. That is why the preponderance of authority is in favour of the view that in this class of cases leave is not a condition precedent to the institution of the suit. Another class of cases which lies midway between these two groups is illustrated by the provision of O. 2, r. 4, Civil Procedure Code, as regards the joinder of particular claims in one suit with a particular claim for the recovery of immovable property. Under the corresponding rule of the English practice, it has been held in England that the leave contemplated by this rule may be granted even at a later stage of the suit (see *Lloyd* v. *Great Western Dairies Company*[1]) The observations of Jessel, M. R., in In re *Pilcher*: *Pilcher* v. *Hinds*[2], seem to suggest a stricter view, but they have been explained by Buckley, L. J., in the later case. Again, the leave contemplated by S. 20 (*b*), Civil Procedure Code, in respect of defendants residing outside the jurisdiction of the Court has been held to be capable of being granted on an

1. (1907) 2 K. B. 727.
2. (1879) 11 Ch. D. 905.

application made after the institution of the suit. These illustrations show that where leave is not a condition precedent to the jurisdiction of the Court to entertain the particular action, there is no inherent necessity that the application for leave should be made before the institution of the suit itself or at least along with the plaint.

Where the objection under O. 2, r. 2, Civil Procedure Code, arises, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked for, it only entails a disability as regards subsequent proceedings. It therefore seems to me that there is even less reason in this class of cases for insisting that the application for leave to omit must precede or at least be contemporaneous with the plaint in the first suit. It may be that as a matter of prudence the plaintiff will do well to make the application for leave even before he files his plaint or at least along with his plaint, because he will otherwise be running the risk of the application being refused when it will be too late to set matters right. But that is different from saying that the Court has no power to grant leave unless the application is made before the institution of the suit or along with the presentation of the plaint. So far as I can see, the Court when called upon to deal with such an application will ordinarily have to consider whether the grant of leave to reserve certain remedies will in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well be dealt with by the Court during the pendency of the suit as before its institution. I am therefore unable to agree with Mr. Somayya's contention that the reason of the thing requires that such an application must have been made prior to the institution of the suit in which the application is made. In this view, the omission in the new Code of the words found in parenthesis in the third clause of S. 43 of the old Code justifies the inference that the legislature did not wish to insist upon leave being obtained before the first hearing. Some of the commentators on the new Code (including Sir Dinshaw Mulla) also take this view, and I am not satisfied that that view does not correctly represent the intention of the legislature.

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The Civil Revision Petitions accordingly fail and are dismissed with costs in Civil Revision Petition No. 87 of 1937.

S. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Chukka Durgiah .. *Petitioner* (Respondent-Appellant).*

Chukka Durgiah, *In re.*

*Court-Fees Act (VII of 1870), S. 12—Judicial determination of court-fee —Subsequent variation of.*

When a Court has passed a judicial order fixing the correct Court-fee payable on a memorandum of appeal, it is not open to that Court to vary it afterwards either at the instance of a party or of its own motion.

*Sadasivam Pillai* v. *Varadaraja Odayar*, (1937) 1 M.L.J. 89 and *Lakshmana Aiyar* v. *Palaniappa Chettiar*, (1935) 69 M.L.J. 479, followed.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of East Godavari at Rajahmundry, dated 11th December, 1937, and made in I.A. No. 467 of 1937 in A.S. No. 62 of 1936.

*K. Kameswara Rao* for Petitioner.

*The Government Pleader (B. Sitarama Rao)* for Crown.

The Court delivered the following

JUDGMENT:—The point raised in this petition is that decided in *Sadasivam Pillai* v. *Varadaraja Odayar*[1]. In that case Venkataramana Rao, J., purported to follow a previous decision, namely, that of Venkatasubba Rao, J., in *Lakshmana Aiyar* v. *Palaniappa Chettiar*[2]. The point is whether when a Court has passed a judicial order fixing the correct court-fee payable on a memorandum of appeal it is open to that Court to revise it afterwards either at the instance of a party or of its own motion. This question was answered in the negative in the cases referred to above and I see no sufficient reason for not following those decisions. It is urged however by Mr. Sitarama Rao that the word 'final' found in S. 12 (1) of the Court-Fees Act is capable of the meaning that there should be no appeal from that order and not that it shall not be open to review by the same Court which made the order. This argument does not appear to have been put forward in the course of arguments in the previous cases, but it appears to me that this argument is hardly available in view of cl. (2) of the

* C. R. P. No. 301 of 1938. 19th August, 1938.

1. (1937) 1 M.L.J. 89. 2. (1935) 69 M.L.J. 479.

Chukka Durgiah, *In re.*

same section which provides for an alteration of the order by a superior Court of appeal or revision. In the particular case before us there was no application for a review of the order by the petitioner himself against whom the present order was made modifying the order which was favourable to him. Nor did the Court purport to act under its inherent powers. Finally it is impossible in a case like this to say that it was necessary for the ends of justice to modify the order already passed. In these circumstances I am of opinion that the learned District Judge had no jurisdiction to vary the order dated 28th September, 1937, to the prejudice of the petitioner by his subsequent order dated 11th December, 1937, in the matter of the court-fee payable on the memorandum of appeal.

The petition is therefore allowed and the order of the District Judge, dated 11th December, 1937, is set aside. There will be no order as to costs of this petition.

K. C. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Balagurumurthy Chettiar .. *Appellant* (Plaintiff)*

*v.*

Kalingan Ambalagaran (deceased) and others .. *Respondents (Defendants 1 to 3 and nil).*

Balagurumurthy Chettiar *v.* Kalingan Ambalagaran.

*Civil Procedure Code (V of 1908), O. 41, r. 27—Additional evidence—Admission in appeal—Conditions to be satisfied—Admission of additional evidence before hearing of appeal—Validity.*

The powers of the appellate Court in the matter of admission of additional evidence are subject to limitations which are clearly laid down in O. 41, r. 27 of the Civil Procedure Code. The legitimate occasion for the exercise of the discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence but when on examining the evidence as it stands some inherent lacuna or defect becomes apparent. It may well be that the defect may be pointed out by a party or that a party may move the Court to supply the defect but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. Consequently it is not open to the appellate Court to admit additional evidence in appeal even before the appeal is heard.

*Parsotim Thakur* v. *Lal Mohar Thakur,* (1931) 61 M.L.J. 489: L.R. 58 I.A. 254: I.L.R. 10 Pat. 654 at 668 and 669 (P.C.), relied on.

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*A. A. O. No. 73 of 1936. 8th August, 1938.

Balagurumurthy Chettiar *v.* Kalingan Ambalagaran.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in Appeal Suit No. 31 of 1935 (O. S. No. 403 of 1934, District Munsiff's Court, Trichinopoly).

*A. V. Narayanaswami Aiyar* for Appellant.

*S. Amudachari* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal from the judgment of the Additional Subordinate Judge of Trichinopoly dated the 6th December, 1935, allowing the appeal by the defendants from the decree of the District Munsiff, Trichinopoly, dated the 21st December, 1934, and remanding the suit to the trial Court for fresh disposal after taking evidence on a certain point. For the purpose of deciding this appeal it is unnecessary to go into the facts of the case at any length. The suit was for recovery of the amount due under the mortgage executed by the father of defendants 1 to 3 and the fourth defendant in favour of the plaintiff. The fourth defendant's name was struck off and his case need not be considered. The suit was defended on the ground that the mortgage sued on had been discharged by the father of defendants 1 to 3 and that the endorsements of payments found on the mortgage deed were not true. After full trial the suit was decreed in favour of the plaintiff. It was not the case of the defendants who appealed to the District Court that they had not sufficient opportunity to present their case or adduce evidence in support of their case. But nevertheless they filed an application purporting to be under O. 41, r. 27, Civil Procedure Code, praying the District Court to admit a certain document in evidence in appeal, namely, a certified copy of an entry from a death register said to relate to their father. This application was opposed by the plaintiff-respondent but was allowed by the District Judge on the 5th April, 1935, that is to say, long before the appeal was even ripe for hearing. In any case it is clear that the District Judge did not go into the merits of the appeal before he passed the order and the appeal itself was transferred by the District Judge to the Additional Subordinate Judge for disposal on a subsequent date. The Additional Subordinate Judge who disposed of the appeal appears to have thought that he was bound by the order of the District Judge admitting the document in question as evidence in appeal and he thought

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that it was but fair that the plaintiff-respondent should have an opportunity of leading rebutting evidence to show that the entry in the death register in question did not relate to the father of defendants 1 to 3. He was not content with making this direction, but actually remanded the case to the lower Court for fresh disposal after taking evidence on the point. This necessarily involved the setting aside of the decree of the lower Court and that too for no valid reason. It cannot be maintained for a moment that the procedure adopted either by the District Judge in admitting additional evidence in appeal or the judgment of the Subordinate Judge reversing the decree of the Court below and remanding the case for fresh disposal was justifiable. The powers of the appellate Court in the matter of admission of additional evidence are subject to limitations which are clearly laid down in O. 41, r. 27. This matter has been dealt with in more than one case by their Lordships of the Privy Council and it cannot for a moment be urged that the District Judge acted with jurisdiction when he ordered the document in question to be admitted as evidence in appeal before hearing the appeal itself at the instance of a party. As was observed by their Lordships in *Parsotim Thakur* v. *Lal Mohar Thakur*[1]:

> " The legitimate occasion for the exercise of this discretion (of admitting additional evidence in appeal) is not whenever before the appeal is heard a party applies to adduce fresh evidence, but 'when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent' . . . . It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands."

Their Lordships go on to state that wherever the Court adopts this procedure it is bound by r. 27 (2) to record its reasons for so doing, and under r. 29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. In this case the order admitting additional evidence in appeal was passed before the appeal was heard and there is no doubt therefore that that order was without jurisdiction. Even if the learned Subordinate Judge thought that this order of the District Judge admitting evidence was binding on him, there was no necessity for him to have reversed the decree of the Court below and remanded

1. (1931) 61 M.L.J. 489: L.R. 58 I.A. 254: I.L.R. 10 Pat. 654 at 668 and 669 (P.C.).

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the suit for fresh disposal; the correct procedure which he ought to have followed, even if he thought that the order of the District Judge was binding on him, was to have the additional evidence taken either by himself or by the lower Court and then dealt with the appeal. Both the order of the District Judge admitting evidence in appeal as well as the judgment of the Subordinate Judge reversing the decree of the trial Court and remanding the suit for fresh disposal are clearly erroneous and contrary to law. They are therefore set aside and the lower appellate Court is directed to dispose of the appeal afresh according to law. The appellant is entitled to have his costs of this appeal from the respondents. The costs in the Court below should be provided for in the revised decree of the lower appellate Court.

B. V. V. —— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—MR. ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VARADACHARIAR.

S. Meera Sahib and Brothers .. *Appellants* (Defendants)*

*v.*

Hajee M. Abdul Azeez Sahib .. *Respondent (Plaintiff).*

Meera Sahib v. Abdul Azeez Sahib.

*Trade Mark—Passing off action—Manufacturer of goods in England—Sale of goods exclusively through importer—Infringement of trade mark—Intention to defraud—Right of importer to sue for injunction and damages—Manufacturer whether entitled to relief—Principles applicable to passing off actions—Proof of reputation—Knowledge of ultimate purchaser if necessary.*

A merchant who sells particular goods under a particular trade mark is entitled to protection for that mark if he can show that it is associated in the market with the goods which he sells, because the law will not permit a person to pass off his goods for those of another. And it matters not whether the merchant has goods made for him abroad or whether he has them made for him within the country. In such cases a reputation must be established but that does not mean that the ultimate purchaser must know the actual name of the owner of the goods.

The second plaintiff who was a piece goods merchant at Madras had for twelve years before the suit been in the habit of buying white twill from the first plaintiff, a company carrying on business in London. Having bought the twill from the first plaintiff and imported it into Madras the second plaintiff sold it in the Madras Presidency where it became well known as " diamond " twill, because on it was stamped in gold the picture of a diamond with lines representing radiation from the diamond. Above the diamond was printed in gold the word " diamond " and below, the word " twill ". The first plaintiff

* O. S. A. Nos. 20 and 29 of 1937. 19th August, 1937.

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had never sold the goods bearing the said mark but he sold them to the second plaintiff who with the consent of the first plaintiff sold it in India as his own 'diamond' twill. The defendant who was also a Madras piece goods merchant began to import twill under a mark which he called the "gold star" mark. It consisted of a five pointed star with another star in the centre of it, and around his central star were ten other smaller stars. From the star there were thin lines intended to represent radiation. Above the star were the words "gold star" and underneath, the word "twill". The lettering was of an entirely different character to the lettering of the mark used by the second plaintiff. At a later date the defendant changed his mark by altering the form of the letters to the very distinctive mark used by the second plaintiff, he filled in the body of the star and made it more in conformity with plaintiffs' diamond and he changed the thin lines rays of light to thicker ones and made them more like the "diamond" mark. The plaintiffs sued the defendant for an injunction and for damages on the ground that the new mark constituted a colourable imitation of their "diamond" mark.

*Held*, that the second plaintiff was entitled to succeed as there was a deliberate intention on the part of the defendant to defraud by reason of the alteration of the trade mark. In such a case the fact that the second plaintiff was a mere importer of goods did not matter. And the second plaintiff need not show that the ultimate purchaser knew his name; it is sufficient if the ultimate purchaser knew that the goods bearing the mark had a reputation and that that mark denoted the goods which he wished to buy.

*Held, further*, that the first plaintiff was not entitled to any relief as the evidence did not show any reputation in him so far as the sale of the goods in India was concerned.

Case-law discussed.

Appeals against the judgment of the Hon'ble Mr. Justice Gentle dated 7th December, 1936, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 149 of 1936.

*K. Krishnaswami Aiyangar* and *E. Anthony Lobo* for Appellants.

*Dr. V. K. John* for Respondent.

The Court delivered the following

Leach, C. J.

JUDGMENTS. *The Chief Justice.*—This appeal and Appeal No. 29 of 1937 arise out of a suit which was filed on the Original Side of this Court for an injunction in a passing off action and as they have been heard together they will be dealt with in one judgment. The appellant in this appeal was the defendant in the suit, and the appellant in Appeal No. 29 was the first plaintiff. The respondent in this appeal was the second plaintiff. It will be convenient to refer to them as the first plaintiff, the second plaintiff and the defendant, respectively.

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The second plaintiff is a piece goods merchant carrying on business in Madras. For twelve years before the suit he had been in the habit of buying white twill from the first plaintiff, a company carrying on business in London. For the purposes of the case the first plaintiff has been treated as the manufacturer of the goods, although he in fact did not make them. Having bought the twill from the first plaintiff and imported it into Madras the second plaintiff sold it in the Madras Presidency where it has become well known as "diamond" twill. It is known as "diamond" twill because on it is stamped in gold the picture of a diamond with lines representing radiation from the diamond. Above the diamond is printed in gold the word "diamond" and below the word "twill". The form of these letters is unusual. The mark was designed by the first plaintiff and so far as business in England is concerned it has been accepted as belonging to the first plaintiff, but it is common ground that the first plaintiff has never sold goods in India bearing this mark. His business has been confined to selling twill to the second plaintiff, who with the full consent of the first plaintiff has sold it in India as his own "diamond" twill. In fact, the goods have been shipped by the first plaintiff to the second plaintiff with the mark stamped on them, and in a letter, dated the 12th July, 1928, written by the first plaintiff to the second plaintiff the first plaintiff said:—

> "We have already assured you that we would not under any conditions supply other dealers with twill stamped with your trade mark."

The words "your trade mark" refer to the diamond mark. In the plaint, however, it was claimed that the plaintiffs were jointly entitled to the exclusive use of the mark and an injunction was asked for on this basis.

The defendant is also a Madras piece goods merchant doing business throughout the Presidency. He, like the second plaintiff, imports twills and other classes of piece goods for sale here. From 1933 to 1935 he was importing twill under a mark which he called the "gold-star" mark. It consisted of a five pointed star with another star in the centre of it. Around this central star were ten other smaller stars. From the star were thin lines intended to represent radiation. Above the star were the words "gold-star" and underneath the word "twill". The lettering was of an entirely different character to the lettering of the mark used by the second plaintiff. In

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1935 the defendant changed his mark in the following respects: (*i*) he altered the form of the letters to the very distinctive form used by the second plaintiff; (*ii*) he filled in the body of the star which had the effect of changing its appearance considerably and made it more in conformity with the plaintiff's diamond; and (*iii*) he changed the thin lines representing rays of light to thicker ones and thus made them more like the lines in the diamond mark. It is this new mark which the plaintiffs allege constitutes a colourable imitation of the diamond mark and in respect of which they seek the injunction.

The case was tried by Gentle, J., who held that the defendant had deliberately changed his mark for the purpose of making it look like the diamond mark and that in its altered form it constituted a colourable imitation of that mark. After discussing the evidence the learned trial Judge rejected the contention that the plaintiffs were the joint owners of the mark, but held that the second plaintiff was entitled to an injunction on the ground that the mark had become associated in the public mind with the goods sold by him. Accordingly he dismissed the first plaintiff from the suit, but granted an injunction to the second plaintiff with costs. He also awarded him a sum of Rs. 500 by way of damages. The defendant has appealed against the decree passed against him, and the first plaintiff has appealed against the order embodied in it dismissing him from the suit.

I will first deal with the appeal against the dismissal of the first plaintiff from the suit. In India there are no statutory enactments of the nature of the Trade Mark Acts which have been passed in England, and relief here can only be granted on the ground that the defendant has done something which is calculated to deceive. It is essential in a passing off action to show that there has been a false representation. It is not enough for a plaintiff to claim that he has adopted a device as a trade mark and that the defendant has copied this device or used one so like it that deception is possible. The plaintiff must show that he has used the mark claimed by him on his goods or in connection with them and that the mark has become associated in the minds of the public with his goods. There must be user of the mark because without user no reputation can be acquired. In this case the

evidence does not show any reputation in the first plaintiff so far as India is concerned and this finding is sufficient to dispose of the first plaintiff's appeal. It will be necessary to return to the question of user when discussing the position of the second plaintiff, but the first plaintiff having clearly failed to establish a cause of action against the defendant his appeal must be dismissed. I might add that in the course of his arguments the learned Advocate for the first plaintiff pointed out that it was not necessary for the plaintiffs, in view of the attitude of the defendant to lay any stress in the trial Court on the plea of joint ownership. The defendant there conceded that either the first plaintiff or the second plaintiff or both of them together had the exclusive right to the use of the diamond mark in India. We appreciate this, and it is our intention merely to deal with the case so far as it affects the defendant and to say as little as possible with regard to the rights of the plaintiffs *inter se*.

Turning now to the defendant's appeal, I have no doubt that the defendant deliberately changed his mark in 1935 in order to make it resemble the mark used by the second plaintiff and that he did this with the object of acquiring part of the second plaintiff's trade. I am further of the opinion that the alteration was of such a character as to make it likely that the mark would be mistaken for the diamond mark. We have here a deliberate intention to defraud. The learned advocate for the defendant, however, contends, that the second plaintiff is not entitled to the injunction granted to him for two reasons. In the first place he says that the second plaintiff is not the maker of the goods, but merely an importer and therefore he must show that the mark has become associated with his name in some special way as the importer of the goods, and not merely as the seller. In the second place he says that before the second plaintiff can obtain relief he must also show that the ultimate purchaser associates the mark with his name. He maintains that these conditions have not been fulfilled in this case.

On the first point the learned advocate for the defendant has cited many cases, but a detailed discussion of them is not called for. His argument is really based on a passage in the judgment of the Privy Council in the case of *Imperial*

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*Tobacco Company of India, Limited* v. *Bonnan*[1], where it was pointed out that an importer might get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness, and if therefore, goods though of the same make are passed off by competitors as being imported by him he will have a right of action. But this statement does not pretend to be exhaustive and to declare all the circumstances in which an importer may acquire the right to the exclusive use of a trade mark. A merchant who sells particular goods under a particular trade mark is entitled to protection for that mark if he can show that it is associated in the market with the goods which he sells, because the law will not permit a person to pass off his goods for those of another. This is the governing principle and it matters not whether the merchant has goods made for him abroad or whether he has them made for him within the country. A decision of the Privy Council which has a direct bearing on this case is that of *Ullmann & Co.* v. *Cesar Leuba*[2]. The plaintiffs there were manufacturers of watches in Switzerland and had acquired the business and trade marks of another Swiss firm of watch manufacturers. The firm from which the plaintiffs had acquired these trade marks had been in the habit of supplying watches to a customer carrying on business at Hong Kong who sold them under the manufacturers' trade marks. The plaintiffs instituted a passing off action in Hong Kong against another dealer there on the ground that he was infringing the rights which they had acquired. Their Lordships held that the trade in Hong Kong belonged to the original importer and that the plaintiffs had not sufficient interest to found a cause of action. The same principle was applied by this Court in *Ebrahim Currim* v. *Essa Abba Sait*[3] and by the Bombay High Court in *West End Watch Co.* v. *Berna Watch Co.*[4].

In this case the evidence does establish the fact that the diamond mark is associated with the twill sold by the second plaintiff and having established his reputation in connection with this mark the fact that the suppliers of the goods have

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1. (1924) A.C. 755.
2. (1908) A.C. 443.
3. (1900) I.L.R. 24 Mad. 163.
4. (1910) I.L.R. 35 Bom. 425.

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also acquired a reputation in connection with it in another country does not affect him. The manufacturer has never used the mark in India, and it was open to the second plaintiff to adopt it for his business in India, which as I have already pointed out, he did with the full consent of the manufacturer. The defendant has altered his mark for the purpose of gaining for himself part of the business which his rival has built up and in view of the probability of deception the second plaintiff has a cause of action.

The contention of the defendant that the second plaintiff must show that the ultimate purchaser associates this mark with his name is also fallacious. A reputation must be established, but that does not mean that the ultimate purchaser must know the actual name of the owner of the goods. In this connection I will refer to certain passages in the judgments in *Birmingham Vinegar Brewery Company, Ltd.* v. *Powell*[1] which is the well known "Yorkshire Relish" case. Lord Halsbury observed (page 713) :—

> "It may be true that the customer does not know or care who the manufacturer is, but it is a particular manufacture that he desires. He wants 'Yorkshire Relish' to which he has been accustomed, and which it is not denied has been made exclusively by the plaintiff for a great number of years. This thing which is put into the hands of the intended customer is not 'Yorkshire Relish' in that sense. It is not the original manufacture. It is not made by the person who invented it. Under these circumstances it is a fraud upon the person who purchases to give him the one thing in place of the other."

In the same way it would be a fraud to place in the hands of a customer who wanted diamond twill, twill bearing the mark of the defendant.

In the course of his judgment Lord Herschell said (page 715) :—

> "In the present case it seems to me that 'Yorkshire Relish' meant the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it meant a particular manufacture, and that when a person sold 'Yorkshire Relish', as the defendants did, by selling it as 'Yorkshire Relish' and calling it 'Yorkshire Relish,' they represented to the public that it was that manufacture which was known as and by the name of 'Yorkshire Relish'."

In *Madhavji Dharamsey Manufacturing Co., Ltd.* v. *Central India Spinning, Weaving and Manufacturing Co.*[2], Scott, C.J., held that where goods have acquired by a particular

1. (1897) A.C. 710.
2. (1916) I.L.R. 41 Bom. 49.

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fancy description, combination or device, a reputation in the market it is immaterial that the customers do not know who the maker is, and relied on the remarks of Lord Halsbury in the Yorkshire Relish case and similar remarks of Lord Hatherley in *Wotherspoon* v. *Currie*[1]. It is, therefore, quite clear that the second plaintiff has not got to show that the ultimate purchaser knows his name and associates his name with the diamond mark. It is sufficient if the ultimate purchaser knows that goods bearing this mark have a reputation and that this mark denotes the goods which he wishes to buy.

We do not regard the damages awarded as excessive and the only further question requiring consideration is the form of injunction. The learned trial Judge has issued an injunction prohibiting the use of the offending mark on all classes of piece goods. It has been said on behalf of the defendant that this is too wide. In their plaint the plaintiffs asked for an injunction in respect of all classes of piece goods and in the trial court it was not contended by the defendant that an injunction of this nature would be too wide if the plaintiffs succeeded in establishing their rights to the diamond mark. It was in fact taken for granted that they would be entitled to an injunction in this form if the right to exclusive user was proved. The second plaintiff and the defendant deal in the same kind of piece goods and the diamond mark has become associated in the trade with the second plaintiff. In these circumstances we see no reason to alter the form of the injunction. Both the appeals are accordingly dismissed. In Appeal No. 20, the second plaintiff will be entitled to costs against the defendant, but the defendant will be entitled to costs in Appeal No. 29, as he has been successful there.

Varadachariar, J.

*Varadachariar, J.*—I agree. I wish to add a few words with reference to the decision in *Batchayi Rowther* v. *Ramaswami Pillai*[2], as the learned Counsel for the appellant relied on some observations of mine there as supporting his contention that the plaintiff in a "passing off" action must show that the persons purchasing the goods knew of the manufacturer or merchant *by name* and associated such name with the goods. That this is not the law is shown by the observations quoted by my Lord from the 'Yorkshire Relish' case. To the same

1. (1872) L.R. 5 H.L. 508. 2. (1935) 43 L.W. 210.

effect there are also statements in *William Edge & Sons, Ltd.* v. *William Niccolls & Sons, Ltd.*[1] and *Slazenger & Sons* v. *Spalding & Brothers*[2]. (See also *Wulfing* v. *Jivandas & Co.*[3]). As the observations of Lord Herschell in the 'Yorkshire Relish' case have been referred to in my judgment in *Batchayi Rowther* v. *Ramaswami Pillai*[4], it will not be a fair interpretation of that judgment to suggest that there is anything in it to support the appellant's present contention. The point I had then to determine was whether plaintiff has shown a right to sue at all. He had certainly to establish some connection in a sense known to law, such as manufacturer, seller, importer, etc., between himself and the article which was alleged to have obtained a reputation. On the evidence in that case, it appeared that it was his brother that had been manufacturing and selling the goods but the plaintiff did not claim in his brother's right. There was very little evidence as to what happened after the brother's death. It was on those facts that after making a quotation from *Muhamad Esuf* v. *Rajaratnam Pillai*[5], I observed that there was "no evidence to establish any such association in the public mind between the plaintiff's business and the goods bearing the mark in question."

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Varadachariar, J.

B. V. V. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

The Public Prosecutor .. *Appellant* in all cases*

*v.*

Chikka Rangan and others .. *Respondents (Accused).*

Public Prosecutor v. Chikka Rangan.

*Prevention of Cruelty to Animals Act (XI of 1890), S. 3 (a)—Bench Magistrates, whether can decide on the question of overloading.*

The Bench Magistrates are competent to decide whether as a matter of fact there was overloading or not under S. 3 (*a*) of the Prevention of Cruelty to Animals Act (XI of 1890).

Appeals under S. 417 of the Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondents (accused) by the Court of the Bench of Magistrates, Ootacamund, in S. C. Nos. 859 to 865 of 1937 respectively.

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1. (1911) A.C. 693 at 702, 705.
2. (1910) 1 Ch. 257.
3. (1924) I.L.R. 50 Bom. 402 at 412.
4. (1935) 43 L.W. 210.
5. (1909) I.L.R. 33 Mad. 402.

* Crl. Appeals Nos. 683 to 689 of 1937. 2nd August, 1938.

Public Prosecutor *v.* Chikka Rangan.

Appellant in person.

*L. V. Krishnaswamy* for Respondents.

The Court delivered the following

JUDGMENT.—These appeals raise the same question. The Bench Magistrates of Ootacamund acquitted the accused in these cases, who were charged with having overloaded their pack ponies and thereby committed an offence punishable under S. 3 (*a*) of the Prevention of Cruelty to Animals Act (XI of 1890). The acquittal was pronounced without hearing any evidence, and on the preliminary point that under Ss. 1 and 2 of the Prevention of Cruelty to Animals Act, the Local Government have to determine the maximum weight to be carried by pack ponies, and that as the determination has not been made and the District Magistrate's orders had not been published in the local Gazette, the prosecution was incompetent. The whole of this reasoning proceeds on a misconception of the law on the subject and there can be no doubt that these requirements are not necessary for a determination of the case on the merits. It is for the Bench Magistrates to decide whether as a matter of fact there was overloading or not, and decide the cases in accordance with their finding on that point. The orders of acquittal are therefore set aside and the cases are remitted to the Bench Magistrates for retrial according to law.

It has been urged by the advocate who appears for the respondents that the alleged offence was, if at all, committed in a place to which the Prevention of Cruelty to Animals Act has not been extended. This is however a point which should be determined during the retrial and I have no doubt the Bench Magistrates will deal with the point and decide it. It is unnecessary for me, and indeed it is not possible for me on the materials on record, to say whether there is any substance in the point or not.

K. C. *Retrial ordered.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE GENTLE AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

*In the matter of* G. S. Pleader, Chicacole.*

F.B.
G.S.Pleader, Chicacole, *In re.*

*Legal Practitioners' Act (XVIII of 1879), S. 13 (b) and (f)—Neglect of pleader—Whether amounts to professional misconduct—Employment of unregistered clerk—Propriety.*

Mere negligence does not found a petition for professional misconduct. In order that professional misconduct might be inferred there must be moral delinquency in addition to negligence.

In re *A Vakil,* (1925) 50 M.L.J. 399 : I.L.R. 49 Mad. 523 (F.B.), relied on.

There is nothing unprofessional in a pleader employing an unregistered clerk. The law allows a pleader to have two registered clerks but does not insist that any clerk should be registered.

The notice under S. 13 (*b*) and (*f*) of the Legal Practitioners' Act issued to G.S. Pleader, Chicacole, calling upon him to show cause why disciplinary action should not be taken against him for professional misconduct, one Abbas Ali having filed a petition dated 13th January, 1938, in the District Court, Vizagapatam, which was transferred to the Court of the District Munsiff of Chicacole, and numbered as O. P. No. 1 of 1938 alleging, that on 6th September, 1937, the said Abbas Ali engaged the said G. S. as his pleader, that the said G. S. wilfully neglected to file a guardian petition in E. P. No. 454 of 1937 in O. S. No. 86 of 1933 on the file of the Court of the District Munsiff of Chicacole, and took no further steps in the said execution petition between 13th September, 1937 and 9th November, 1937, in spite of sufficient funds having been provided by the said Abbas Ali and that the said G. S. was therefore guilty of professional misconduct liable to be dealt with under S. 13 of the Legal Practitioners' Act.

*N. Rajagopala Aiyangar* for *The Advocate-General* (*Sir Alladi Krishnaswami Aiyar*) for the Crown.

*B. Jagannatha Doss* for the Pleader.

The Court made the following

ORDER. *The Chief Justice.*—The Court is called upon to consider a report of the District Judge of Vizagapatam in Leach, C.J.

* 19th April, 1938.

F.B.
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which he suggests that the respondent, a pleader, should be censured for unprofessional conduct. The proceedings arise out of a petition filed by one Abbas Ali Sahib, in which he complained that the respondent had neglected instructions given to him in connection with certain execution proceedings on the 6th September, 1937, and had failed to take effective steps until the 9th November, 1937. It appears that the complainant paid the respondent a sum of Rs. 10-4-0 on account of out-of-pocket expenses and his fee of Rs. 2 and also paid to the respondent's clerk Rs. 3-12-0 of which one rupee was to be the clerk's fee. A question arose when the case was before the District Munsiff who inquired into the complaint whether the Rs. 3-12-0 had been refunded to the petitioner, as alleged by the clerk. The District Munsiff held that the amount had not been returned, but this question is of no importance. There is no charge against the respondent in respect of the moneys. The charge is one of having neglected his client's interests. The District Munsiff held that there had been no neglect and that the delay was the result of the complainant not having seen the respondent between the 13th September, and the 9th November, 1937. The District Munsiff accordingly held that the respondent was not guilty of intentional neglect in the conduct of the execution proceedings.

It appears that the clerk was an unregistered clerk and when the report came before the District Judge this fact weighed greatly with him. He has expressed the opinion that keeping the clerk after he had discovered that the Rs. 3-12-0 had not been returned to the complainant was reprehensible, and he considered that the respondent had not paid due care to the complainant's business as he was bound to do. He also laid stress on the fact that the respondent had not told the complainant that his clerk was unregistered. Holding these views he considered that the respondent had been guilty of minor professional misconduct calling for a censure from the High Court.

It is quite clear that the learned District Judge misconceived the whole position. The charge was one of negligence and negligence had not been proved. Even if it had been proved mere negligence does not found a petition for professional misconduct as was pointed out by a Full Bench of this Court

in In re *A Vakili*. There must be moral delinquency in addition to negligence. The charge here is merely one of neglect. There is nothing unprofessional in a pleader employing an unregistered clerk. The law allows a pleader to have two registered clerks but does not insist that any clerk should be registered.

It follows from what I have said that the report of the District Judge cannot be accepted. My learned brothers agree and consequently the complaint will be dismissed. There is not the slightest foundation for a charge of professional misconduct against the respondent.

B. V. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE ABDUR RAHMAN.

Vedakannu Nadar and others.. *Appellants** (*Defendants*)

*v.*

Nanguneri Taluk Singikulam Annadana Chatram through its huktdars Medai Dalavoi Ranganatha Mudaliar and others .. *Respondents (Plaintiffs, Defendants and L. Rs.).*



*Hindu Law—Religious endowments—Right of management vested in a family—Alienation of office of trustee in favour of a member of family—Validity—Sale-deed—Interpretation—Sale of properties along with duty or right of conducting charities—Effect—Defendants becoming lessees prior to the plaintiff getting the office of trustee—Suit by plaintiff in ejectment—Objection to the maintainability of suit—Sustainability—*De facto *trustee of charity—Right to maintain suit without impleading co-trustees as parties—Amendment of plaint—Application to join co-trustees as parties at a late stage—If can be allowed.*

Where the intention of the founder of a charitable trust must have been that the office of management should be held by the members of the family jointly, the alienation of the office of the trustee of the charitable endowment for consideration even in favour of a member of the family is not legal and valid as it is against the interest of the institution and opposed to public policy. The alienation confers no right on the alienee, and in any case, cannot be of any validity after the death of the alienor and cannot prejudice the rights of his sons, who should be considered to be still trustees.

*Rajah Varma Valia* v. *Ravi Varma Kunhi Kutty*, (1876) L.R. 4 I.A. 76: I.L.R. 1 Mad. 235 (P.C.), applied.

1. (1925) 50 M.L.J. 399: I.L.R. 49 Mad. 523 (F.B.).

* Appeals Nos. 111 and 112 of 1935. 6th May, 1938.

Veda-kannu Nadar v. Ranganatha Mudaliar.

*Alagappa Mudaliar* v. *Sivaramasundara Mudaliar*, (1895) I.L.R. 19 Mad. 211 and *Rajaram* v. *Ram Boy*, (1912) 24 M.L.J. 75, relied on.

Where the plaintiff came into possession of the office of a trustee long after the lease of the trust properties was granted to the defendants, and the plaintiff brought a suit against the defendants in ejectment, *held* that the defendants were not debarred from questioning the *locus standi* of the plaintiff to maintain the suit.

Where a deed purports to convey in absolute rights a certain share in the properties which was wrongly assumed to belong to the vendor's family and over which the charities were declared to have a charge merely but really the properties belonged to the charities, and the sale-deed recited that the vendor shall have no claim of any kind in respect of the schedule mentioned properties or duty or the right of conducting the charities;

*Held*, that the right to manage the charities was not merely ancillary to the properties conveyed under the deed of sale and the document was intended to convey the right of management to the vendee.

*Redgrave* v. *Hurd*, (1881) 20 Ch. D. 1, relied on.

A *de facto* trustee, as such, has no *locus standi* to maintain an action on behalf of the trust even if the action is taken to have been instituted for the benefit of the trust. His position is that of an intermeddler or a wrongdoer (unless on the facts of each case a presumption can be raised in his favour of being a trustee *de jure*). He cannot confer any rights on himself by committing a wrong, although he may assume liability on account of his conduct. He is really no other than what is known to law as a trustee *de son tort*.

*Moidin Bibi Ammal* v. *Rathnavelu Mudali*, (1926) 51 M.L.J. 598 and *Mahomed Ibrahim* v. *Sundaram Chetty*, A.I.R. 1926 Mad. 1066, dissented from.

The office of a trustee, irrespective of the number of trustees is a joint one. Co-trustees form, as it were, one trustee and must therefore execute the duties of their office jointly. It is not legally permissible for one of the trustees and his heirs to file or continue a suit in regard to trust properties without the remaining trustees being parties to the suit either as plaintiff or as defendants.

*Rajendronath Dutt* v. *Shaikh Mahomed Lal*, (1881) L.R. 8 I.A. 135: I.L.R. 8 Cal. 42 (P.C.); *Bechu Lal* v. *Oliullah*, (1885) I.L.R. 11 Cal. 338; *Ashtamurthi Nambudri* v. *Raman Menon*, (1899) 9 M.L.J. 312 and *Shanmugha Moopanar* v. *Subbayya Moopanar*, (1921) 42 M.L.J. 133, followed.

Where a trustee deliberately failed to make his co-trustees parties to the suit, and only applied at a very late stage of the suit to add them as parties, though the objection as to non-joinder was taken at the earliest opportunity, the Court should not exercise its discretion to add them as parties.

*Rajendronath Dutt* v. *Shaikh Mahomed Lal*, (1881) L.R. 8 I.A. 135: I.L.R. 8 Cal. 42 (P.C.), relied on.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 62 of 1921 dated 27th March, 1935, etc.

*S. Duraiswami Aiyar, K. Venkateswaran, K. R. Rajagopalan* and *S. P. Vasudevan* for Appellants.

Veda-kannu Nadar *v.* Ranganatha Mudaliar.

Abdur Rahman, J.

*M. Patanjali Sastri* and *M. Balasubramania Mudaliar* for Respondents.

The Court delivered the following

JUDGMENTS. *Abdur Rahman, J.*—Two suits for ejectment, out of which these appeals arise, were filed in the name of a public charity known as Nanguneri Taluk Singikulam Annadana Chatram by the plaintiff as a huqdar (which is here used for a manager of a trust) sometime in 1921 against a number of tenants and were decreed by the Subordinate Judge in March, 1935. Having regard to the fact that the suits were filed on behalf of a charity, which was neither registered nor a juristic entity, it is fairly obvious that they could not proceed, but since they have gone on for this length of time and even succeeded in the trial Court, it may well be argued that the defect was one of wrong description merely and should not be allowed to prevail at this stage. We have therefore decided to go into the other question relating to the right of the plaintiff and after his death, which occurred while the suits were still pending, to that of his heirs to institute and maintain these actions.

The facts which are relevant for this purpose may be shortly stated. These properties appear to have belonged to one family at one time and were endowed for the purpose of a chatram (which may be regarded as a Dharmasala or an inn) long ago. The origin of the endowment is lost in obscurity. The parties however agree that the properties belonging to this family were divided in three shares. The plaintiff and one Alagappa Mudaliar claimed 5/12 and 6/12 out of these properties respectively while defendant 1 stated that she was entitled to 2/12. Some arrangement appears to have been arrived at between them in regard to these shares but we are not concerned here with what was allotted to each of them. It appears that following the arrangement regarding their private properties, these three branches managed this charity and considered themselves to be entitled as 'huqdars' in the endowed properties to the same extent until 10th February, 1914, when Alagappa Mudaliar assigned his rights in those properties to the original plaintiff in consideration of a sum of Rs. 1,300. In view of the present contention raised on behalf of the parties, I shall have to examine this document in its appropriate place. To resume the narrative, it appears that Alagappa took no inte-

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rest in the management and in view of the transfer effected in 1914, the original plaintiff instituted these suits for ejectment in 1921 in which the huqdar of 1/12 interest in the endowed property was impleaded as first defendant but Alagappa or his heirs, as he is also said to have died subsequently, leaving three sons behind him and who are stated to be alive even now, were neither impleaded as plaintiffs nor as defendants.

The only question that we have now been called upon to decide is, if Alagappa or his sons were necessary parties to the suit and whether in their absence, these suits could be maintained. This objection was specifically raised by the defendants in their written statements and having been decided against them by the lower Court, it has been again taken in the grounds of appeals and pressed before us. In fact, the learned Counsel for the appellant has argued this as a preliminary point and has stated that it would be unnecessary to go into others if we agreed with this contention of his. He urges that it was absolutely necessary for the original plaintiff and his heirs to implead Alagappa and his heirs as plaintiffs and if he or they refused to join as such, he or they should have been added at least as defendants. But the plaintiffs refused to join them either as plaintiffs or defendants and it is therefore contended that the present plaintiffs have no *locus standi* to maintain these actions in their absence.

In order to determine this question, it is essential to examine the deed of transfer executed by Alagappa Mudaliar in 1914 (Ex. F) and adjudicate on its validity. This deed purports to convey 6/12th share in the properties in suits to the original plaintiff, which have been stated to belong to the executant of the document and over which the charities are declared to have a charge merely. It is common case of the parties now, that this statement in the document is entirely incorrect and the properties belonged to the charity itself. Basing his contention on this fact, it was argued by Mr. Patanjali Sastri that the consideration was paid by the original plaintiff to Alagappa Mudaliar as a price for the properties alone but since the properties did not belong to the vendor, they could not have passed to the original plaintiff and the money paid by him must be deemed to have been paid for nothing and wasted; but the duty of conducting the charities

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should nonetheless be held to have devolved on him as he contends that the share in the properties was sold subject to a charge in regard to charities, and since this share in the properties was found not to belong to the vendor; the charge or burden on the properties and the right to manage the charities should still be found to have been transferred to the original plaintiff as the right to manage the charities was merely ancillary to the ownership which had been transferred to the plaintiff. On the other hand, it is contended by Mr. Doraiswami Aiyar for the appellants that on a true construction, the document must be taken to have been executed with the object of transferring the property as well as the right of conducting the charities and the price should be taken to have been paid not only for the properties but for the right attached to these properties as well. In view of the fact that no attempt was made by the original plaintiff to get rid of the transaction covered by this deed on account of a mutual mistake of parties as to the transferor's title, if the parties were really under a mistake, or on account of fraud, if the transferor knew at the time of the sale that he had no title to the property, or at all events on account of failure of consideration, we were asked to draw the inference that the parties were fully conscious of the fact that Alagappa had no title to the properties at the time of the execution of the sale deed and that the document was executed in this manner to avert a charge of illegality which would otherwise be patent on the face of it; as in that case it would have to be stated in the document that a trustee's right of conducting charities was being sold to another co-trustee. It was also put to us alternatively that if we did not agree with the above contention, it must be held that there were no specific words in the deed which could be construed to have transferred the right of conducting charities; and while in the former case the transfer of the right of a trustee to a co-trustee for consideration would be void, being against public policy, there would be no transfer at all in the latter case. In either case, the original plaintiff and his heirs, it is urged, have no right to sue alone particularly when Alagappa or his heirs were not impleaded even as defendants.

Having read the document as a whole, I am unable to agree with the contention put forward by Mr. Patanjali Sastri.

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It is true that at the commencement of the sale deed the properties have been stated to have belonged to the family and a charge only has been declared to be existing in regard to the charities; but the conveyance of the properties with 'absolute rights' read along with the reasons of transfer contained in the document leaves no doubt in my mind that the right of managing the charities was intended to be conveyed to the original plaintiff. This is very clearly brought out by the penultimate sentence in the sale deed which reads as follows:—

"Hereafter, I shall have no *claim* of any kind in respect of the schedule mentioned properties or duty or *right* of conducting the charities."

The words 'claim' and 'right' used in this sentence are significant and point very clearly to the intention of the parties.

Mr. Patanjali Sastri's argument did not take notice of the fact that it was not only the duty of conducting charities but its right as well which was transferred to the original plaintiff and the price which was paid must be taken to cover both the properties and the right of management. Moreover it is not correct to say that the right to manage the charities was merely ancillary to the properties conveyed under the deed of sale. There is a great deal of force in the contention that if the words 'absolute rights' are not taken to cover the right of management, there are no other words in the sale deed under which this right could be held to have been transferred.

It would not perhaps be incorrect to infer from the litigation (O. S. No. 32 of 1916) which followed soon after the execution of Ex. F, when these properties were claimed to belong to the original plaintiff, but to substantiate which no evidence had been produced by him, that the parties to the document were under no misapprehension as regards the nature of the properties transferred under this deed. In view of the words of the deed, however it is unnecessary to rely on this circumstance as, in my opinion, this document was intended to convey the right of management to the original plaintiff, and that the consideration was paid either wholly or at all events partially for this right as well. There was only one contract between the parties and it must be held, as was found to be the case in *Redgrave* v. *Hurd*[1] to be entire and indivisi-

1. (1881) 20 Ch. D. 1.

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ble in character. It is impossible to divide Ex. F into bits as Mr. Patanjali Sastri urges us to do and detach one portion of its contents from the rest and give effect to it.

I must for the above reasons hold that the right to conduct the charities was transferred to the original plaintiff for consideration by Alagappa Mudaliar.

The next question then to decide is, if the alienation of the huq right was valid or in other words, was it possible for the huqdar or trustee to transfer his right of management of the endowed property to the original plaintiff for consideration? Reliance was placed by the learned counsel for the appellant in this connection on a Privy Council decision in *Rajah Varma Valia* v. *Ravi Varma Kunhi Kutty*[1]. The question which came up for consideration in that case was whether the uralars (trustees) of Tracharamana Pagoda could lawfully alienate their right to manage the said pagoda? It is true that this case was in respect of a transfer of the trustees' rights in properties endowed for religious purposes, and the case which we are now called upon to decide relates to a charitable trust. But there is no principle or reason to hold that a decision on this point in regard to trusts of religious nature would not equally apply to those which are charitable in character.

Their Lordships in the course of their judgment observed:—

"The first question is, whether, independently of custom, persons holding such a trust are capable of transferring it at their own will. No authority has been laid before their Lordships to establish this proposition; principle and reason seem to be strongly opposed to such a power, and particularly to such an exercise of it as has taken place in this instance. The unknown founder may be supposed to have established this species of corporation with the distinct object of securing the due performance of the worship and the due administration of the property by the instrumentality and at the discretion of four persons capable of deliberating and bound to deliberate together; he may also have considered it essential that those four persons should be the heads of particular families resident in a particular district open to the public opinion of that district and having that sort of family interest in the maintenance of this religious worship which would insure its due performance. It seems very unreasonable to suppose that the founder of such a corporation ever intended to empower the four trustees of his creation at their mere will to transfer their office and its duties, with all the property of the trust, to a single individual who might act according to his sole discretion, and might have no connection with the families from which the trustees were to be taken."

1. (1876) L.R. 4 I.A. 76: I.L.R. 1 Mad. 235 (P.C.).

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The next case cited was that of *Kuppa Gurukkal* v. *Doraswami Gurukkal*[1]. This also related to a religious trust. It was held in this case that an alienation of hereditary religious trusts or offices to a person not in the line of heirs was not legal, but the learned Judges considered it unnecessary to determine whether an alienation to a person standing in the line of heirs should be upheld. In the course of their judgment it was observed:

> "To hold so would tend to public mischief in inducing needy incumbents of hereditary religious offices who desired to sell them to give a dishonest recognition to qualifications which, in fact, were not the qualifications demanded by the nature of the office."

The third case which is directly in point and which relates to a charitable endowment is that of *Alagappa Mudaliar* v. *Sivaramasundara Mudaliar*[2]. The learned Subordinate Judge has quoted a passage from this judgment but has unfortunately misunderstood the observations and was therefore unable to apply them correctly to the facts of the present case. The passage reads as follows:—

> "It is well settled that such offices cannot be alienated by the act of parties. The question then is whether the arrangement made in the present case amounts to an alienation. If it was a mere arrangement for the more convenient management of the choultry, reserving to the plaintiff's brothers their right of control, and, if necessary, of resumption of actual management, then it might be said that there would be no interference with the supposed will of the founder and that the arrangement would be lawful. To that extent it seems clear that any coparcener, jointly entitled to management, may waive his rights."

The learned Subordinate Judge appears to have considered that the arrangement contained in Ex. F would be covered by the last two sentences but he apparently overlooked the important reservation made in them and expressed in the words "and, if necessary, of resumption of actual management". Is there anything like the reservation mentioned in this case? On the contrary the penultimate sentence in the sale deed, which has been already quoted, makes it clear that the power of resumption was not only not reserved but it was clearly stated on the other hand that the vendor would not have any claim of any kind in respect of duty or right of conducting the charities. For the same reason sufficient attention was not paid by the

1. (1882) I.L.R. 6 Mad. 76. 2. (1895) I.L.R. 19 Mad. 211 (214)

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trial Court to the words "to that extent" in the last sentence of the judgment quoted above.

It may also be noted in passing that like the Privy Council case in *Rajah Varma Valia* v. *Ravi Varma Kunhi Kutty*[1] the learned Judges in this case (*Alagappa Mudaliar* v. *Sivaramasundara Mudaliar*[2]) presumed that in the absence of any other suggestion as to rule of succession the intention of the founder of the choultry must be taken to have been that the office of management should be held in common by the family of the original holders. It is hardly necessary to discuss the other cases which were cited by Mr. Duraiswami Aiyar but the decision in *Sundarambal Ammal* v. *Yogavana Gurukkal*[3] might be referred to with advantage.

Mr. Patanjali Sastri has relied on *SriMahant* v. *Govindacharlu*[4]. This was a case of an alienation of office of an archaka (pujari) which was held to be valid as it was made without any consideration to one in the line of heirs and was not considered to be opposed to the interests of the institution. It was also observed in this case that the duties entrusted to an archaka were frequently carried out in temples by proxy and an alienation of the office was for these reasons upheld. It may be interesting to note the gradual development of this branch of the law and of the various views expressed by eminent judges at various times; but the case has no application to the facts of the present case, where the office in dispute is first of all that of a trustee of a charitable endowment and not of an archaka and, what is more important, this has been found to have been alienated for consideration under Ex. F. Moreover the alienation was not in the line of heirs although it may have been to a member of the family, but it cannot be said that the alienation was not opposed to the interest of the institution or that there are any circumstances in this case which may rebut the presumption raised by their Lordships of the Privy Council in *Rajah Varma Valia* v. *Ravi Varma Kunhi Kutty*[1] and by the learned Judges in *Alagappa Mudaliar* v. *Sivaramasundara Mudaliar*[2] to the effect that the intention of

1. (1876) L.R. 4 I.A. 76: I.L.R. 1 Mad. 235 (P.C.).
2. (1895) I.L.R. 19 Mad. 211.
3. (1914) 26 M.L.J. 315: I.L.R. 38 Mad. 850.
4. (1934) 68 M.L.J. 295.

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the founder of the trust must have been that the office of management should be held in common by the members of his family jointly. The other cases relied on by the learned Counsel for the respondents are these of *Narayana* v. *Ranga*[1] and *Ramanathan Chetty* v. *Murugappa Chetty*[2]. They have no application to this case as the first one relates to the office of a pujari while in the second case the parties had agreed to carry on the management of a religious institution by rotation and no question of alienation of an office for consideration was raised or considered. Moreover the members of the junior branch who had surrendered their office were not parties to the suit, which was confined to the disputes between the members of the senior branch *inter se*, and their Lordships of the Judicial Committee in confirming this judgment in *Ramanathan Chetty* v. *Murugappa Chetty*[3] clearly stated that this decision would not affect the rights of the members of the junior branch who were not before the Court. As for *Nirad Mohini Dassi* v. *Shibadas Pal Dewasin*[4] which was the case of a private idol, the alienation of the shebaitshaip to a closely connected member of the family was held to be valid under the Hindu law and it was held that the alienation was not effected for any personal gain and the alienee appeared to have more interest in the worship of the idol than any one else. As stated above, this decision was arrived at in the special circumstances of that case and does not fit in with the various Madras cases which have been cited above. Having regard to the idea of the public policy which militates against the alienation of the office of a trustee to an endowment either charitable or religious and to the principle enunciated in *Alagappa Mudaliar* v. *Sivaramasundara Mudaliar*[5] with which we are in respectful agreement, and which follows the Privy Council decision in *Rajah Varma Valia* v. *Ravi Varma Kunhi Kutty*[6], we must hold that Alagappa Mudaliar could not alienate his office in favour of the original plaintiff, and the alienation conferred no right on him. It is hardly necessary to consider how Alagappa's position would be affected if he were alive, since

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1. (1891) 2 M.L.J. 19: I.L.R. 15 Mad. 183.
2. (1903) 13 M.L.J. 341: I.L.R. 27 Mad. 192.
3. (1906) 16 M.L.J. 265: L.R. 33 I.A. 139: I.L.R. 29 Mad. 283 (P.C.).
4. (1909) I.L.R. 36 Cal. 975.
5. (1895) I.L.R. 19 Mad. 211.
6. (1876) L.R. 4 I.A. 76: I.L.R. 1 Mad. 235 (P.C.).

he had executed a sale deed himself; but it is clear that his sons could not be prejudiced by their father's conduct in transferring the office which he could not legally alienate, and which could not, in any case be, of any validity after his death. Consequently Alagappa's heirs should still be considered to be joint trustees with the original plaintiff and defendant 1.

The next point raised by the learned Counsel for the respondents was that since the original plaintiff had been functioning as a trustee *de facto*, he was entitled to institute these suits regardless of whether he was a trustee *de jure* or not. This argument has been rendered possible on account of some decided cases, which were cited by him and to which I shall advert shortly.

The term "*de facto*" appears to have been rather loosely used but when used in connection with a trustee or a guardian as distinguished from a "*de jure*" trustee or guardian it is meant to convey a person who has been actually functioning in either of these capacities when he was not entitled to do so legally. If this is all that is meant to convey, the expression is unhappy, as this idea would have been better expressed, at least so far as a trustee is concerned, by the words "trustee *de son tort*", a term which is so well known and which brings out the idea of wrong so very clearly. A person cannot legally confer any right on himself by acting in a wrongful manner although he may subject himself to certain liabilities. This was pointed out by their Lordships of the Judicial Committee in *Mata Din* v. *Ahmed Ali*[1] in the following words:

> "It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a "*de facto*" guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

If on the other hand, the term "*de facto*" is employed to describe a person who is found to be acting as a trustee of an institution or as a guardian of a person under disability and thus presumed to be a trustee or a guardian *de jure* unless found to be otherwise, it would not do, in my opinion, that harm which it has now done. In other words, a legal presumption in favour of a person's legal title and the office may be raised if he is found to be acting as such—as was done in

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1. (1912) 23 M.L.J. 6: L.R. 39 I.A. 49: I.L.R. 34 All. 213 (P.C.).

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*Niamat Ali* v. *Ali Raza*[1], but it must be remembered that it is rebuttable and would shift the burden of proof on the party who denies his position. It would then be a rule of evidence merely and not one of substantive law and can be defended on the principle underlying S. 110 of the Indian Evidence Act.

But unfortunately the cases have not rested there. It is hardly necessary to discuss *Guzzu Payidayya* v. *Venkadaru Venkata Reddi*[2] which was the case of a dormant partner and which was decided on an entirely different principle, but with great deference I am not prepared to accede to the correctness of the decisions in *Mahomed Ibrahim* v. *Sundaram Chetti*[3] and *Moidin Bibi Ammal* v. *Rathnavelu Mudali*[4] which followed two Allahabad cases in *Benarsi* v. *Altaf Hussain*[5] and *Muiz-ud-din* v. *Md. Ikhlaq*[6].

I should like to examine the Allahabad cases first on which both the Madras decisions are based. Taking up *Benarsi* v. *Altaf Hussain*[5], I find that one Altaf Hussain had filed a suit for an injunction against Benarsi restraining him from building on a piece of land which was situated between an imambara and his premises on the ground that certain Muharram ceremonies were being performed by him as a muttavalli every year. The suit was dismissed by the trial Court, on what grounds one cannot say, but was partially decreed in appeal. The matter was then taken up to the High Court where Altaf Hussain's *locus standi* to institute the suit was challenged on the ground that muttavalli's rights were inalienable, and a transfer of such rights to Altaf Hussain would not confer any rights on and consequently any title in him to file the suit. I cannot say if this objection was raised in the trial and the lower appellate Courts or if it was raised for the first time before the High Court. It was found by Stuart, J., who delivered the judgment of the Court that the previous muttavalli had transferred his rights to Altaf Hussain a few years before the suit who had since then made considerable improvements in the imambara with his own funds. It is hardly necessary for me to express any opinion in this case on the question whether the learned Judge was right in disagreeing with the conclusion

1. (1914) I.L.R. 37 All. 86.
2. (1915) 31 I.C. 913.
3. A.I.R. 1926 Mad. 1066.
4. (1926) 51 M.L.J. 598.
5. (1921) 63 I.C. 171.
6. A.I.R. 1924 All. 59.

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arrived at in *Wahid Ali* v. *Ashruff Hossain*[1], but suffice it to say that in the absence of the deed of trust, under which the trust was created and where the founder of the trust could confer an authority on the muttavalli to transfer his office, the learned Judge presumed the appointment to be a good one *prima facie* and held that it could be challenged for sufficient reasons only and could not be questioned by a person who was alleged to have infringed rights of the mosque or imambara. Then follow the words:

"A person challenging the *de facto* muttavalli's position must adduce evidence to show that he has no title."

They only mean, in my opinion, that, under the circumstances of the case, the learned Judge was willing to raise a presumption that Altaf Hussain who had been acting as a muttavalli under a deed of transfer by the prior incumbent of office must be taken to be a muttavalli *de jure* in the absence of the deed of trust and that it was for Benarsi to rebut this presumption which he had failed to do. It is unnecessary to examine this case any further as I find that the learned Judge decided the question of Altaf Hussain's rights to maintain the suit not only on the presumption raised by him but on other considerations as well. It would thus follow that if analysed the case does not go any further than what was held in *Niamat Ali* v. *Ali Raza*[2].

The other Allahabad case is that of *Muiz-ud-din* v. *Md. Ikhlaq*[3]. The question in that case was whether Muiz-ud-din was entitled to obtain a refund of certain moneys found to be due to his late father Bashiruddin, who was described to be a *de facto* muttavalli of the trust. In a suit which was filed against Bashiruddin for his removal, it was held by the High Court in appeal that he had acted as a *de facto* muttavalli of the trust sufficiently long to be entitled to remain in possession of the trust property as such. The facts of this case are not known, but if the learned Judges were deciding the case on a consideration of the question of limitation, it would be an entirely different matter. On the other hand, if they were prepared to raise a presumption in favour of his being a *de jure* muttavalli, the case does not take us any further than what was decided in *Niamat Ali* v. *Ali Raza*[2].

1. (1882) I.L.R. 8 Cal. 732.
2. (1914) I.L.R. 37 All. 86.
3. A.I.R. 1924 All. 59.

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The other *de facto* trustee mentioned in this case is Muiz-ud-din himself. When he tried to realise the balance of certain money by execution, to which Bashiruddin was found to be entitled by virtue of the decree which was passed by the High Court in his favour, Muiz-ud-din's allegation that he was appointed to be a muttavalli by his father was not accepted but in his capacity as a muttawalli *de facto*, he was held entitled to execute the decree on two conditions which are to a certain extent conflicting. The first condition was that he must agree 'to credit' the money realised by him to the trust and "account therefor duly to the person or persons who may hereafter be declared lawfully entitled to the muttavalliship." The other condition was that he would not be entitled to withdraw the moneys "if the opposite party takes steps within a reasonable period to get the question of muttavalliship to the trust adjudicated in a proper Court."

If Muiz-ud-din had any legal rights as a *de facto* muttavalli, why and under what law were these conditions being imposed? If he was being treated as a next friend of a minor would have been, whose interests had to be protected by the Court, he was not being treated as a muttavalli at all but a stranger and the user of the term '*de facto*' was, with great deference, incorrect. This case is, therefore, no authority for the proposition that a *de facto* muttavalli has any rights as such.

Let me now take up the Madras cases on this point. The first one is *Kasi Chetty* v. *Srimathu Deivasikhamoney Nataraja*[1]. There is no discussion in that case on this point at all and is therefore of no value in arriving at a conclusion. Moreover the plaintiff's possession in this case was found to be prior to that of the defendant's and the plaintiff was for that reason held entitled to eject the defendant. The second one in *Mahomed Ibrahim* v. *Sundaram Chetty*[2] was a case by a muttavalli for possession of a property which belonged to a mosque. This was decreed in spite of the objection that a *de facto* trusteeship was not recognised under the Muhammadan law and the plaintiff was therefore not entitled to sue. There is no discussion in that case on the point although both the

1. (1913) M.W.N. 181. 2. A.I.R. 1926 Mad. 1066.

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Allahabad cases were cited and the decision was based on the ground that no such objection was taken in them. They could hardly be any authority if this point was not taken or decided in them. I have gone through them and already stated what the rationale of these decisions was. The 3rd Madras case which was cited was that in *Moidin Bibi Ammal* v. *Rathnavelu Mudali*[1]. The same contention 'that Muhammadan law does not contemplate a *de facto* trustee and that such a person has no *locus standi* to sue' was raised in this case but repelled by the learned Judges on the ground that "*de facto* muttavallis of mosques are spoken of as if they were well known to the law", in the Allahabad case cited above. The only work on Muhammadan law to which any reference was made was that of Tyabji's, but the remark made by the learned author:

> "That a person not validly entitled to act as muttavalli, by taking charge of it and purporting to manage the property thereby becomes a trustee *de son tort* and answerable as such,"

does not seem to have been followed and does not certainly support the conclusion at which the learned Judges arrived.

The next case relied upon by the learned Counsel for the respondents was that of *Appasami Pillai* v. *Ramu Thevar*[2]. A study of the facts of that case would however show that the case was finally decided by Ramesam, J., on the ground that Neelambal Achi's right of possession passed on Kandaswami's death, which occurred before he could accept the trustee's office, to the plaintiff and not on Kandaswami's heirs as he, that is, the plaintiff was found to be the reversioner to Neelambal's estate. The other remarks in the judgment are in the nature of *obiter* and have no application to the facts of the present case. It has been admitted in the present plaint that the lease to the present defendants was granted by the Taluk Board of Shermadevi in 1906 and they were recognised to be permanent tenants under a compromise which was arrived at between the parties to O. S. No. 11 of 1909 at the appellate stage. This would show that the tenants were in possession of the properties in dispute long before the transfer of the trustee's office was effected in favour of the original plaintiff. There is no rule of law under which they can be debarred from questioning the *locus standi* of the original plaintiff to maintain

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1. (1926) 51 M.L.J. 598. 2. (1931) 61 M.L.J. 887.

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the suit for ejectment when he is said to have come into possession of that right long after their occupation of the property in suit.

The only other case which was cited by Mr. Patanjali Sastri was a Calcutta decision in *Hari Mohan Modak* v. *Rameswar Das*[1]. There is no discussion on this point in that case while it appears that the plaintiff had been recognised to be a shebait by the parties concerned. The case was therefore decided on what appears to be an admission rather than on a settlement of the question whether he was entitled to sue in the capacity of a *de facto* trustee.

An examination of these cases would show that there is no warrant for the conclusion that a *de facto* trustee, as such, has any *locus standi* to maintain an action. After all his position is that of an intermeddler or a wrongdoer (unless on the facts of each case a presumption can be relied in his favour of being a trustee *de jure*) and he cannot confer any rights on himself by committing a wrong, although, as their Lordships observed in *Mata Din* v. *Ahmed Ali*[2], he may assume liability on account of this conduct.

We are concerned in this case with the position of what has been styled a trustee *de facto*. It may be that under the Hindu law, unlike the Muhammadan law, the action of a guardian *de facto* has been held to entail certain liabilities on minors, if his action in alienating their properties is found to have been for their benefit or necessity as held in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[3], *Nathuram* v. *Shoma Chhagan*[4], *Vembu Aiyar* v. *Srinivasa Aiyangar*[5] and *Vemulapalli Sitaramamma* v. *Maganti Appayya*[6]. But we are not concerned here with *de facto* guardians but with what have been called trustees *de facto*. I have not come across any case, nor has one been cited at the bar which may lead me to the conclusion that the position of such trustees under the Hindu law is any different from what they occupy under other systems of law.

I have therefore no hesitation in holding that a trustee *de facto* is really no other than what is known to law as a

1. (1920) 64 I.C. 737.
2. (1912) 23 M.L.J. 6: L.R. 39 I.A. 49: I.L.R. 34 All. 213 (P.C.).
3. (1856) 6 M.I.A. 393.
4. (1890) I.L.R. 14 Bom. 562.
5. (1912) 23 M.L.J. 638.
6. (1925) 50 M.L.J. 689: I.L.R. 49 Mad. 768.

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trustee *de son tort* and his position does not improve, as remarked by their Lordships of the Judicial Committee, by describing him to be a trustee *de facto*. As a trustee *de son tort* he cannot be held to confer a right on himself to maintain these suits, even if they are taken to have been instituted for the benefit of the charities.

Moreover, having found that Alagappa's heirs still continue to be trustees of the Chattram, and that it was not legally permissible for the original plaintiff and his heirs to file or continue these actions without his (Alagappa's) heirs being parties to the suit either as plaintiffs or as defendants, the question of *de facto* trusteeship assumes, in my opinion, secondary importance merely.

The general principle of law is that the office of a trustee, irrespective of the number of trustees, is a joint one and co-trustees form, as it were, one trustee and must therefore execute the duties of their office jointly. It has been held in a number of cases that no suit in regard to trust properties would be maintainable by one or some of the trustees only, if the remaining trustees are not before the Court either as plaintiffs or even as defendants. See *Rajendronath Dutt* v. *Shaikh Mahomed Lal*[1], *Bechu Lal* v. *Oliullah*[2], *Ashtamurthi Nambudri* v. *Raman Menon*[3] and *Shanmugha Moopanar* v. *Subbayya Moopanar*[4].

Following these authorities it must be held that the suits were not maintainable by the original plaintiff or by his legal representatives without impleading Alagappa or his heirs either as plaintiff or as defendants in the suits.

Having found that the present plaintiffs could not continue the suits in the absence of Alagappa's heirs, we have to decide the course which we should follow in regard to them. The suits were pending in the trial Court for 14 years and the plaintiffs were adamant in their opposition to the objection raised on account of non-joinder of the remaining trustees. Mr. Patanjali Sastri made a verbal application at the close of his arguments, that his clients might be permitted to join Alagappa's heirs as parties to the suits now, and that the case

1. (1881) L.R. 8 I.A. 135: I.L.R. 8 Cal. 42 (P.C.).
2. (1885) I.L.R. 11 Cal. 338.
3. (1899) 9 M.L.J. 312.
4. (1921) 42 M.L.J. 133.

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remanded for a fresh trial after they had been impleaded. He placed reliance on *Ramanathan Chettiar* v. *Raja Sir Annamalai Chettiar*[1]. The application was vehemently opposed by the Counsel for the appellants.

Mr. Duraiswami Aiyar has first of all contended that even if we remand the suits at this stage, the orders passed by us would be infructuous, as the suits would have to be dismissed under S. 22 of the Indian Limitation Act. He has placed reliance in this part of the case on *Meyappa Chetty* v. *Subramanian Chetty*[2], *Seerangathuni* v. *Bava Vaithilinga Mudaliar*[3], *Mohanavelu Mudaliar* v. *Annamalai Mudaliar*[4] and *Sri Raja Sobhanadri Appa Rao* v. *Sri Raja Parthasarathi Appa Rao*[5]. He has further urged that in view of the plaintiff's conduct during the last 17 years, this is not a case in which we should exercise our discretion—even if it exists—in the plaintiff's favour and take away an advantage which his clients have gained, on account of the plaintiff's persistence, by lapse of time. Having considered the matter very carefully, it appears to us that the plaintiffs' abstinence from making Alagappa or his heirs parties to the suits was deliberate and they were trying to fight shy of Alagappa or his heirs in this litigation. The request by their counsel at the fag end of the cases is too belated to be seriously noticed. It seems to be unnecessary for me to determine the question of limitation which might have had to be carefully considered if I had been inclined to exercise my discretion in the plaintiffs' favour. But in view of their conduct and the prejudice which may be caused to the appellants it appears to me that the exercise of discretion in their favour would neither be judicious nor judicial.

In these circumstances we are constrained to accept the appeals and dismiss these suits. The appellants will have their costs in both the courts.

*Appeal No. 111 of 1935.*

Venkata-subba Rao, J.

*Venkatasubba Rao, J.*—I agree with the judgment just delivered by my learned brother. The appeal raises several questions, but there is one point fatal to the plaintiff's case with which alone it is necessary to deal. The suit has been

1. (1934) 66 M.L.J. 451: I.L.R. 57 Mad. 1031.
2. (1916) A.C. 603.
3. (1921) 40 M.L.J. 532.
4. (1922) 44 M.L.J. 249.
5. (1931) 62 M.L.J. 154.

brought by one Thirumalayappa Mudaliar, who claims to be the sole trustee of a certain Annadhana Chattram or choultry —a charitable foundation. His case is that his family has enjoyed the right of trusteeship for about two centuries that he was himself possessed of a 5-12ths share of the right, that he acquired by transfer 6-12ths share of a co-sharer by name Alagappa and that the first defendant Kalyani, a Hindu widow, was possessed of the remaining 1-12th share, which she lost by non-enjoyment and to which he somehow became entitled. The plaintiff thus claims that the entire right passed to him, and on the strength of that alleged title, seeks to recover possession of the properties in question said to belong to the charity. The first defendant, out of the fifteen defendants originally impleaded, was thus a formal party and of the remaining defendants the second and the third are the most important.

The facts that led to the suit may be briefly set forth. The Taluk Board of Shermadevi, alleging mismanagement of the trust, took possession of the properties in the year 1905 and was in possession thereof till 1915, when owing to a certain order made by the Government, they were restored to the plaintiff's family. The possession of the Taluk Board, according to the plaintiff, was that of a trespasser, and he further alleged that defendants 2 and 3 obtained from that body the properties on lease and their possession was also in consequence wrongful. There was a litigation between the Taluk Board and the aforesaid defendants 2 and 3, which, ended in a compromise recognizing in them occupancy rights. The plaintiff impeached this compromise, declared that he was not bound by it and in 1916 sued defendants 2 and 3 for possession. In the suit he claimed the properties as belonging to his family in private ownership, subject only to some sort of trust in favour of the choultry. Defendants 2 and 3, who claimed permanent rights in the property and contended that they were not liable to be ejected, asserted that the plaintiff's claim was a fraudulent one and that the properties exclusively belonged to the choultry. There was an issue framed as to whether the properties belonged to the plaintiff's family or to the charity. No attempt was made by the plaintiff to prove the private ownership set up by him, but at the close of the case and just before the delivery of the judgment, applied that the choultry should

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be impleaded as a party. His application was granted, but his suit, on some ground with which we are not concerned, was dismissed. An appeal was taken and the District Judge, Mr. Jackson holding that by the time the charity was brought on the record the claim became statute barred, confirmed the lower Court's decision. It was while this appeal was pending that the present suit was brought in 1921. From Mr. Jackson's judgment a second appeal was filed in the High Court, which in 1930, was withdrawn by consent of parties, it being agreed that the matters in controversy were to be left at large. Such in brief are the antecedent facts of this litigation.

Defendants 2 and 3 pleaded that they and their ancestors were in possession from time immemorial enjoying permanent occupancy rights; they raise a further contention, a plea *in limine*, that the transfer by Alagappa on which the plaintiff relied, was inoperative and invalid and did not confer on him the right he claimed. This contention, as I shall presently show, is well founded and ought to prevail. So far as the first defendant Kalyani is concerned, she pleaded that the plaintiff does not possess the full right of trusteeship as claimed by him and that she is entitled to a sixth share thereof. It may be mentioned that by a decree passed in a separate suit, her right as put forward here has been recognised and affirmed.

The question then that has to be considered is, whether the plaintiff has validly acquired Alagappa's share in the right in question. The lower Court's decision is in his favour and the defendants have filed the present appeal. It has been laid down by the Judicial Committee that a trustee of a Hindu temple has no power to transfer his right of management. In the case before the Board, the trusteeship vested in the karnavans of four distinct tarwads and they transferred to a third party—the Rajah of Charakel—the property of the temple as well as their right of trusteeship. Their Lordships hold that independently of custom, persons holding such a trust are incapable of transferring it and both principle and reason are strongly opposed to such a power and particularly to such an exercise of it as had taken place in the case before them. They state in conclusion that under what may be termed the common law of India, the trustees have no power to transfer their right and dealing with the question of custom, they go on to declare that in no circumstances will the law recognise a

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custom sanctioning *not merely the transfer but the sale* of a trusteeship *Rajah Varma Valia* v. *Ravi Varma Kunhi Kutty*[1] and *Alagappa Mudaliar* v. *Sivaramasundara Mudaliar*[2] (which, it is interesting to note, related to this very family) is more directly in point. There, as here, the trust related to a charity and the assignment was in favour of a member of the family. It was held by Muthuswami Aiyar and Shephard, JJ., that it did not operate as an effectual transfer of the trust. The view as expressed by the learned Judges seems to be, that the transfer of a trusteeship is bad, *whether or not* for consideration; not does it make any difference in their opinion that the alienee happens to be a member of the same family. This decision moreover introduces an important qualification—Is the arrangement intended for the convenient management of the charity, the assignor reserving to himself his right of control and resumption, or, is it intended to divest him once for all of his right of management? In the former case, the arrangement is good but in the latter, is not. This view of the law has been accepted in several later decisions, of which it is sufficient to mention *Rajaram* v. *Ram Boy*[3]. That a transfer of trusteeship, if for consideration, that is to say, for the personal or pecuniary benefit of the transferor is utterly bad, is not disputed by Mr. Patanjali Sastri, the respondents' (the plaintiffs') learned counsel. But he contends that a transfer for no consideration *and* in favour of the next heir or a member of the same family is valid and ought to be recognised. On this point there has been a conflict of opinion in the various Courts, and even in the same Court divergent views have been expressed. It is unnecessary to pursue this matter, as I am clearly satisfied that the transfer, if any, in the present case (I use the words 'if any' as will be seen, advisedly) is for the pecuniary benefit of the transferor.

This brings me to the question, what is the effect of Ex. F (dated 10th February, 1914), described as a deed of sale, on its proper interpretation? Mr. Patanjali Sastri's contention may be put thus: At the date of the document the plaintiff's family assumed (though in the sequel the assumption has turned out to be wrong) that it owned the property,

1. (1876) L.R. 4 I.A. 76: I.L.R. 1 Mad. 235 (P.C.).
2. (1895) I.L.R. 19 Mad. 211.
3. (1912) 24 M.L.J. 75.

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burdened no doubt with some trust; the subject of the bargain therefore was the property and not the trusteeship; the consideration of Rs. 1,300 mentioned in Ex. F must thus be related to the property. In the first place, the document is not susceptible of this interpretation. It says:—

> "As it would be very much convenient for the charities to be conducted in case my share also is added to yours, the above properties have been settled to be sold to you for Rs. 1,300 subject to the charge of the above charities."

This shows that the parties regarded the two things, the owning of the property and the conducting of the charity, as inseparably connected. The same idea occurs again:

> "As you too are responsible for conducting the charities out of the above properties, as you alone are to succeed to the two shares out of the twelve shares."

Here also the ownership of the property carries with it the duty of performing the charity. The matter does not stop there. The document concludes thus:

> "Hereafter I shall have no claim of any kind in respect of the schedule mentioned properties or the duty or the right of conducting the charities."

It will be seen that the parties kept in mind both the aspects of the trusteeship, namely, the duty as well as the right. It is difficult in the face of these recitals, to accept the contention that the object of the document was to deal solely with the property. *Secondly*, it is argued that the consideration was fixed with reference to the property alone and that the trusteeship passed to the transferee as merely ancillary to it. There was, I have no doubt, an entire contract for a single consideration and it is impossible to sever the contract as suggested. Each part of the contract was an inducement to every other part of it and there is no warrant for dividing the bargain into two distinct parts (*see* the observations of *Jessel, M.R.* at p. 18 and of *Lush, L.J.* at p. 26 in *Redgrave* v. *Hurd*[1].) *Thirdly*, it is argued that the operative part of the document is that which deals with the property and not the passage quoted above, which deals with "duty and the right of conducting the charities". Here I must observe that Mr. Patanjali Sastri is put into a dilemma. If his contention is right, there has been no transfer at all of the office in question, in which case the plaintiff is out of Court. *Lastly*, it remains to observe that on the learned Counsel's own showing the document is vitiated by a mutual mistake, both the parties being under the mistaken

1. (1881) 20 Ch. D. 1.

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impression, that the property belonged to the family and not to the charity. If this be so, the document must be deemed to be of no effect and the right of trusteeship has not passed to the plaintiff.

In the result, as Mr. Duraiswami Aiyar rightly contends (1) either there has been a sale of the office, in which case the transaction is illegal and cannot be given effect to, (2) or there has been no transfer of the trusteeship at all, on which hypothesis the plaintiff's claim to Alagappa's share falls to the ground. Whichever is the correct view, Alagappa the co-trustee has not been represented in the suit. Misconduct on the part of a trustee does not *ipso facto* result in his removal—granting that Alagappa was guilty of misconduct in alienating or attempting to alienate his trusteeship. In any event the office is a hereditary one and Alagappa having died shortly after the suit, leaving three adult sons, his right devolved upon them.

Co-trustees, as has been held, form as it were one collective trustee, whose office is joint and indivisible and whose powers and duties must be exercised jointly (*Rajaram* v. *Ram Boy*[1], already cited, at p. 76 and *Shanmugha Moopanar* v. *Subbayya Moopanar*[2]). All co-owners must join in a suit to recover property unless the law otherwise provides. If some co-owners refuse to join, it is the practice in India to allow them to be included in the array of defendants (*Kanna Pisharody* v. *Narayanan Somayajipad*[3]). Co-trustees are subject to the above rule (*Shanmugha Moopanar* v. *Subbayya Moopanar*[2] already cited; *Bechu Lal* v. *Oliullah*[4] and *Ashtamurthi Nambudri* v. *Raman Menon*[5]). Similarly in the case of co-executors a suit cannot be held properly constituted unless all of them are on the record. An action having been brought by one executor only, the co-executor was impleaded as defendant on objection being taken. It was held that the suit was time-barred under S. 22 of the Limitation Act, as the co-executor was brought on the record after the period allowed by the statute (*see* the judgment of Sir John Wallis in *Seerangathuni* v. *Bava Vaithilinga Mudaliar*[6]).

1. (1912) 24 M.L.J. 75.
2. (1921) 42 M.L.J. 133.
3. (1881) I.L.R. 3 Mad. 234.
4. (1885) I.L.R. 11 Cal. 338.
5. (1899) 9 M.L.J. 312.
6. (1921) 40 M.L.J. 532.

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Mr. Patanjali Sastri at the close of his argument applied that he should now be permitted to bring on the record the sons of Alagappa. The suit was filed nearly seventeen years ago and the objection as to non-joinder was taken at the earliest stage. It would not be proper exercise of discretion to allow the defect to be cured at this distance of time. The observations of the Judicial Committee in *Rajendronath Dutt* v. *Shaikh Mahomed Lal*[1] apply with great force to the facts here. After holding that "the non-joinder of Bikuntanath is not an objection of form only", their Lordships go on to state:

"The appellants have not on any occasion sought the assistance of the Court as they might have done . . . . . . . . to make him a party to the suit. It is not the province of either the High Court or the District Judge to force that course upon them. The objection was clearly taken; and they, for motives of their own, deliberately abstained from making him a party to the suit."

The history of the previous suit filed by the plaintiff in 1916 seems to be repeating itself. On that occasion he put forward the false claim that the properties belonged to the family and not to the trust. Mr. Jackson, the District Judge, referring to the late addition of the choultry as plaintiff, remarked thus:

"Of course the Court had no right to allow an entirely fresh plaintiff to be brought into the suit in this precipitate manner, but apart from the question of procedure the chatram which adopted the first plaintiff's plaint *in toto* had no *locus standi*. It was in terms suing in 1920 a trespasser who had come in in 1906."

Holding that by the time the chatram was brought on the record the action had become time-barred, the learned District Judge dismissed the suit. In the present plaint also defendants 2 and 3 are, as already stated, treated as trespassers. Granting that the suit was in time when it was filed, it has now been pending for over 17 years, and it does not appear just to deprive the defendants of the plea of limitation that is available to them. On this ground, if on no other, the request made at this late stage must be refused.

Lastly, it was contended that where a *de facto* trustee brings a suit he is entitled to a decree. First, it must be observed that this case has been put forward for the first time at the hearing of the appeal. *Secondly*, the argument rests on a very slender foundation. The few Madras cases which seem

1. (1881) L.R. 8 I.A. 135: I.L.R. 8 Cal. 42 (P.C.).

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to support this view (such as *Moidin Bibi Ammal* v. *Rathnavelu Mudali*[1] and *Mahomed Ibrahim* v. *Sundaram Chetty*[2]) purport to follow certain decisions which, with great respect, have been completely misunderstood. *Niamat Ali* v. *Ali Raza*[3] is one of such decisions. There a suit was brought under S. 92, C. P. Code and it was dismissed on the ground that no breach of trust was alleged or proved. Referring to the defendant who succeeded Karamat Ali, the learned Judges observed:

> "Assuming that Karamat Ali was legally entitled to be the muttavalli (which office he undoubtedly *de facto* enjoyed), he was entitled to appoint his successor."

It is difficult to see how this countenances the view that a suit lies at the instance of a *de facto* trustee. In *Benarsi* v. *Altaf Hussain*[4], it was held that a person challenging the *de facto* muttavalli's possession must adduce evidence to show that the latter has no title. It decides no more than that a *de facto* trustee may be presumed to be also the *de jure* trustee,—a presumption liable of course to be rebutted. In *Muiz-ud-din* v. *Mohammad Ikhlaq*[5], no question of law whatever has been decided, as a glance at that case will show. In *Abkan Sahib* v. *Soran Bivi Saiba Ammal*[6], it has been held that a *de facto* trustee or a trustee *de son tort* is entitled, like a *de jure* trustee, to be reimbursed the moneys properly expended by him. How this decision supports the view taken in the two Madras cases cited above, it is difficult to see. Nor does *Hari Mohan Modak* v. *Rameswar Das*[7] avail the plaintiff. The judgment makes it clear that the *de facto* manager *was recognised as such* by the parties concerned. Some reliance has been placed upon *Narayana Rao* v. *Dharmachar*[8]. But that case deals with what is known as possessory title. As against a wrongdoer, prior possession of the plaintiff in an action of ejectment is sufficient title; that is all that has been decided. The two Madras cases to which I have referred are thus, in my opinion, clearly wrong. The contention therefore that a *de facto* manager is entitled to a decree, assuming that it can now be raised, must be overruled.

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1. (1926) 51 M.L.J. 598.
2. A.I.R. 1926 Mad. 1066.
3. (1914) I.L.R. 37 All. 86.
4. (1921) 63 I.C. 171.
5. A.I.R. 1924 All. 59.
6. (1913) 28 M.L.J. 347: I.L.R. 38 Mad. 260.
7. (1920) 64 I.C. 737.
8. (1902) 13 M.L.J. 146: I.L.R. 26 Mad. 514.

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In the result, the lower Court's decree is reversed and the suit is dismissed with costs throughout.

These appeals Nos. 111 and 112 of 1935 having been posted for being spoken to this day, the Court made the following

ORDER. *A. S. Nos. 111 and 112 of 1935.*—The costs will be paid by Medai Dalavai Ranganatha Mudaliar (respondent No. 1), Medai Dalavai Kumaraswami Mudaliar (respondent No. 2), and Chellammal, the widow of Medai Dalavai Shanmuga Kumaraswami Mudaliar, from the assets in their hands of Thirumalayappa Mudaliar.

*Appeal No. 112 of 1935.*—It follows from my judgment in the connected appeal that the lower Court's decree here is also reversed and the suit is dismissed with costs throughout.

S. V. V. —— *Appeals dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

Paboodan Goolabchand .. *Appellant* (Plaintiff)*

*v.*

M. J. Miller and another .. *Respondents (1st and 2nd Defendants).*

Goolab-chand v. Miller.

*Principal and agent—Estate management by agent—Power-of-attorney—Borrowing moneys beyond the powers given in the power-of-attorney—Moneys applied to estate purposes—Liability of principal for, as unjust enrichment—Absence of funds in estate if necessary condition for liability on this ground—Interest under contract—If claimable against principal—Scope of Ss. 187 and 188 of the Contract Act.*

One W. M. M. was the owner of H. F. estate. He bequeathed it to his son the first defendant and certain others. The first defendant was one of the executors under his father's will and he also took out probate. He appointed the second defendant by a power-of-attorney as his agent for the management of the H. F. estate. Between 1927 and 1929, the second defendant borrowed from time to time from the plaintiff, a marwari banker. The first defendant was sought to be made liable for these sums on the grounds (1) that the second defendant acted within the limits of his authority in borrowing the moneys and (2) that the first defendant and the estate had benefited by the moneys paid by the plaintiff. It was found that the moneys claimed were advanced to the second defendant only in his capacity as agent of the first defendant, and that therefore the first defendant cannot be held liable in this case on the footing that in borrowing from the plaintiff the second defendant acted within the limits of his authority. As for the claim made by the plaintiff to the extent to which the moneys were used for estate

* Appeal No. 132 of 1935. 12th April, 1938.

Goolab-chand *v.* Miller.

purposes, the trial Court held that admitting that the moneys were actually applied for estate purposes, yet the plaintiff cannot claim against the principal unless "there was need to borrow for this purpose and the estate had not sufficient funds from which these calls could be met".

*Held,* (*i*) that where, as here, the agent's authority is defined in writing, S. 187 of the Contract Act cannot be relied on, as the agent's authority will have to be found in the four corners of the instrument, either in express terms or by necessary implication, the limits of such necessary implication being those defined in S. 188.

(*ii*) In such cases of a claim on foot of 'unjust enrichment', it is not a necessary condition in respect of the creditor's right to relief that there should be no funds in the hands of the agent at the time of the borrowing.

*Bannatyne* v. *MacIver*, (1906) 1 K.B. 103 at 111, distinguished as a case of misappropriation by the agent.

(*iii*) This equitable rule is applicable, and has been applied, in India and is not excluded by the Contract Act. The claim can also be rested under S. 69 or 70 of the Contract Act.

(*iv*) In spite of the fact that a decree has been obtained in the suit (the lower Court having given a decree against the agent), the principal could also be made liable, as in these cases it is one of joint and several liability of both principal and agent.

(*v*) In so far as the claim against the principal is not on the *contract* itself but only for the restoration of the benefit enjoyed by him, the lender is not entitled to discount or interest as per the terms of the contract between him and the agent. The right to interest on grounds of equity left open.

Appeal against the decree of the Court of the Subordinate Judge of the Nilgiris at Ootacamand in O. S. No. 83 of 1932.

*S. Srinivasa Aiyangar, K. Rajah Aiyar* and *V. Ramaswami Aiyar* for Appellant.

*S. Panchapakesa Sastri* and *K. R. Krishnaswami* for Respondents.

This appeal came on for hearing on Tuesday and Wednesday, the 9th and 10th days of March, 1937.

The Court made the following

Varada-chariar, J.

ORDER. *Varadachariar, J.*—The appellant, a marwari banker at Coonoor, sued for recovery of a sum of money representing the balance due under a running account of advances and dealings between himself and the second defendant, when the latter was in management of an estate known as the 'High Field Estate' near Coonoor. The plaint prayed for a decree not only against the second defendant but also against defendants 1 and 3 and against the estate of W. M. Miller, the deceased father of the first defendant and the husband of the third. It is difficult to understand the ground on which the third defendant was sought to be made liable, and as the lower Court

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exonerated her and that part of the decision has not been appealed against, it is unnecessary to refer to that part of the claim any further. The suit was decreed as against the second defendant, but dismissed as against the first. The second defendant has allowed the decree against him to become final. The plaintiff has appealed against so much of the lower Court's decree as dismissed the claim against the first defendant.

W. M. Miller was the last owner of the High Field Estate and he bequeathed it to the first defendant and certain others, subject to a life interest in favour of the third defendant. The first defendant was one of the executors under his father's will and he alone took out Probate. Under Ex. B (11th April, 1927) the first defendant appointed the second defendant his agent for the management of the High Field Estate and though the third defendant was also appointed agent, she was away from India during part of the material period and even during the period of her stay at Coonoor (January to December, 1928) she left the management in the second defendant's hands. It is the plaintiff's case that between August, 1927 and October, 1929, the second defendant "in a usual and regular conduct, management and superintendence of the High Field Estate" drew moneys from the plaintiff from time to time, 'for the payment of the staff and labour of the estate and its working expenses, taxes and public dues'. Repayments used to be made by the second defendant by cash or by cheque and sometimes by the supply of tea grown on the estate. In October, 1929, the balance due to the plaintiff was found to be Rs. 15,000 and by an agreement (Ex. TT) dated 28th October, 1929, between the plaintiff and the second defendant, it was arranged that this amount should be treated as an advance for the supply of tea from the estate for a period of three years. As the third defendant repudiated this agreement, the plaintiff claims payment of the amount of Rs. 15,000 treated as advance under that agreement.

The first defendant was sought to be made liable on two grounds:—(*i*) that the second defendant acted within the limits of his authority in borrowing moneys from the plaintiff and (*ii*) that the first defendant and the estate have benefited by the moneys paid by the plaintiff from time to time, "the same having been spent for the business of the estate, the maintenance of the staff and payment of its taxes and dues".

The first defendant contended that Ex. B the power of attorney did not authorise the second defendant to borrow, that there was no necessity for him to borrow for estate purposes and that the second defendant must, if at all, have borrowed from the plaintiff for other businesses of his own. He denied that any money borrowed from the plaintiff was used for or on the estate. The agreement of October, 1929 (Ex. TT) he denounced as the result of a conspiracy between the second defendant and the plaintiff, got up apparently with a view to render the plaintiff's position stronger, at the expense of the estate.

Though an issue was raised in respect of the agreement of 28th October, 1929, it is not necessary for the purposes of this case to deal with it. An issue was also raised as to the *truth* of the dealings between the plaintiff and the second defendant; the lower Court recorded a finding in plaintiff's favour on this question and the correctness of that finding has not been challenged before us, on behalf of the first defendant. The only point for determination in the appeal is whether the first defendant can be held liable for the plaint claim and if so to what extent.

At the time when the issues were framed and when the defendants' witnesses were examined, the possible grounds on which the first defendant could be made liable do not seem to have been very clearly realised. The investigation seems to have been practically confined to the question whether the second defendant was authorised to borrow and whether there was necessity for him to borrow for the purpose of the estate. On this part of the case, the trial Court has upheld the first defendant's contention and found that the second defendant had no authority to borrow and that there was no necessity for borrowing. This finding against the second defendant's authority and the need for borrowing has been challenged before us by the appellant's learned Counsel.

Before the suit came on for argument, it seems to have been realised that it was also necessary to decide how much, if any, of the money advanced by the plaintiff to the second defendant was used by him for the purposes of the High Field Estate. To facilitate the investigation of this question, a Commissioner was appointed on 6th October, 1934 and it appears from his report (Ex. OOO) that four questions were referred to him, to report upon after an examination of the

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accounts and connected records filed by the parties. Oral evidence was also adduced, through some of the witnesses examined on the plaintiff's side, to show that the amounts advanced by the plaintiffs were sometimes utilised for estate purposes, such as payment of wages to coolies, payment of taxes and other dues, etc. In this connection, the lower Court observed that it is

"difficult to judge from the second defendant's account books alone how much money was actually received on behalf of the estate as income from the estate and how much money had to be spent on account of that estate...... If the second defendant had sufficient funds from the income of the estate itself to meet all those expenses but misappropriated those moneys and borrowed money from the plaintiff to meet necessary expenses, it would not follow that the principal would be thereby bound."

In another part of the judgment, the learned Subordinate Judge said that it was *unnecessary* to consider the evidence on the plaintiff's side as to the actual application of his money for estate purposes, because, "admitting that it is so, it does not follow that plaintiff has got a right of claim against the first defendant" unless it is "shown further that there was need to borrow for this purpose and that the estate had not sufficient funds from which these calls could be met". This part of the judgment has been criticised by the appellant's learned Counsel as vitiated by error of law and as resting on an assumption of possible misappropriation by the second defendant for which there was no warrant. It was also contended that the Commissioner's report contained all the necessary information required for this part of the case and that if the lower Court was not satisfied with that report, it should have considered the evidence and come to its own conclusion as to the extent to which moneys advanced by the plaintiff have been applied by the second defendant for the benefit of the first defendant or of the estate.

In para. 16 of the judgment, the learned Subordinate Judge remarks that plaintiff must have thought that the moneys were lent to the second defendant himself and not to the agent of the first defendant. It is difficult to reconcile this observation with the opening sentence in para. 15 where he rejects the first defendant's suggestion that plaintiff must have *originally* opened his accounts in the name of the second defendant personally and not in the name of the manager of the High Field Estate and proceeds to say that 'plaintiff might have

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believed that second defendant had authority to borrow'. We have little doubt that the plaintiff advanced the moneys referred to in the plaint to the second defendant only in his capacity as agent of the first defendant. The respondent's learned Counsel urged before us that the way in which plaintiff's accounts in respect of his dealings with the second defendant have been kept—as explained by the Commissioner in explanatory note No. 1 of his report Ex. OOO—suggested that the larger advances must have been made to the second defendant in his personal capacity. We are unable to agree with this contention. As pointed out in the objections filed on behalf of the plaintiff to that report, some of the entries are only paper entries and the actual advances and repayments must, according to the plaintiff's accounts, be taken to amount only to Rs. 70,000 and odd and Rs. 61,000 and odd respectively.

Dealing with the question of the 2nd defendant's authority to borrow, the learned Counsel for the appellant conceded that the 2nd defendant had no *express* authority to do so, in view of the terms of Ex. B, but he contended that such power must be implied in the case of a person who is entrusted with the conduct of a *business*, especially where the principal is away from the country. He relied on S. 187 of the Contract Act and criticised the proposition founded on *Hawtayne* v. *Bourne*[1] as not consistent with later authorities, like *Ricketts* v. *Bennett*[2]. (See also *Heramba Chandra Pal Chowdhury* v. *Kasi Nath Sukul*[3].) He also took exception to the criticism of Messrs. Pollock and Mulla on *Dhanpat Rae* v. *Allahabad Bank, Ltd., Lucknow*[4] and relied on the wide observations in *Withington* v. *Herring*[5] and *Montaignac* v. *Shitta*[6]. It does not seem to us necessary, in this case, to deal with the general question of the borrowing powers of a person placed in charge of a *business*. The Indian Legislature appears to have solved the conflict of authority in England by a specific provision in the second part of S. 188 of the Contract Act (*cf.* Art. 37 and the illustrations thereto in Bowstead on Agency). Where, as here, the agent's authority is defined in writing, we doubt if S. 187 of the Contract Act can be relied on, for it is well-settled that

1. (1841) 7 M. & W. 595: 151 E.R. 905.
2. (1847) 4 C.B. 686: 136 E.R. 678.
3. (1905) 1 C.L.J. 199 at 205.
4. (1926) I.L.R. 2 Luck. 253.
5. (1829) 5 Bing. 442: 130 E.R. 1132.
6. (1890) 15 A.C. 357.

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"Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument, the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication." (*Bank of Bengal* v. *Ramanathan Chetty*[1].)

The limits of 'necessary implication' are indicated by S. 188 of the Contract Act. (See *Palaniappa Chettiar* v. *Arunachalla Chettiar*[2] and *Ferguson* v. *Um Chand Boid*[3].) As no attempt was made to justify the borrowing in this case on the ground of 'necessity' or with reference to the 'usual course of business', we must confirm the finding of the Court below that the 1st defendant cannot be held liable in this case on the footing that in borrowing from the plaintiff the 2nd defendant acted within the limits of his authority. The observations in *Montaignac* v. *Shitta*[4] cannot be relied on here, because it was *conceded* in that case that the agent did have power to borrow and the only question was whether the nature and terms of the particular loan were justified.

As regards the alternative basis on which the appellant's claim is sought to be supported, namely, the utilisation of the plaintiff's moneys for the benefit of the 1st defendant or the estate, it must be conceded that the appellant's criticism against that part of the lower Court's judgment which deals with it is in the main justified. The learned Subordinate Judge fell into an error in mixing up the question of necessity with the question of benefit. If necessity for the loan is made out, the creditor holds the principal liable on the contract itself, because, by the terms of S. 188 of the Contract Act, the agent's authority to bind the principal is recognised whenever what the agent does is necessary for the business. It is only when the contract *as such* cannot be enforced against the principal, that the lender has to fall back on the equitable rule founded on the theory of 'unjust enrichment'. Though the authorities have not been uniform as to the precise basis of the rule, the rule itself is now well established that, where by any wrongful or unauthorised act of an agent the money or property of a third person comes to the hands of the principal

1. (1915) 30 M.L.J. 232: L.R. 43 I.A. 48: I.L.R. 43 Cal. 527 at 540 (P.C.).
2. (1912) 23 M.L.J. 595 at 598.
3. (1905) I.L.R. 33 Cal. 343.
4. (1890) 15 A.C. 357.

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or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or the value of such money or property (*see* Bowstead, Art. 103). In some cases, the plaintiff's right was based on the count for money had and received or the theory of failure of consideration, and sometimes on the analogy of the count for money paid to the use of the defendant. Again, the theory of subrogation was at one time suggested as the analogy but it was later on pointed out that the analogy was not true. (In re *Wrexham, Mold and Connah's Quay Railway Co.*[1]) It was also suggested that in such cases, there was really no borrowing at all, because there was no addition to the principal's total liability, but merely a substitution of liability to one person (the lender) in place of the pre-existing liability to another (the person paid off). Other cases have supported the claim only on grounds of equity; and in In re *Wrexham, Mold and Connah's Quay Railway Co.*[1], two of the Lords Justices observed that the effect of the rule was to make the borrowing valid to the extent to which the principal has received the money or the benefit of its application. For a discussion of the theoretical basis, *see* Keener on Quasi-Contracts, pages 329 *et seq*.

On behalf of the 1st defendant, Mr. Panchapagesa Sastri relied on the circumstance that in *Bannatyne* v. *MacIver*[2], reference has been made in the judgments to the fact that when the unauthorised loan was borrowed by the agent, he had no funds of the principal in his bank account; and he contended that the principle recognised in this class of cases should not be applied here, unless it was shown that at the time when the 2nd defendant borrowed moneys from the plaintiff, he did not have in his hands sufficient moneys of his principal to meet the then existing demands. Mr. Srinivasa Aiyangar asserted that the 2nd defendant must have borrowed only on account of necessity and he maintained that the observations of the lower Court about misappropriation by the 2nd defendant are absolutely baseless. He further contended on the authority of *Reid* v. *Rigby & Co.*[3], that if and in so far as it is shown that the plaintiff's moneys have been utilised by the 2nd defendant for

1. (1899) 1 Ch. 440. 2. (1906) 1 K.B. 103.
3. (1894) 2 Q.B. 40.

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the benefit of the 1st defendant, the plaintiff's right to recover such amount from the 1st defendant cannot be affected by the fact, even if it be a fact, that the 2nd defendant had misappropriated moneys belonging to the 1st defendant, unless it was proved that the plaintiff was aware of and was a party to the 2nd defendant's misconduct. We are not satisfied that there is any warrant in the evidence for the theory of misappropriation. Though the agent's cash-book (Ex. II is said to be incomplete, the 1st defendant's learned Counsel admits that the 2nd defendant has brought into one or other of the various books of account kept by him all his receipts from the estate. We are not concerned to know whether or not he informed his principal of his lack of funds or left him to remain under the impression that he had sufficient funds in his hands to carry on the administration of the estate. The suggestion that part of the moneys received from the plaintiff might have been used for 2nd defendant's personal concerns is immaterial to the present discussion, because, under this head, plaintiff seeks to hold the 1st defendant liable only for what is shown to have been applied for his benefit. Whether the accounts of the 2nd defendant are complete or not, it has not been suggested or shown that the entries, so far as they go, are false; and the plaintiff is entitled to rely on them to the extent to which they go. We agree with Mr. Srinivasa Aiyangar's contention based on *Reid* v. *Rigby & Co.*[1] and we also think that the reference in *Bannatyne* v. *MacIver*[2] to the absence of other funds in the hands of the agent at the time of the borrowing, must not be understood as intended to import a necessary condition in respect of the creditor's right to relief against the principal in such cases. If the agent had already misappropriated the principal's moneys and thus created a necessity for the borrowing, the lender cannot suffer for the dishonesty of the agent and the borrowing would have been at a time when there were in fact no funds of the principal available. If, on the other hand, the agent borrowed even when the principal's moneys were available, the borrowed money, if paid into the principal's account or applied for his benefit will clearly be money, which the principal was not entitled to retain, and the fact or possibility

1. (1894) 2 Q.B. 40.

2. (1906) 1 K.B. 103.

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of a *subsequent* misappropriation by the agent cannot affect the lender's remedies; *Bannatyne* v. *MacIver*[1]. On p. 334 of his book on Quasi-Contracts, Mr. Keener refers to one case in which misappropriation by the agent may afford a defence to the principal against the lender's claim, that is, where the agent pays the borrowed money into the principal's account and then draws it out and misappropriates it, without utilising it for the principal's benefit. That observation has no application to a claim which is founded on the actual application of the plaintiff's moneys to the principal's benefit.

Mr. Sastri next contended that in India the creditor's right against the principal must be limited to the cases provided for in the Contract Act; but the equitable rule was recognised and followed in this country in *Suppayya Pattar* v. *Hajee Ahmed Sait*[2], *Heramba Chandra Pal Chowdhury* v. *Kasi Nath Sukul*[3], *Ghasiram* v. *Raja Mohan Bikram Sha*[4] and *T. R. Pratt, Ltd.* v. *E. D. Sassoon & Co.*[5] There is no justification for the contention that equitable claims are excluded by the Contract Act. If necessary, the creditor's claim in a case of this kind may be rested on S. 64 or S. 70 of the Contract Act.

It was next contended on behalf of the first defendant that a claim on this alternative footing must be held to be barred by limitation, as plaintiff should be deemed to have had a separate cause of action each time the moneys advanced by him were utilised for the first defendant's benefit and the suit was instituted more than 3 years after the last of such advances. It is not necessary for the purposes of this case to decide whether a claim of this kind will be governed by the 3 years rule of limitation or will be governed by Art. 120 and what will be the starting point of limitation. Even according to the principle suggested by first defendant's learned Counsel, the plaintiff had a subsisting claim against the first defendant on 28th October, 1929, and on that date the amount so due was treated as advance under Ex. TT. An agreement like that for the sale of tea was within the second defendant's power and from the date of Ex. TT. Plaintiff was not, on the principle of *Bassu Kuar* v. *Dhum Singh*[6], entitled to recover the money

1. (1906) 1 K. B. 103 at 111.
2. (1915) M.W.N. 761.
3. (1905) 1 C.L.J. 199.
4. (1907) 6 C.L.J. 639.
5. (1935) I.L.R. 60 Bom. 326: A.I.R. 1936 Bom. 62 at 66 and 87.
6. (1888) L.R. 15 I.A. 211: I.L.R. 11 All. 47 (P.C.).

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till the consideration failed by reason of the third defendant's repudiation of Ex. TT. The suit has been filed within 3 years of the date of this repudiation.

Lastly Mr. Sastri contended that as the plaintiff had obtained a decree against the agent, he could not seek to hold the principal *jointly* liable. *Firm of R. M. K. R. M.* v. *Firm of M. R. M. V. L.*[1] relied on by him in this connection has no application here; because, that decision related to the maintainability of a *subsequent* suit against the principal after a decree had been obtained against the agent in a previous suit. Notwithstanding the opinion expressed by Coutts-Trotter, C.J., in *Kuttikrishnan Nair* v. *Appa Nair*[2], it seems to us also open to question whether in the face of the clear language of S. 233 of the Indian Contract Act, we can apply the English rule of *alternative* liability in this country. Further, even in England, the principle of *Kendall* v. *Hamilton*[3] on which *Firm of R. M. K. R. M.* v. *Firm of M. R. M. V. L.*[1] is based will apply only when the principal is subsequently sued *on the contract* of the agent. Where, as here, the principal is sought to be held liable on equitable grounds, even the rule in England, as stated by Bowstead (Art. 103) seems to be one of joint and several liability of both principal and agent.

It remains to determine the amount which, on this alternative ground, the plaintiff will be entitled to recover from the first defendant. The lower Court has not given any finding on this point, in the view that it took of the law. The oral evidence adduced on the plaintiff's side only proves in a general way that moneys borrowed from the plaintiff used to be applied by the second defendant or under his directions for the benefit of the first defendant. The amount thus applied must be fixed only with reference to the accounts produced on both sides. The Commissioner who examined the accounts states (in Table D of Ex. OOO) that out of the plaintiff's advances to the second defendant, Rs. 21,199-6-1 could be traced in the accounts kept by the second defendant and Rs. 8,956-2-0 could be "doubtfully traced". In Table E, he shows that from the second defendant's books only Rs. 17,874-8-3 could be traced to have been repaid to the plaintiff. In Table F the Commis-

1. (1926) A.C. 761.
2. (1926) 51 M.L.J. 311 : I.L.R. 49 Mad. 900.
3. (1879) 4 A.C. 504.

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sioner shows that the Rs. 21,199-6-1 have been used for the purposes of the estate; and he adds that the sum of Rs. 8,956-2-0 'may be presumed to have been spent on the estate'. It is conceded on behalf of the appellant that in so far as the claim against the first defendant is not *on the contract* itself but only for the restoration of the benefit enjoyed by him, plaintiff is not entitled to discount or interest as per terms of the contract between him and the second defendant. Whether he will be entitled to interest on grounds of equity and if so, at what rate and for what period, may be left to be determined after the return of the finding we propose to call for.

Both parties also agree that the plaintiff *must* give credit to the first defendant for all sums that he has received from the second defendant in repayment of the advances comprised in the present claim (*see* Keener, p. 281). Mr. Sastri contends that as the plaintiff admits receipt of about Rs. 61,000 there is nothing more that he could claim from the first defendant if (as per the Commissioner's report) only about Rs. 30,000 (Rs. 21,199 *plus* Rs. 8,956) could at best have been spent on his estate. Mr. Srinivasa Aiyangar rightly points out that the plaintiff's admission was made on the footing that more than Rs. 70,000 had been advanced and if, on the strength of the second defendant's accounts, only a smaller sum is to be held to have been applied for first defendant's benefit, the first defendant cannot ignore those accounts when it comes to the question of repayment and contend that all the Rs. 61,000 repaid by the second defendant to the plaintiff should be deemed to have been paid *out of the first defendant's funds.* The first defendant must either rely on the plaintiff's accounts and admissions *as a whole* or prove the extent of repayment by other evidence.

At one stage, we were inclined to adopt the figures given in the Commissioner's Tables D, E and F and pass a decree here on their basis, particularly in view of the fact that in the objections filed on behalf of the first defendant to that report no *specific* objection has been taken to these figures or to the Commissioner's remarks relating to them; but the objection statement does in a way question the correctness of the Commissioner's method and of his figures. As the Commissioner's report has left a large sum as 'doubtful' and his view

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as to its application is stated only as a matter of presumption, we have thought it more satisfactory to ask the lower Court to examine the accounts and the other evidence in the case and submit a finding as to (1) How much of the amounts advanced by the plaintiff to the second defendant between August, 1927, and October, 1929, was paid by the latter into the first defendant's account or applied for the benefit of the first defendant or of the estate of which the first defendant was executor. (2) What amounts have been repaid by the second defendant to the plaintiff out of the funds of the first defendant or of the estate. We may add that though, as we have already held, the mere possession by the second defendant of funds of the first defendant or of the estate at the time of any borrowing from the plaintiff will not as a matter of *law* affect the plaintiff's right of recovery, such possession of funds will be a relevant fact to be taken into consideration in deciding whether any particular item of expenditure was in fact met out of the plaintiff's advances or out of moneys belonging to the first defendant or to the estate. We leave it to the lower Court to determine whether it is necessary to obtain a fresh report from the same or from another Commissioner. Finding to be submitted before the 31st July, 1937. Ten days for objections.

[In pursuance of the above order, the lower Court submitted a finding that out of plaintiff's advances Rs. 31,907 had been applied for the benefit of the estate and that plaintiff had been repaid Rs. 18,996 from the first defendant's estate. Objections were filed to this finding by the respondent that the value of tea supplied by the estate to the plaintiff should also be treated as having been repaid by the estate to the plaintiff. Their Lordships accepted this contention and in the end found that the plaintiff had been repaid from out of the estate funds and tea, more than Rs. 31,907 advanced by him and spent on the estate and accordingly dismissed the appeal.—*Reporter's note.*

The judgment on return of finding is omitted from this report.]

S. V. V. —— *Appeal dismissed.*

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Adoor Arunachalam Chetty .. *Appellant** (*Plaintiff*)

*v.*

Konjiti Seshiah Chetty and another .. *Respondents* (*Defendants*).

Aruna-chalam Chetty *v.* Seshiah Chetty.

*Hindu Widows Remarriage Act (XV of 1856), S. 2—Property of husband—Settlement of widow's right to maintenance—Execution of promissory note by coparceners to her uncle as guardian—Ratification by widow—Suit on promissory note—Remarriage if provides a defence to the suit—Widow if necessary party to suit.*

The coparceners of the deceased husband of a Hindu widow settled with her maternal uncle as her guardian her claim to maintenance during all her lifetime at a fixed sum in satisfaction of which a promissory note was executed by them to the uncle as her guardian. A release deed was executed on behalf of the widow, which put an end to any interest which she might have in the property of her deceased husband. Subsequently the widow ratified the action of her guardian. A suit was filed for the balance due under the promissory note. After the filing of the suit, the widow remarried, and it was contended that by virtue of S. 2 of the Hindu Widows Remarriage Act, the widow having remarried forfeited her claim to maintenance and as such the balance due under the promissory note cannot be claimed.

*Held*, (1) that though the widow was a beneficiary under the arrangement, she need not be made a party to the suit.

(2) That the debt due by the coparceners could not be treated as an interest in the property of the deceased husband which the widow could claim within the meaning of S. 2 of the Hindu Widows Remarriage Act. So the defendants could not repudiate the debt, though the possibility of the remarriage was not actually visualized by them at the time of the arrangement.

Appeal against the decree of the District Court, Nellore, in Appeal Suit No. 77 of 1934, preferred against the decree of the Court of the District Munsiff of Nellore in Original Suit No. 670 of 1933.

*C. Vasudevan* and *Bhagavat* for Appellant.

*M. S. Ramachandra Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff sued on a promissory note which was executed in circumstances about which there is no dispute. The plaintiff is the maternal uncle of a child widow and was acting as her guardian after the death of her husband. In that capacity, he opened negotiations with the coparceners of the deceased husband of the widow and there was an arbitration and a series of documents came into existence on the same

* S.A. No. 913 of 1936. 26th August, 1938.

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date. The plaintiff as guardian of the widow executed a release deed Ex. II. It recites that in consideration of the execution of a promissory note for Rs. 2,500 in favour of the plaintiff, a fixed amount in lieu of maintenance payable to the widow during all her life time, she surrenders her rights in the estate of her husband's coparceners and renounces all claims which she might have as a result of any change of circumstances, etc., and releases her right to maintenance. On the same date, there is Ex. I which is a deed of indemnity executed by the plaintiff. It recites the receipt of Rs. 2,500 in the shape of a promissory note, undertakes to get the widow to ratify the release deed as soon as she attains her majority and to hold the defendants blameless in the event of any claim by her. On the same date we have also Ex. A, the suit promissory note, executed by the defendants in favour of the plaintiff, which recites, "We agreed to pay you the sum of Rs. 2,500 being the maintenance amount for the widow". On this promissory note, there is an endorsement of payment of Rs. 1,250. The suit for the balance due on the promissory note was presented on 24th July, 1933. On the 9th September, 1933, after the filing of the suit, the widow executed Ex. B, in which she ratifies the action of her guardian in releasing her maintenance right as the plaintiff had undertaken in Ex. I that she should ratify his action. On 14th September, 1933, the widow remarried.

It is not now contended that the suit by the promisee under Ex. A is incompetent because of the absence from the array of parties of the widow who is the beneficiary under the arrangement whereby the promissory note came into existence. Such a contention would clearly be untenable. It is however contended that the District Judge was right in holding that by virtue of the provisions of S. 2 of the Hindu Widows Remarriage Act, the widow having by her marriage forfeited her right to maintenance from her husband's estate, the balance due under the promissory note executed in lieu of maintenance to the plaintiff cannot be claimed. The relevant words of S. 2 of the Hindu Widows Remarriage Act are as follows:—

"All rights and interests which any widow may have in her deceased husband's property by way of maintenance . . . . . shall upon her remarriage cease and determine as if she had then died."

It is contended that the claim for the unpaid amount due under this promissory note is in fact a right to claim main-

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tenance out of the property of the deceased husband. It seems to me that this contention is unreasonable on the facts of the case. On the date of Ex. A, there was, in my opinion, a complete settlement of the widow's claim to maintenance for all time and a composition whereby in lieu of an uncertain liability for a recurring payment towards maintenance, the defendants executed a promissory note for a lump sum. The nature of this transaction can be seen from the nature of the release deed executed on behalf of the widow Ex. II, which expressly puts an end to any interest which the widow might have in the property of her deceased husband in consideration of a payment which is treated as having already been made by the execution of the promissory note; that is to say, there is a completed contract whereby the coparceners of the deceased husband, taking into consideration the uncertainty of the future claims which the widow might make, compounded for those claims by a fixed sum which was treated as having been paid by the substitution for the actual payment of a promissory note executed by the defendants to the uncle of the widow. When once this promissory note and this discharge document have been executed, the widow no longer has any interest in her husband's estate. She has taken in substitution therefor a claim against her uncle to the proceeds of the promissory note debt due by the defendants to the plaintiff, the uncle. I fail to see how this debt due by the defendants to the plaintiff can be treated as an interest in the property of the deceased husband which the widow can claim. The widow could not sue on this promissory note nor could she claim anything from her husband's coparceners, her right would be to sue the present plaintiff. Looking at the words of the Act, it is clear the position of the widow on remarriage is that she has no more rights in her husband's property than she would have if she had died on the date when she remarried. Could it for a moment be contended, that if this lady had died instead of remarrying, her death would have provided a defence to the suit on the promissory note by the plaintiff? Quite clearly, it could not. When this promissory note debt was incurred, it was incurred in lieu of the cash payment which was the consideration for the release deed executed on behalf of the widow. That cash payment was in fact a composition for a recurring claim which might conceivably endure for seventy years or more, or might on the other hand be terminated in a short

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space of time by various circumstances, one of which might be the untimely death of the widow. It may be that the defendants did not actually visualize the possibility of the widow's remarriage, but it may be taken that they agreed to the payment of a cash sum in lieu of an uncertain claim which might be affected by various contingencies, for example, a change in the circumstances of the family or a lapse into unchastity of the claimant. It is not, to my mind, open to them to say,

"There is one contingency which we overlooked in agreeing to this payment and that is the contingency of the widow's remarriage."

Neither on the strict letter of the Act nor in equity, have the defendants, to my mind, the right to repudiate this debt.

I therefore allow the appeal and restore the decree of the learned District Munsiff with costs in the first appellate Court and in this Court.

S. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE VENKATARAMANA RAO.

T. S. Swaminatha Odayar, lately a minor by guardian Meenakshi Achi but now declared a major and guardian on record discharged—*vide* Order dated 26th November, 1936, on C.M.P. No. 4763 of 1936 .. *Appellant* (6th Respondent 6th Defendant)*

*v.*

T. S. Gopalaswami Odayar and others .. *Respondents (Defendants).*

Swami-natha Odayar v. Gopala-swami Odayar.

*Hindu Law—Joint family—Suit for partition and possession—Effect of filing of written statement—Manager—Liability to account—Principles applicable—Civil Procedure Code (V of 1908), O. 20, rr. 12 and 18—Suit for partition and possession—Preliminary decree silent regarding mesne profits—Award of mesne profits by final decree—Permissibility.*

Where a written statement filed in a suit for partition and possession contains an expression of a fixed desire to separate, it may be taken to effect a separation in the same manner as a plaint in a partition suit does; thus the

* Appeal No. 60 of 1933 and C. M. P. No. 5202 of 1937. 9th May, 1938.

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written statement may be evidence of severance among the members *inter se* of the sub-family who constitute the parties to the suit.

Principles governing division in status of members of Hindu joint families stated.

In the absence of fraud or other improper conduct the only account the manager of a Hindu joint family is liable to render is as to the existing state of the property divisible and the enquiry directed by the Court must be in the manner usually adopted for the discovery of what the family property in fact consists of.

*Mayne's Hindu Law*, 9th Edition, page 470, relied on.

The Civil Procedure Code has not expressly laid down any procedure in regard to a composite action for partition and possession and in such a case the Court may pass a final decree for mesne profits even if it was not preceded by a preliminary decree relating to them. The mere fact that the preliminary decree for partition was silent as to the claim for mesne profits does not preclude the parties from applying or the Court from awarding mesne profits by its final decree; and this is specially so where the party liable has in the course of the suit undertaken to pay mesne profits to the successful party.

Appeal against the final decree of the Court of the Subordinate Judge of Kumbakonam, dated the 26th day of September, 1932, and made in I. A. No. 695 of 1930 in O. S. No. 22 of 1934.

*V. Radhakrishnayya, R. Gopalaswami Aiyangar* and *S. Ramanuja Aiyangar* for Appellant.

*T. R. Venkatarama Sastri, K. Bashyam Aiyangar, V. C. Viraraghavachari, N. A. Krishna Aiyar, K. S. Desikan, T. R. Srinivasa Aiyangar, S. Venkatesa Aiyangar, S. R. Subramania Aiyar, P. R. Ganapathi Aiyar, N. K. Ananthapadmanabhan, R. Visvanatha Aiyar, S. Thiyagarajan, A.V. Viswanatha Sastri, R. Rajagopala Aiyangar, K. S. Sankara Aiyar, S. Sankara Aiyar* and *T. Krishnaswami Aiyangar* for Respondents.

This appeal having stood over for consideration, on 6th May, 1937, the Court (*Venkatasubba Rao* and *Cornish, JJ.*) delivered the following

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JUDGMENT. *Venkatasubba Rao, J.*—For a proper understanding of the contentions raised, it is necessary first to follow closely the pedigree given below and secondly to glance at some of the main conclusions arrived at the previous stages of this unfortunate and protracted litigation.

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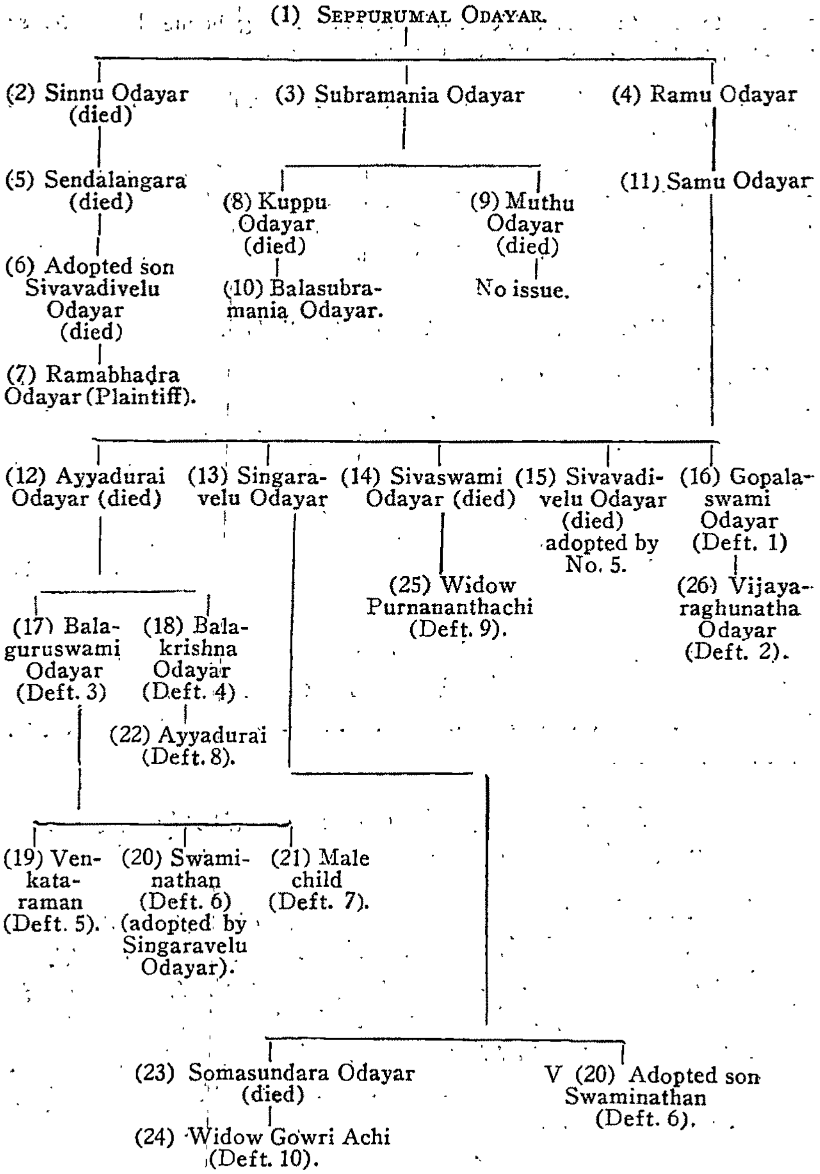


It will be well to mention at the outset that when the present partition suit (out of which these appeals including the memoranda of objections arise) was commenced two decades back, the family with which we are concerned was possessed of considerable wealth; but its position has during the pendency of this litigation so declined, that its members, all but the sixth defendant, have either been obliged to be adjudicated insolvents or to enter into arrangements with their

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creditors. The result is, that the parties, excepting the sixth defendant (the appellant) who is still solvent, have ceased to possess any personal interest, the rights of the plaintiff and the third defendant having passed to the Official Receiver of West Tanjore, of the fourth defendant, to the Official Assignee of Madras, and of defendants 1 and 2, to trustees appointed under a composition deed. They have all been brought on the record, but it will be convenient to this judgment to refer to the original parties and not to their representatives.

From the pedigree above, it will be seen that the family consisted of three main branches: those of Sinnu, Subramania and Ramu. In 1895 an arrangement was entered into (by means of a deed marked Ex. A) consequent upon certain disputes that arose in the family. Balasubramania (No. 10 in the pedigree) separated from the remainder of the family, his share having been ascertained and allotted to him. It was agreed that the other members should continue to live jointly, their shares, however, having been defined on a basis agreed to by the parties, widely different however, from those they would be entitled to, under the law. One of the disputes that was set at rest by the deed, related to the status of Sivavadivelu (No. 6 in the pedigree) the plaintiff's father. He claimed to be the adopted son of Sendalangara and under the family arrangement that claim was recognised; but his share was fixed (and this is important) as though there had been no adoption and he continued to occupy his natural place in the family as Samu Odayar's son.

Then the next event of importance happened in the year 1917, when Singaravelu (No. 13 in the pedigree) probably the most prominent member of the family then, adopted Swaminatha (the 6th defendant and the appellant before us) the natural born son of Balaguruswami. But for this adoption, as the pedigree will show, Singaravelu's branch would upon his death become extinct and its effect therefore would be to diminish the quantum of the share of defendants 1 and 2 in the family property. The adoption of Swaminatha was followed by a notice issued a week later (that is, on 13th May, 1917). It was sent by three persons: (1) Singaravelu acting for himself and the minor 6th defendant, (2) Balaguruswami the 3rd defendant, and (3) Balakrishna the 4th defendant, and was addressed to the 1st and 2nd defendants and the plaintiff. That notice

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amounted to a declaration on the part of those that sent it, of their intention to divide from the rest of the family. Within a fortnight thereafter (that is, on 31st May, 1917) Singaravelu died. These three events which quickly followed each other, that is, the 6th defendant's adoption, the issuing of the notice and the death of Singaravelu, led, as might be expected, to dissensions and disputes among the parties. The next important event which intensified the ill-feeling between the parties, was the granting of certain leases, to which reference will be made, by the 3rd defendant on the 26th July, 1919. The result of it was, that the present suit was filed in August, 1919, and on an application made immediately, a receiver was appointed on the 26th April, 1920, who took charge of the properties on the 1st June of that year and remained in possession till 1931. The institution of the suit was preceded by a scramble for possession in certain magisterial proceedings, to which we do not propose to refer here in any detail.

In the suit, several contentions were raised. To begin with, the plaintiff (who, it may be remarked, had not even been born in 1895) repudiated the validity of the family arrangement made in that year, attacked the allotment under which his father was given only a fifth share, and claimed, in virtue of his representing one of the two main surviving branches, a half share in the family property. Another contention related to the adoption of the 6th defendant, which defendants 1 and 2 attacked. A further issue was raised, namely, granting that the plaintiff was bound by the deed of 1895, did it alter the status of the family into one of severance? Then finally, the question was raised whether the leases granted by the 3rd defendant were binding upon the other members of the family. The Subordinate Judge who delivered his preliminary judgment on the 25th October, 1924, found that the arrangement of 1895 was binding upon the plaintiff, that it effected a disruption of the joint family, that the 6th defendant was validly adopted by Singaravelu and that the leases granted by the 3rd defendant were fraudulent and nominal. Pursuant to his findings, as to the binding character of the family arrangement and its legal effect, he held, adopting the allotment agreed to under the deed of 1895, that (1) the plaintiff, (2) the 1st and 2nd defendants, (3) the 3rd and 4th defendants together with their male issue, (4) the 6th defen-

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dant, and (5) the 9th defendant Sivaswami's widow as representing his branch, were entitled each to a fifth share in the family estate. The parties at the trial ranged themselves mainly into three groups represented by (1) the plaintiff, (2) defendants 1 and 2, and (3) defendants 3 to 8. The effect of the notice issued before the suit to which reference has been made, was to sever the group of defendants 3 to 8 from the other two groups. The institution of the suit produced the further result of dividing the plaintiff from each of the two remaining groups. In other words, the combined effect of the notice and the filing of the suit was to split the family into the three groups mentioned above, each becoming divided in status from the remaining two.

The learned trial Judge in his decree treated the 6th defendant as having become divided from the other members of his sub-group and accordingly allotted to him, as above mentioned, a separate $\frac{1}{5}$ th share; but in the directions he gave as to accounting, he treated the entire group as a single entity, without recognising the 6th defendant's status as a separated member, making the whole sub-group liable as one unit for certain amounts.

Appeals were filed against the Subordinate Judge's judgment. The High Court in 1930 confirmed his findings on all the main issues excepting one. The learned Chief Justice and Curgenven, J. (who heard the appeals) held that the plaintiff was bound by the deed of 1895, that the 6th defendant became Singaravelu's son by adoption and that the leases granted by the 3rd defendant were fraudulent and nominal. But differing from the trial Judge, they held that the legal effect of the deed mentioned above was not to produce a disruption of the joint family and gave effect to that view, by negativing the claim to a share of Sivaswami's widow (the 9th defendant) and dividing the $\frac{1}{5}$th share allotted to her by the trial Court among the other members of Ramu's main branch. Vide *Ramabhadra Odayar* v. *Gopalaswami Odayar*[1] where this case has been reported. It must be mentioned here that during the pendency of the appeals in the High Court, the plaintiff and the 3rd and 4th defendants were adjudicated insolvents; but what concerns us in this connection is the insolvency of the

1. (1930) 59 M.L.J. 782: I.L.R. 54 Mad. 269.

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3rd and the 4th defendants. In the decree passed by the High Court, by reason of their adjudication the 3rd defendant was separated from the 4th and they were allotted distinct shares. One further matter, to which we may conveniently here refer, is the fact that till the 3rd defendant's adjudication and for sometime thereafter, it was he that represented the minor 6th defendant, his natural born son; but from the 28th April, 1926, Meenakshi, the 3rd defendant's wife, acted for the minor as his guardian *ad litem* in all the subsequent proceedings. The shares as varied by the High Court were as follows:—

| | | | |
|---|---|---|---|
| Plaintiff | .. | | $\frac{1}{5}$th. |
| Defendants 1 to 2 | .. | | $\frac{4}{15}$ths. |
| Defendant 6 | .. | | $\frac{4}{15}$ths. |
| Defendant 3 and his sons | .. | $\frac{2}{15}$ths | $\frac{4}{15}$ths. |
| Defendant 4 and his son | .. | $\frac{2}{15}$ths | |

It remains to add that there was an appeal filed to His Majesty in Council by the 9th defendant, whose claim to a share was, as observed above, negatived by the High Court. The Judicial Committee dismissed her appeal in 1936, upholding the High Court's view of the legal effect of the family settlement of 1895. Vide *Purnananthachi* v. *Gopalaswami Odayar*[1] where this decision has been reported. In the meantime, in pursuance of the High Court's decree, the case was remitted to the lower Court with a view to a final partition decree being passed. The Subordinate Judge went into various matters recorded findings on them and in accordance therewith passed a final decree on the 26th September, 1932. The 6th defendant has filed the present appeal, impeaching that decree in various respects and several other parties have filed cross-appeals.

We have so far briefly set forth by way of introduction the previous history of this litigation and noted some material dates, with a view to make the contentions raised now intelligible. The first and the most important of them is that raised on behalf of the 6th defendant (the appellant), for whom it is contended, that he became severed from the other members of his sub-family, when certain written statements in the case were filed. The importance of this contention lies in this: by reason of the finding that the leases granted by the third defendant were sham and dishonest, his group con-

1. (1936) 71 M.L.J. 554: L.R. 63 I.A. 436 (P.C.).

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sisting of defendants 3 to 8 was collectively held responsible for such a large sum as Rs. 1,84,000 odd. This subsidiary group consists of three branches, those of the third, the fourth and the sixth defendants. If it could be shown that during the period when the third defendant incurred this liability, the sixth defendant had become separated in estate, the latter could with success contend that no portion of it should be thrown upon him. It may be mentioned that the fourth defendant puts forward a similar contention and urges that on the date of the written statements, and by reason of them, he also became severed from the third. Some question has been raised as to what the effect of the finding is, whether the Court should be deemed to have held that the leases are fraudulent or merely nominal, the suggestion being that in the former case, the transactions being affected by fraud, would in no event (that is to say, whether or not there was a severance), be binding upon the other members of the sub-family. But we do not think this argument need detain us. We have been referred to the relevant passages in the judgments both of the Sub-Court and of the High Court, and there can be no doubt that what was decided on the former occasion, was, that the leases were sham and that it was the 3rd defendant, that retained effective control over the lands, through the pretended leases. The lands no doubt ostensibly passed under the leases to certain third parties, who, however, by reason of the findings, must now be held to be mere dummies or the creatures of the third defendant. The leases were granted, as already mentioned, in July, 1919, and were to enure for a period of five years. The receiver that was appointed in the suit in 1920, was merely permitted to collect from the nominal lessees the rents reserved and was not allowed to take physical possession of the lands. The complaint was that the lands had been leased for unduly low rents, and by the preliminary judgment passed, the sub-group in question was held accountable for Rs. 1,84,000 odd (the sum mentioned above), that is, the difference between what might be described as proper or normal rents on the one hand and the stipulated rents under the bogus lease deeds on the other. The leases having been granted on the eve of the action, it will be seen that the entire liability was incurred under this heading during the pendency of this litigation. We are now concerned with three written statements: those filed

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by the third defendant's branch, the fourth defendant's branch and the sixth defendant, all bearing the date, the 6th of March, 1920. The major portion of the liability, the dates given above will show, was incurred subsequent to this date and it would therefore be in the interests of the fourth and the sixth defendants to contend, as mentioned above, that on the date of, and by reason of, those written statements, they became separated in interest from the third defendant.

This brings us to the question referred to above, namely, did the written statements, as contended by the fourth and sixth defendants, effect a severance of the joint status as among the members *inter se* of this sub-family? Now, there are these doctrines of Hindu law which have been established by authority. *First*, there may be a division of rights leading to a disruption of the joint status, although the physical division of the property may be postponed (*Appovier's case*).[1] From a definition or fixation of shares, an intention to divide may be legitimately inferred, as according to the true constitution of a Hindu family, no member, while it remains undivided can predicate of the property that he has a definite share and the act of fixing or defining the shares is inconsistent with, and repugnant to, this conception. This, we take it, is the meaning of the following observation of Sir Shadi Lal in *Alluri Venkatapathi Raju's case*[2]:

"It is a settled rule that when the members of a family hold the family estate in defined shares, they cannot be held to be joint in estate."

But the question in each case must be one of intention, whether in defining the shares, the parties intended to effect an immediate division (*vide* the observations of Sir W. Colvile in *Baboo Doorga Pershad* v. *Mussumat Kundun Koonwar*[3]). That the intention is the decisive factor, appears clearly from the judgment delivered by Sir John Edge in *Palani Ammal's case*[4]. His Lordship observes:

"But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be *reasons other than a contemplated immediate separation* for ascertaining what the shares of the coparceners on a separation would be." (The italicised portion is important.)

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1. (1866) 11 M.I.A. 75.
2. (1936) 71 M.L.J. 558: L.R. 63 I.A. 397: I.L.R. 1937 Mad. 1 (P.C.).
3. (1873) L.R. 1 I.A. 55.
4. (1924) 48 M.L.J. 83: L.R. 52 I.A. 83: I.L.R. 48 Mad. 254 (P.C.).

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The recent decision of the Privy Council (to which reference has already been made), which negatived the contention of the ninth defendant, puts the matter beyond doubt. His Lordship Sir Shadi Lal held, construing the deed of 1895, that although it defined and fixed the shares, it did not effect a separation of interests *in praesenti.* It was held, having regard to the intention of the parties, that there was no immediate severance of status but that it was postponed to a future date, *Purnananthachi* v. *Gopalaswami Odayar*[1]. *Secondly,* there may be a division of rights disrupting the whole family, resulting from an agreement among all the members; or, there may be a severance limited to such member alone that separates; the severance following either from an agreement on his part with the remaining members or from his individual volition. Even where there is such partial severance, produced in either way, there may be a division of rights without there being a physical division, *Bal Krishna* v. *Ram Krishna*[2] and *Kawal Nain* v. *Budh Singh*[3]. *Thirdly,* in the case of a separation resulting from individual volition, it is immaterial, as the very statement shows, whether the co-sharers assent; but the separating member must give intimation to them, of his unequivocal desire for separation, either by conduct or by words. The institution of a suit for partition by a member, being one of the most effective modes of asserting his right to separate, leads to his separation from the joint family, from the commencement of the action, although a decree may be necessary for working out the result of the severance (*Kawal Nain* v. *Budh Singh*[3]). *Fourthly,* the general presumption, in favour of every Hindu family being joint, unless the contrary is proved, does not continue, if it is established that one member has separated with reference to the others. This rule applies whether his separation has been brought by an agreement as in *Balabux* v. *Rukhmabai*[4] and *Jatti* v. *Banwari Lal*[5] or is the result of the communication by him to his co-sharers of his individual decision, as in *Bal Krishna* v. *Ram Krishna*[2]. The suggestion made at the Bar that in the latter class of cases

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1. (1936) 71 M.L.J. 554: L.R. 63 I.A. 436 (P.C.).
2. (1931) 61 M.L.J. 362: L.R. 58 I.A. 220: I.L.R. 53 All. 300 (P.C.).
3. (1917) 33 M.L.J. 42: L.R. 44 I.A. 159: I.L.R. 39 All. 496 (P.C.).
4. (1903) L.R. 30 I.A. 130: I.L.R. 30 Cal. 725 (P.C.).
5. (1923) 45 M.L.J. 355: L.R. 50 I.A. 192: I.L.R. 4 Lah. 350 (P.C.)

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this rule does not apply, is opposed to the clear trend of the decisions of the Judicial Committee. Among the cases which refer to this onus of proof, is *Bal Krishna* v. *Ram Krishna*[1] already referred to. There, the judgment shows that the separation that was found, was one that resulted from individual decision or the unilateral act on the part of the separating member, as is borne out by the following passage:

"It has been concurrently found by both Courts in India that he did so intend, and that his intention was communicated to the other co-sharers, and there is ample evidence upon which this conclusion could be based."

It is in a case of this sort that Sir George Lowndes, delivering the judgment of the Judicial Committee, reaffirmed the rule as to the onus of proof as above stated. *Fifthly*, it follows from the above rule, that there is no presumption, when one coparcener separates from the others, that the latter remain united; an agreement amongst the remaining members to remain joint must be proved like any other fact (per Lord Davey in *Balabux* v. *Rukhmabai*[2]; per Lord Dunedin in *Jatti* v. *Banwari Lal*[3], and per Sir Shadi Lal in *Alluri Venkatapathi Raju* v. *Dantuluri Venkatanarasimha Raju*[4]. But it is equally clear that the separation of one does not automatically involve the separation of the others (per Sir George Lowndes in *Bal Krishna* v. *Ram Krishna*[1] and per Sir John Edge in *Palani Ammal's case*[5]).

In the light of these principles, let us examine whether by reason of the written statements referred to above, there has been a severance of rights among the members *inter se* of the sub-family in question. As observed already, the combined effect of the notice of May, 1917, and the institution of the suit was to split this family as a whole into three distinct groups, each separated from the remaining two. As a severance in status can result from the filing of a plaint, it stands to reason that the filing of a written statement can produce a similar result, for, the instituting of a suit is, as mentioned above, but an instance of the application of the rule that a partition of rights can be brought about by an intimation of an unequivocal desire to

1. (1931) 61 M.L.J. 362: L.R. 58 I.A. 220 at 225: I.L.R. 53 All. 300 (P.C.).
2. (1903) L.R. 30 I.A. 130: I.L.R. 30 Cal. 725 (P.C.).
3. (1923) 45 M.L.J. 355: L.R. 50 I.A. 192: I.L.R. 4 Lah. 350 (P.C.).
4. (1936) 71 M.L.J. 558: L.R. 63 I.A. 397: I.L.R. 1937 Mad. 1 (P.C.).
5. (1924) 48 M.L.J. 83: L.R. 52 I.A. 83: I.L.R. 48 Mad. 254 (P.C.).

separate. Thus, if upon a proper construction of a written statement it contains an expression of such a fixed desire to sever, there is no reason why it should not effect a separation in the same manner as a plaint in a partition suit does. The question then is, on a proper reading of the written statements relied upon, can they be held to contain a clear and unambiguous indication of a resolve to separate? One of the most important questions raised in the suit was that relating to the alleged adoption of the 6th defendant by Singaravelu, and defendants 1 and 2, as mentioned above, were vitally interested in repudiating it. In the disputes that preceded the action, it is not denied that the adoption was impugned both by the plaintiff and the branch of defendants 1 and 2. In the plaint, however, this status of the 6th defendant was recognised, for, in truth the plaintiff stood neither to gain nor lose by the adoption, the persons whom it affected being defendants 1 and 2 alone. In their written statements, it may be mentioned, they repeated their denial of the adoption. But this does not really matter, for, defendants 3 to 8 had ample notice of the fact that the adoption was going to be questioned. It is essential to bear these facts in mind when construing the passages so strongly relied on. Turning to the plaint first, the share claimed by the plaintiff is one-half, in which event he concedes to the 6th defendant an one-sixth share; in the alternative, he claims for himself one-fourth, allotting on this basis, a similar one-fourth to the 6th defendant also. Then the plaintiff in the relief portion goes on to pray:

"That the shares of the plaintiff and of defendants 1 to 8 be determined."

There are other prayers which show that what the plaintiff was demanding was that he should be put in possession of his own share. What is contended is that the plaintiff is asking for a general partition, and for the purpose of the argument this may be conceded. Turning now to the written statement filed on 6th March, 1920, by the sub-family consisting of defendants 3, 5 and 7 we find that the shares are set out in paragraph 13. There a separate share is claimed on behalf of the 6th defendant in other words, there is an implied assertion that the 6th defendant's status is that of an adopted son. Then, passing to paragraph 25, which is said to contain the crucial passage we find in it the following averment:

"The demand for partition mentioned in paragraph 20 of the plaint is not

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true. However, these defendants have no objection to the joint family properties and liabilities, as they exist at present, being divided and the parties allotted their respective shares as set forth above, subject to their liabilities. We have always been willing to have this done."

This, Mr. Radhakrishnayya strongly contends, amounts to a group declaration on the part of defendants 3 to 8 of their definite desire to separate. The written statement filed on the same date by defendants 4 and 8 need not detain us, as it does no more than adopt in its entirety, the statement filed by the 3rd defendant and his sons. So does the 6th defendant's statement also adopt it, which was filed on his behalf by the 3rd. This last written statement contains the following further allegation:—

> "This defendant was duly adopted on 6th May, 1917 . . . . by the late T. S. Singaravelu Odayar . . . . By the said adoption this defendnnt as his adopted son has become entitled to a fourth share in the joint family properties."

It is contended that there is an unambiguous intimation of a desire to separate on the part of each of the three sub-branches. With this contention we are totally unable to agree. *In the first place*, the desire expressed is not to effect an immediate severance, the parties contemplating a division *in future* to be made by the Court. *Secondly*, what is expressed is not a fixed and unalterable desire to separate, the expression used being "The defendants have no *objection* to the family being divided". Does this convey a fixed determination to separate? Is there a clear, definite, unequivocal intimation of such a desire? On the contrary, the plain meaning of the words is that the parties leave it to the Court to effect or not, as its option, an *inter se* division. We must therefore disallow this contention.

Then Mr. Radhakrishnayya advances an alternative contention, that from the three written statements taken together, ought to be inferred an agreement to separate. This argument is mainly based upon his contention that the shares have been defined and fixed. Granting that this has been done, what is the consensus which these three statements evidence? What is asserted is, that "the parties have no objection" to a division being made on the basis of the declared shares. Supposing that the Court does not uphold the adoption and treat the 6th defendant as belonging to his natural branch—what then? The agreement is thus conditional on the Court

ultimately accepting the shares as enumerated by themselves. The words are perfectly explicit—not that that a partition absolute and definite is desired but a partition on an uncertain and asserted basis. Nor is this all. The shares have not been defined with a view to a severance to be effected *in praesenti* and the words of Sir John Edge in *Palani Ammal's case*[1] may be appropriately again quoted here:

"There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be."

In order to put forward the 6th defendant's adoption, it was necessary to state what his share would be, and for specifying his share, the shares of all the others had to be mentioned. The object therefore of the parties in enumerating the shares was not to produce an immediate division, but to safeguard their rights, by putting forward, in as clear a manner as possible, their claim based on the 6th defendant's adoption. Further, as Mr. Venkatarama Sastri rightly contends, how can a two-sided or a three-sided agreement result from unilateral declarations, each of which, taken by itself, is wanting in definiteness and is thus inadequate? We must therefore disagree with this alternative contention also.

In the result, we must hold, that there was no division in status between the 6th defendant and the other members of this group until the date of the preliminary decree made in the suit. Similarly, we must hold that the 3rd and the 4th defendants became divided *inter se*, only on the date when the High Court decree was passed.

Having disposed of the most important legal contention put forward, we now proceed to deal with the other grounds urged. By the preliminary decree, an enquiry was directed, from Singaravelu's death, as being roughly the date of the disruption of the joint status. The main lines of accounting were decided by that decree, which also determined that (1) the plaintiff, (2) defendants 1 and 2 together, and (3) defendants 3 to 8 collectively, were accountable to the general estate for certain monies. As already stated, the liability of the last mentioned group in relation to the other parties has not been disputed here. From our finding that they remained united till the date of the preliminary decree, it further follows that

1. (1924) 48 M.L.J. 83: L.R. 52 I.A. 83: I.L.R. 48 Mad. 254 (P.C.).

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as between the members of the group *inter se*, each is liable in proportion to his share. These remarks are specially made with reference to the adjudged liability of this group for the income of the lands covered by the bogus lease deeds. It is now contended in appeal that the Subordinate Judge, who passed the final decree, adopted a wrong mode for ascertaining the actual amount due. In our opinion, this contention is well-founded. He had to find what the difference was, between the actual yield of the lands, and what the receiver in fact realised from the nominal lessees. As one might expect, direct evidence was wanting and the question was one of approximation or the nearest possible estimate. There were two methods open to the learned Judge, and the simple point to decide is, which of those two was the sounder one? Certain commissioners were appointed to enquire into the probable yield and they placed before the Court some theoretical figures. There were data of a different kind, which the accounts maintained by the receiver furnished. As already mentioned, the lands were allowed to be in the possession of the nominal lessees, who paid the stipulated rents to the receiver appointed in the action. After the five year period for which the leases were granted was over, the receiver took possession and let the same lands in due course of administration. The accounting period in respect of these lands covered seven years, that is, from 1917 when Singaravelu died to 1924, when the leases expired. The receiver's subsequent possession of the self-same lands was of the same duration, that is, from 1924 to 1931. For this last mentioned period, indubitable evidence of the actual yield was furnished by the receiver's accounts. The question is, was the learned Judge justified in preferring the admittedly speculative figures of the Commissioners to the actual figures of the receiver? True, everything will be presumed as against a wrongdoer, but it does not follow that between two sets of available evidence, the Court will prefer that which is admittedly inferior. Moreover, on the previous occasion, it was by reason of the disparity between the stipulated rents and those realised by the receiver subsequently that first, the trial Court, and then the High Court condemned the leases as nominal. This being so, it stands to reason that the figures disclosed by the audited accounts of the receiver (*see* paragraph 76 of the judgment under appeal) available here for four years, should

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be adopted. He was an officer of Court and his administration at any rate in this respect has not been impeached. However, even while adopting his accounts, we are prepared to give effect to the presumption above referred to. The rent reserved under the bogus leases (we refer here to the rent in kind only) is about 10,000 kalams of paddy. According to the Commissioners' figures, the yield would be upwards of 17,000 kalams. According to the receiver's accounts it ranged from 15,000 kalams per year to 8,000 odd kalams. We have decided to work out the average figure based on the receiver's accounts, bnt subject to this qualification (on the principle that every thing will be presumed as against a wrongdoer), that the stipulated yield will be substituted for the actual yield, in those years where the latter happens to be less than the former. This in our opinion would be both reasonable and just. According to the learned Subordinate Judge, the amount for which defendants 3 to 8 are liable is Rs. 1,84,057-3-7 (*cf.* the foot-note at page 128 of the judgment). For this figure must be substituted the reduced sum of Rs. 90,470 (the figure agreed to by all the parties), arrived at in the manner stated above. The 3rd, the 4th and the sixth defendants will be each liable in respect of this amount in accordance with his share as found. The sixth defendant alone is the appellant, but under O. 41, r. 4, Civil Procedure Code, the decree as will be seen, is varied in favour of the entire group consisting of defendants 3 to 8.

It is represented on behalf of the plaintiff and defendants 1 and 2, that adopting the basis of accounting referred to above, we should reduce the amounts for which they have been held accountable by the lower Court. They have not questioned the amounts by filing separate appeals and we cannot comply with their request.

Here we must notice a contention which was urged in respect of this liability. Mr. Gopalaswami Aiyangar, who has argued this part of the appeal for the sixth defendant contends thus: this liability has arisen from the third defendant having received or retained more than what this sub-family was entitled to. By way of illustration, let us suppose that the entire yield was Rs. 15,000. According to the shares now determined, the plaintiff and defendants 1 and 2 would be entitled to Rs. 7,000 and defendants 3 to 8 to Rs. 8,000. Now,

in respect of the Rs. 7,000, that sum should be deemed to be a debt due by this branch to the other two branches. In the case of a debt (he goes on to argue) it is the duty of the manager to show that it is of such a character as to be binding upon the entire family (in this case the sub-family consisting of defendants 3 to 8); only when that is shown, provision must be made for its payment from the joint family property available for partition, otherwise the managing member alone should be made to bear it. This, in short, is the learned counsel's argument, which we must say, in the case of debts, is perfectly sound. But the facts here preclude the application of that doctrine. When they are analysed, it will be seen that no question of any debt does arise. Even taking the present Subordinate Judge's final figures as correct (the figures as revised by us make the case still stronger), the amount retained by the third defendant was less than the 8/15ths share to which this sub-group was entitled. That this is the result of the figures is not disputed and we must hold therefore that the principle for which the learned Counsel contends, does not apply. In general, the accounts to be taken at a partition is simply an enquiry into the existing assets. For mere misspending, the manager is not liable nor even for extravagance or waste, unless it amounts to actual misappropriation. It has therefore been held that

> "in the absence of fraud or other improper conduct, the only account the manager is liable to render is as to the existing state of the property divisible, and the enquiry directed by the Court must be in the manner usually adopted for the discovery of what in fact the family property consists of." (*Mayne's Hindu Law, 9th Edition, paragraph 470.*)

No misappropriation or fraud or similar misconduct is here alleged against the third defendant and this contention must therefore be over-ruled.

Then the next contention relates to Rs. 7,150 for which this group was held liable on account of certain buildings leased (p. 126 of the judgment). Here again, the Subordinate Judge has fallen into an error. The leases of these buildings are not among those impeached as sham or bogus. The period of accountability here is from 1917 to 1920. The learned Judge preferred here also the Commissioner's speculative figures to the amounts actually stipulated as rents under the leases granted. The *bona fides* of these leases have not been

attacked and no ground has been suggested for discarding the evidence furnished by them. We must therefore substitute Rs. 4,967-8-0 (*see* the review order in the present Documents Book, p. 264) for Rs. 7,150 awarded by the decree under appeal (*see* p. 126 of the judgment).

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The next contention relates to a sum of Rs. 23,602-8-0 for which defendants 3 to 8 were held liable on account of certain leases taken by the third defendant in 1923 (Fasli 1333). The facts are these. During the pendency of the suit several parties leased from the receiver under orders of Court portions of the family estate. The leases in question were obtained by the third defendant before the passing of the final decree, that is, before the joint status of this sub-family was disrupted. The Judge's observation in paragraph 105 of the judgment (it is admitted) is wrong, that the third defendant executed the leases both on his own behalf and on behalf of defendants 4 and 5; but that really does not matter. The question is, are the defendants 4 and 6 liable, as the learned Judge has held, for the amount payable under the leases? The facts connected with this matter are such as to bring into play the doctrine contended for by Mr. Gopalaswami Aiyangar, which we have already noticed. The taking of the leases amounted to the incurring of a liability. As though he were a stranger, the third defendant obtained leases from the receiver and for the rent his liability was that of a stranger-debtor. Thus, the rule that applies is, *that relating to debts* and *not to receipt of, or participation in*, the income. The question then is, has the debt been shown to be of such a nature that it binds the entire sub-family? In other words, has it been made out that provision should be made for its payment *from the family funds* (that is, of the sub-family) before partition? As between the manager and the other members, there is a duty cast on him to prove that the debt was incurred for the benefit of the family. Not only is such proof wanting here, but there is evidence to show that the taking of the leases was a personal act of the third defendant, which far from benefiting the family, was calculated to injure it. The receiver's report made at the time shows that the third defendant paid "*ruinous*", "*inflated and abnormal*" rents with the indirect object, namely, "of driving out the plaintiff and defendants 1 and 2". The learned Judge has held that this sum of Rs. 23,602-8-0 should

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be borne by the third, fourth and sixth defendants in proportion to their shares. This, for the reasons already stated, is wrong and we must hold that the third defendant is solely liable for this sum.

The next objection relates to certain sums amounting to Rs. 50,089-8-0. While this litigation was pending, the Court made orders from time to time directing payments to be made from the funds in the hands of the receiver, either to the parties or on their behalf.

There were three suits 10, 12 and 26 of 1920—where third parties had obtained decrees *by consent* against the third, fourth and sixth defendants. The decree-holders sought to execute the decrees, but by that time the third and fourth defendants had become insolvents. Then on the application made on the sixth defendant's behalf, the Court directed payments to be made to the creditors, from the family funds in the receiver's custody. These, as in the case of other similar payments, were made subject to adjustments at the final partition. There can be no shadow of doubt that both under the law and in justice, these amounts should be debited against all the members of this sub-group; but strangely enough the Subordinate Judge, on the curious ground that the payments were made at the sixth defendant's instance (he was then a minor), has made him solely liable for these sums. The fact that the third and fourth defendants had by then been adjudicated insolvents, makes no difference whatsoever (*vide* the decision of the Privy Council reported in *Sat Narain* v. *Sri Kishan Das*[1]) for, before a partition is effected, provision should be made for payment of the family debts. We must therefore, without hesitation, set aside the lower Court's direction and order that this amount should be borne by the third, fourth and sixth defendants according to their shares. The sums which go to make up the Rs. 50,089-8-0 are the following:—

| | | | |
|---|---|---|---|
| Rs. 9,457 | .. .. .. | | p. 146 of the judgment. |
| Rs. 2,900 | .. (out of Rs. 4,000) | item 1, p. 147 | do. |
| Rs. 1,500 | .. (out of Rs. 8,976-9-5) | item 3, p. 147 | do. |
| Rs. 7,500 | .. .. .. | item 14, p. 148 | do. |
| Rs. 7,500 | .. .. .. | item 15, p. 148 | do. |
| Rs. 11,820 | .. (out of Rs. 15,320) | item 28, p. 148 | do. |

To these sums must be added Rs. 6,275 and Rs. 3,137-8-0 which by reason of the orders made by the Judge in relation

1. (1936) 71 M.L.J. 812: L.R. 63 I.A. 384: I.L.R. 17 Lah. 644 (P.C.).

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to defendants 33 and 35, must be held to have been paid by the sixth and fourth defendants, respectively (paragraph 47 of the judgment).

The next objection relates to the concern known as the National High School, Mannargudi. The trial Judge in his preliminary judgment found that the whole family was entitled

"to a half share in the premises of the National High School . . . . and in the properties attached to it and in the right of management of the School". (Paragraph 94.)

The other moiety belongs to one Ramadurai Aiyar's family. On the previous occasion, it was contended in appeal, for the sixth defendant before the High Court, that certain debts had been incurred by Singaravelu in the course of management and that the trial Judge ought to have given a direction that those debts should be borne by all the members of the family. Dealing with this, the learned Chief Justice observes:

"Mr. Varadachari (who appeared for defendants 1 and 2) does not contend that all the members of the family are not liable for those debts, but argues that the point was never put forward and that we have no materials here to guide us. With those observations I entirely agree. All that we can do, it seems to me, is to say that the matter is left open as we have no materials here to enable us to say what debts are binding and what they amount to."

Among the points formulated on the present occasion by the Subordinate Judge for decision, there were two (*points 1 (a) and 14*, pages 108 and 110) that specially related to this contention. They directly raise the questions: (1) What were the amounts spent by the third defendant and Singaravelu? and (2) For what amount is each sharer liable? Having raised these points, the Subordinate Judge in paragraph 64 of his judgment declined to deal with them, on the ground, that the High Court had been requested to make a direction in that matter but had refused to do so. (*See also* paragraph 37 of the lower Court's judgment.) We are not prepared to construe the High Court's judgment in this way. It is elementary that provision should be made for payment of family debts before a family partition is made. When the learned Chief Justice observed that the matter was left open, all that he could have meant was, that he was not going to give

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a decision then and there. The appeal on that occasion was from the preliminary decree, and there were several matters to be gone into, as everybody knew, before the final partition decree could be made. Moreover, it would be intolerable after all this expense and delay, to drive the parties to a further suit for the purpose of this liability being determined. It may not be worth the while of the parties to have this case sent back for obtaining the decision of the lower Court on what is, in view of the magnitude of this case, a comparatively trifling matter. However, if they do not reach a decision as to the amount payable by each sharer, we direct that the lower Court shall, after taking evidence, return a finding in one month from the re-opening of the High Court on point 1 (*a*) referred to above. Objections, if any, must be preferred in ten days.

The next contention relates to the refusal of the learned Judge to hold the first defendant liable for certain kalams of paddy (paragraph 66 of the judgment). The matter arises in this way. The Subordinate Judge on the former occasion held defendants 3 to 8 accountable for 3,500 kalams of paddy; the High Court in appeal, differing from the Subordinate Judge, set aside his finding and in doing so, the learned Chief Justice observed:

"The evidence tracing its possession to the third defendant is in my view vague and having regard to the undoubted fact that the three villages in which the paddy was stored were in the possession of the first defendant, I do not agree that with safety that defendants 3 to 8 cannot be held accountable for it." (Page 302 of the Privy Council Pleadings Book.)

When the case went back to the trial Court, the Judge was requested to find that the first defendant was liable. It is not disputed that he cannot be held accountable on such material as now exists. In the lower Court, defendants 3 to 8 did no more than rely upon the observation of the learned Chief Justice quoted above; but that does not carry them far. If they had offered to adduce evidence and had been prevented from doing so, they would have had a legitimate ground of complaint; but they did not adopt this course and we cannot hold in the circumstances that the Subordinate Judge is wrong.

The next objection affects certain stranger defendants impleaded in the suit. Two properties in their possession were claimed on the ground that they belonged to the family and the lower Court gave a decision in its favour, which on appeal on the previous occasion was confirmed by the High Court. The

parties so impleaded were defendants 26 and 27. The former died and the 28th defendant was brought on the record as his legal representative. The properties claimed were item C-5 a specific moiety in a certain village and item C-7, an entire village. C-5 has been held to belong to the family and as to C-7, the finding is that the family and the stranger defendants own it in two equal moieties. The question was raised whether these defendants were liable for subsequent profits, that is to say, for the profits which accrued due during the pendency of the suit. The lower Court has awarded Rs. 28,600 as the profits payable for the period from fasli 1330 to fasli 1340 (1920 to 1930), to be divided among the members of the family according to the shares declared. The appellant contends that a larger amount ought to have been granted, his objection relating both to the Judge's estimate of the yield and the rate fixed for the paddy. It is argued that the lower Court has taken a somewhat lenient view in regard to the respondents. That may be so, but the question was at the best, one of estimate, depending upon various uncertain factors, and after going through the judgment carefully, we are not prepared to differ from the learned Judge's conclusion. The appeal against these respondents is dismissed but without costs.

In this connection the memorandum of objections filed by the twenty-seventh defendant (why the 28th has not joined, does not appear) remains to be considered. He contends that the lower Court acted in excess of its jurisdiction in embodying in its final decree the direction as to the payment of profits. The argument has been put in more than one way. First, it is suggested that there was no claim for mesne profits in the suit. A glance at the pleadings and the subsequent proceedings to which we shall presently refer, will show that there is no substance in this contention. It is sufficient for this purpose to refer to the written statements alone. In paragraph 10 of the original statement filed by them, defendants 26 and 27 allege "they are not bound to surrender the same *with profits* to the plaintiff." In paragraph 16 again, they object, "the *income* claimed by the plaintiff from us is not valid". In a further statement, filed four years later, it is repeated in paragraph 5 that the claim to *profits* is not maintainable. So much for the pleadings; turning now to their conduct during

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the progress of the suit that shows also the same consciousness on their part. In 1922, that is, long before the passing of the preliminary decree, the Court was requested on behalf of the family (by means of two applications I. A. Nos. 626 and 627 of 1922) to direct the receiver to take possession of the two items mentioned above (C-5 and a half of C-7) and to collect the mesne profits that accrued due. The petitions were strenuously opposed and the defendants in question filed on 6th December, 1922, a counter-affidavit (which has not been printed but a certified copy thereof has been produced and shown to us), and the allegations made in it are extremely important. They say that the claim of the family relates to the two villages mentioned above, and allege that they have a valid defence in respect of each of them. Then they go on to assert that before the issues raised in the suit are disposed of, the Court has no jurisdiction to direct them either to deliver the villages or to pay the mesne profits. Then they add the significant sentence:—

> "Mesne profits have to be ascertained *later on* if and when the plaintiff succeeds in the suit."

On this, the Judge disallowed the petitions, observing *first*:

> "There is no reason to dispossess defendants 27 and 28 of the property in their possession or to direct them to pay its profits to the receiver before deciding the dispute about the ownership of the said property." (*Vide* Order dated 19th December, 1922, in I.A. No. 626 not printed.)

*Secondly*:

> "The Receiver cannot file a regular suit against them as they are already parties to the suit." (*Vide* Order dated 12th March, 1923, in I.A. No. 627.)

These proceedings show beyond a shadow of doubt, that they not only recognised the existence of the claim but invited the Court to deal with it at a later stage.

It is then contended that the final decree for mesne profits, not having been preceded by any preliminary decree relating to them, is incompetent. This contention is in our opinion untenable. The present suit, as the learned Judge rightly observes, is neither a simple suit for partition nor a simple suit for possession. The respondent has not been able to point to any statutory requirement which the lower Court can be said to have transgressed, and it is difficult to see how any question of jurisdiction can arise. O. 20, r. 12,

Civil Procedure Code, provides for two decrees in respect of subsequent mesne profits; preliminary and final; but that rule relates to suits for possession pure and simple. Suits (*a*) for partition and (*b*) separate possession of a share of property, are governed by O. 20, r. 18; but under that provision, the Court has discretion to pass either a single decree or two decrees. The rule enacts that only where "the partition or separation cannot be conveniently made without further enquiry", a preliminary decree may be passed, which by necessary implication directs the passing of a final decree at a later stage. Other specific provisions no doubt there are, but they relate to administration suits, partnership suits and suits for accounts between principals and agents. Thus, it will be seen that the Code has not expressly laid down any procedure in regard to composite actions, such as the present one is.

Now, let us turn to the course which the lower Court has pursued, in order to see whether any principle of law or of justice has been infringed. As already observed, the preliminary judgment delivered in 1924 disposed of the question of title, it having been held that C-5 belongs solely to the family and C-7 is owned in two equal moieties by the family and the defendants in question. The decree that was drawn up contained a declaration to this effect. That being a preliminary decree, it embodied, as might be expected, various declarations and appointed a Commissioner to divide the properties. It was then open to the Court to have gone into the question of the liability for mesne profits; but was it incumbent upon it to have done so? It will be recalled that the Judge, invited to do so by the defendants themselves, had already decided that that question ought to be gone into at the passing of the final decree. Then when the stage arrived for the passing of that decree, numerous and complicated were the questions raised, and, the Judge in dealing with them has shown great care and circumspection. As his final order will show, he dealt with the matters in controversy in fragments and pronounced various orders from time to time between the 6th July, 1931 and the 26th September, 1932. On the first mentioned date, he dealt with the division and disposal of the properties. The learned Judge allotted item C-5 to the third defendant (a member of the family) and directed item C-7 to be divided in two equal halves between the fourth defendant (another member) and defendants 27 and

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28. This happened, as already stated, on the 6th July, 1931. Then on the 17th August, the Judge formulated certain points for decision, of which *point No. 10* related to the claim in question for mesne profits. Meanwhile, an application was made on behalf of the family for the delivery of the lands covered by C-5 which the Judge granted, and delivery was accordingly given on the 22nd February, 1931. As to the moiety of C-7, the defendants, before a formal order could be made, surrendered possession. Then in due course, point No. 10 referred to above was gone into, fully considered and the Judge delivered his order on the 26th September, 1932.

The question resolves itself into, was there any necessity, in respect of these defendants, to pass two decrees for mesne profits; preliminary and final? As we have shown, the procedure adopted has been so elaborate, that no sort of prejudice has been caused to them. As observed in *Raja Peary Mohan* v. *Manohar*[1], the cases mentioned in O. 20 of the Code are mere illustrations of preliminary decrees and are not intended to be exhaustive (page 260). Ordinarily, the learned Judges say, there should be in certain classes of cases a preliminary and final decree; but there are exceptions to this rule and the case before them was an instance in point.

It is then contended, the preliminary decree of 1924 being silent on the question of mesne profits, the Court was precluded at a later stage from going into it. That such a contention cannot prevail, has been held in several decisions, with which we agree. (*Hussain Sahib* v. *Hammad Saheb*[2], *Ramaswami Aiyar* v. *Subramania Aiyar*[3] and *Ramanathan Chetty* v. *Alagappa Chetty*[4]). As observed in the second of the cases referred to above by Sadasiva Aiyar, J. (with whom Napier, J., concurred), in all adjudications which are not intended to be final, there is, and ought always to be, an implied reservation of leave to all parties, to apply for further directions, necessary for a complete disposal of the litigation.

There is a decision of the Judicial Committee, which may be usefully cited in this connection. The Subordinate Judge had there before him a case consisting of two parts: a question

1. (1923) 38 C.L.J. 255.
2. A.I.R. 1923 Mad. 43.
3. (1922) 43 M.L.J. 406: I.L.R. 46 Mad. 47.
4. (1929) 59 M.L.J. 102: I.L.R. 53 Mad. 378.

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of title and an incidental question of accounting. Their Lordships point out, that it was for the obvious advantage of the parties, and they proposed (*as here*), that the first part should be decided and the second reserved for decision. Accordingly, the Court decided the first question and reserved the second for further investigation. That procedure was attacked as having been illegal. Their Lordships in that connection observe:

"If the Code forbade the parties and the Court so to arrange the disposal of a law suit, it would be a very startling thing. It is not pretended that the Code contains any such prohibition. Neither can it be pretended that the Court did not do justice in giving a decision on the leading part of the case at a time when it was not possible to decide on the subsidiary part."

Then follows a further observation equally important here:

"Even if the Court had erred in form, it was in form only, not misleading or injuring anybody; and to treat such an error, as a bar to the proceedings reserved for further decision, is a serious miscarriage of justice." (*Maulvi Muhammad Abdul Majid* v. *Muhammad Abdul Aziz*[1].)

Every word in these extracts applies to the facts before us.

A similar question arose in a case to which one of us was a party. The lower Court there, instead of awarding mesne profits by the decree itself, directed that the enquiry should be postponed to the stage of execution. It was observed in the course of the judgment:

"While deploring this practice, we must still ask ourselves, is it a question of complete want of competency, or, of erroneous exercise of jurisdiction? The distinction between absence of jurisdiction and irregular exercise of jurisdiction has been frequently pointed out. If the Court fails to conform to the provisions of O. 20, r. 12, it is impossible to hold that the defect is one of inherent incompetency." (*Kemgam Swamy* v. *Vaddadi Subbamma*[2].)

Therefore we are clearly of the opinion that the Court acted rightly in dealing with the case in two parts as it did, and granting that there was any error, it was *one of form* and *not of substance.*

There is yet another ground on which the lower Court's decision can be supported. That no person can be permitted to blow hot and cold, is a well-known doctrine. The decision of the Judicial Committee in *Sadasiva* v. *Ramalinga*[3] gave effect to this principle in circumstances similar to the present. That case related to a claim made in execution to profits not awarded by the decree itself. There were, however, certain

1. (1896) L.R. 24 I.A. 22: I.L.R. 19 All. 155 (P.C.).
2. (1929) 57 M.L.J. 728 at 730: I.L.R. 53 Mad. 838.
3. (1875) L.R. 2 I.A. 219.

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proceedings which resulted in the execution of security bonds by the defendant, who undertook to pay subsequent mesne profits. Their Lordships held that upon the general principle of estoppel, the respondent could not be heard to say that the mesne profits were not payable under the decree, and there might arise cases, where the questions raised should be determined by proceedings quite contrary to the ordinary *cursus curiae*.

The facts of the present case are even stronger. Not only did the defendants invite the Court to hold that the enquiry was to be postponed to a future date, with which contention the learned Judge agreed; what is more, he granted them, as already observed, immunity from, being sued on the ground that a separate suit would not lie against them.

Thus, the ground of want of jurisdiction completely fails and we must hold that the lower Court was justified in granting mesne profits. The memorandum of objections fails and is dismissed with costs to be apportioned between (1) the plaintiff, (2) defendants 1 and 2, (3) the third defendant's branch, (4) the fourth defendant's branch, and (5) the sixth defendant in accordance with their declared shares. The costs will be taxed in the usual course.

Lastly, it is contended that the lower Court's decree is wrong in regard to the direction it contains as to the maintenance payable to the tenth defendant. By the preliminary decree passed in 1924 her maintenance was fixed at Rs. 125 a month, and the question, from what date it was payable, was left to be determined by the final decree to be passed. The clause in the decree relating to this may be quoted:

"The tenth defendant is entitled during her life to maintenance at the rate of Rs. 125 a month from the sixth defendant's estate. The provision for the tenth defendant's residence and what properties ought to be charged with her maintenance and from what date the tenth defendant is entitled to claim maintenance will be determined in the final decree."

This direction was confirmed in appeal by the High Court on the previous occasion. The Judge has now held that the maintenance is payable from the 25th March, 1920, when she filed her written statement.

What is argued in the appeal is, that in regard to the arrears now declared payable, there is no reason to hold the sixth defendant alone liable. The argument is thus put: It

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Venkatasubba Rao, J.

has now been held that till the date of the preliminary decree the joint status of defendants 3 to 8 continued; this being so, it follows under the Hindu law that for the maintenance that became payable prior to the date of that decree, all the members of the sub-family would be liable. We cannot, it seems to us, enquire whether this contention is sound or not. The terms of the preliminary decree above quoted preclude us, in our opinion, from going into this question. On two points the direction is quite explicit; first as regards the rate, second as regards the person liable. The decree says in terms, that it is the sixth defendant's estate that is liable for the maintenance. We must therefore disallow this contention.

It remains to be mentioned (as this case is likely to go to the Privy Council) that the eighteenth respondent, the fifth defendant's son who was impleaded as a party to the appeal in virtue of our order dated 16th March, 1937, contends that our decree should contain no provision which would operate to his prejudice. We are not prepared to agree with this contention.

In the result, the lower Court's decree is modified as indicated in the various paragraphs above. We understand that the result of our judgment will be to vary the directions of the lower Court in regard to the charges created by its final decree (*vide* para. 4, pp. 88 and 89 of the pleadings Book). The parties will bring in a scheme specifying in what manner the decree should be varied in this respect. The sums as now found due by us to the various parties will carry interest in the manner provided for in the lower Court's decree.

[Their Lordships gave the necessary directions for costs.]

* * * *

After the return of the finding of the lower Court upon the issue referred by this Court for trial, the Court (*Venkatasubba Rao* and *Abdur Rahman, JJ.*) made the following

ORDER.—The point to decide is whether the amount in question was borrowed and expended on behalf of the family. The books of the institution containing the necessary entries were in the High Court. The claimant therefore in support of his claim relied upon the entries as they appeared in the printed book marked Ex. II. It seems to us that we are not in a position to pronounce judgment in the appeal we are hearing without taking additional evidence. In pursuance of

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our direction the clerk who maintained the accounts has appeared and his evidence has to be recorded. The evidence is for the purpose of showing that the sum in question was borrowed and expended for the school.

The case again came on for hearing after the additional evidence was taken in pursuance of the above order and the Court delivered the following

Venkatasubba Rao, J.

JUDGMENT. *Venkatasubba Rao, J.*—The learned Judge has now returned a finding on the matter on which he was directed to hold an enquiry. It relates to the amounts spent by the group consisting of defendants 3 to 8 in respect of the management of the National High School, Mannargudi and the adjustments that have to be made in the final account. The learned Judge has set out in paragraph 5 of his order the items that were in dispute. As to the first item his finding is against the group mentioned above. This part of the finding has not been questioned by Mr. V. Radhakrishnayya in his argument before us.

As to the second item, the learned Judge holds that it has been proved that the amount covered by it was spent by the 3rd defendant (paragraph 7 of his order). The only question then is, are the other branches liable to contribute in proportion to their shares? The person that actually incurred the expense was, as already stated, the 3rd defendant. During the period in question, as appears from the main judgment, the group, of which the 3rd defendant was a member consisted of defendants 3 to 8. The judgment proceeded upon the ground that these defendants had not become divided in interest *inter se*. The learned Judge's observation to the contrary is clearly wrong. For the very large amount for which the 3rd defendant rendered himself responsible, the entire group was held liable, on the ground that there had been no *inter se* division in status. This being so, the only question is, are the other branches of the family liable for the amount or not? It being found that the expense was properly incurred the liability is a common family liability and the other branches are equally liable for the amount. It follows from this that the sum in question must be borne by the parties in proportion to their shares as declared by the main judgment, and an order is made accordingly.

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The next amount is that covered by paragraph 8 of the lower Court's order. It relates to the decree passed in O. S. No. 57 of 1921. That was a decree obtained by one Kannappa Chetty against the third defendant and the stranger trustee Ramadurai Aiyar since deceased. There was a compromise decree passed in the suit and it recited that the third defendant paid Rs. 4,400 a moiety of the decree amount, and that Ramadurai Aiyar was to be liable for a like sum, which represented the other moiety. The point to decide is, was this decree passed in respect of monies properly borrowed on account of the institution in question? There was an appeal pending here relating to the school and the requisite account books remained in this Court. Owing to this fact, the claimant at the enquiry in question in the Court below contended himself with filing the printed book (Ex. II) which contained the relevant entries, and to this course no objection was taken there. While hearing the appeal we thought it necessary that the original account book and the original entries should be formally proved. In pursuance of a separate order made by us, Shamanna Aiyar, the clerk of the school who maintained the accounts, was examined, and his evidence makes it perfectly clear that the sum covered by the decree was borrowed and expended for the purposes of the school. The learned Judge, however, did not have this evidence before him and as formal proof was wanting, he was constrained to negative the claim. We must hold that the amount under this head must be borne by all the parties in proportion to their shares as declared by the main judgment.

As to the last claim dealt with by the learned Judge (paragraph 9 of his order), it is agreed by all the parties concerned that the finding is correct. There is a reference in the lower Court's order to an appeal pending in the High Court, subject to the result of which the finding was recorded. That appeal has been disposed of, and the qualification in the order has therefore become unnecessary. Paragraph 11 of the lower Court's order contains the necessary declaration but there is no reason why the liability should be limited to Rs. 11,981-5-0 mentioned there. It is agreed that the liability to be apportioned is the entire liability under the decree excluding the costs in the appellate Court. With this modification the lower Court's finding under this head is confirmed.

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Then remains the subject-matter of C. M. P. No. 5202 of 1937. This relates to certain sums the sixth defendant paid subsequent to our main judgment, amounting in the aggregate to Rs. 27,461-8-0. These sums stand upon the same footing as those that went to make up Rs. 50,089-8-0 dealt with under that judgment. The sixth defendant, by having subsequently paid the amounts in question, has completely discharged the three decrees to which we made reference in the judgment, namely, O. S. Nos. 10, 12 and 26 of 1920. If the principle adopted in the main judgment is correct, the sum of Rs. 27,461-8-0, the subject of the present claim, must be borne by the parties in the same manner and in the same proportion as the amount of Rs. 50,089-8-0 dealt with, as already stated, by that judgment, and a direction to this effect is accordingly made. It is satisfactory to note that these decrees have been now fully satisfied; it has been possible to make the necessary adjustment in respect of the sums now claimed, although the payments were made subsequent to our main judgment, by reason of the fact that the final partition decree has not yet been made.

B. V. V. —— *Decree modified.*

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, LORD ROMER, SIR LANCELOT SANDERSON, SIR SHADI LAL AND SIR GEORGE RANKIN.

Dinabandhu Chatterjee .. *Appellant**

*v.*

Ashutosh Chatterjee and others .. *Respondents.*

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*Bengal Land Revenue Sales Act (XI of 1859), Ss. 2 and 3—Arrears of revenue—Last date for payment—Period of grace to be included—Non-payment within period fixed—Sale of estate by revenue authorities.*

S. 2 of the Bengal Land Revenue Sales Act merely defines an arrear of revenue. It makes it clear that the proprietor of an estate is allowed to pay a kist or instalment on any day during the month for which it has been fixed. The section does not impose any penalty for the non-payment of the revenue during the month. And under S. 3 of the Act the Board of Revenue has fixed a period of grace for the payment of the arrears of revenue. Consequently the mere fact that there is an arrear to be paid in respect of an estate

*P. C. Appeal No. 28 of 1937. 18th July, 1938.
Bengal Appeal No. 26 of 1935.

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does not lead to any untoward consequence until the expiry of the last date of payment fixed under S. 3. In the event of non-payment on the date so fixed it is competent for the Revenue authorities to sell the estate for arrears of the revenue.

*Saraswati Bahuria* v. *Surajnarayan Chaudhuri,* (1931) 60 M. L. J. 350: I.L.R. 10 Pat. 496 (P.C.), considered.

Decision of the High Court of Calcutta reversed.

Appeal from a decree dated 21st June, 1935, of the High Court, Fort William, Bengal (*S. N. Guha* and *Lodge, JJ.*) reversing a decree dated 13th August, 1932, of the Second Subordinate Judge, Faridpur.

*J. M. Pringle* for Appellant.—The respondents' case here is that January 12 was not the last day for payment of arrears of land revenue, but the day on which payment became due. Counsel referred to the Tauzi Manual issued by the Bengal Board of Revenue. Under S. 2 of the Act of 1859 revenue is payable by monthly instalments or kists. Under the rules it is collected in two instalments, and the last dates for payment of instalments due have been fixed as 12th January and 28th March in each year. It is clear that if the instalments due on those dates are not paid, they become arrears for which the estate may be sold. (Counsel referred to *Saraswati Bahuria* v. *Surajnarayan Chaudhuri*[1], *Jagdishwar Narayan* v. *Muhammad Haziq Hussain*[2], *Sree Sree Radhagobinda Deb Thakur* v. *Girijaprasanna Mukherji*[3], *Jadunandan Singh* v. *Srimati Savitri Devi*[4] and *Nanak Prasad Sahu* v. *Musammat Kaseda Kumri*[5].) The "instalments" under the rules of collection are not to be confused with the instalments or kists referred to in S. 2, which instalments become in arrear on the first of the month following the month in which they are payable.

*J. M. Parikh* and *Sir H. S. Gour* for Respondents.—12th January and 28th March in each year are kist days, the days on which kists become due, and after which they become in arrear. The reasoning of the Subordinate Judge must be wrong when he says that nine kists must have fallen into arrear by 12th January, and the figures of the actual arrears in any case do not bear that out. *Jagdishwar Narayan* v. *Muhammad Haziq Hussain*[2] and *Indian General Navigation & Ry. Co., Ltd.* v. *Firm Daulat Ram Chaturbuj*[6] are distinguishable on their facts, and in *Saraswati Bahuria* v. *Surajnarayan Chaudhuri*[1], the Board held that the instalment was payable on 28th March and that there were no arrears. *Krishna Chandra Bhowmick* v. *Pabna Dhana Bhandar Co.*[7]

1. (1931) 60 M.L.J. 350: I.L.R. 10 Pat. 496 (P.C.).
2. (1926) L.R. 53 I.A. 246 at 250.
3. (1931) I.L.R. 59 Cal. 186.
4. (1933) I.L.R. 12 Pat. 750 (S.B.).
5. (1935) I.L.R. 15 Pat. 272.
6. A.I.R. 1924 Pat 527.
7. (1931) 62 M.L.J. 421: L.R. 59 I.A. 68: I.L.R. 59 Cal. 1034 (P.C.),

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appears to have proceeded on the ground that the last date for payment and the kist date were the same. The High Court were accordingly right in finding that the kist date was 12th January, with the result that the kist became in arrear on 1st February, following, and the last day for payment was the following 28th March, and the sale of the estate on 22nd March, consequently without jurisdiction as being premature.

18th July, 1938. Their Lordships' judgment was delivered by

Sir Shadi Lal.

SIR SHADI LAL.—This is an appeal from a judgment and decree of the High Court of Judicature of Fort William in Bengal dated the 21st June, 1935, which reversed the judgment and decree of the Second Subordinate Judge of Faridpur dated the 13th August, 1932, and set aside the sale of an estate for arrears of land revenue.

On the 22nd March, 1930, a permanently settled estate, bearing tauzi number 299 of the Backergange Collectorate, was sold by public auction for arrears of land revenue. Three persons, namely, Ashutosh Chatterjee, Rai Rajani Kanta Chatterjee and Suresh Chandra Chatterjee, were proprietors of that estate, each owning one-third share therein. The total land revenue assessed on the estate is Rs. 13-1-1, of which Rs. 5-8-10 has to be paid by the 12th January of each year, and the remainder Rs. 7-8-3 by the 28th March. It is common ground that in respect of the amount of Rs. 5-8-10 which was payable on or before the 12th January, 1930, two co-sharers, namely, the plaintiff, Ashutosh Chatterjee, and the second defendant, Rai Rajani Kanta Chatterjee, duly paid their share of the revenue, but the third co-sharer, Suresh Chandra Chatterjee, failed to make any payment. There stood, however, to the credit of the estate, 9 annas and 9 pies, which had been overpaid on account of the previous instalments. After giving credit for this small sum, the Collector found that there was a deficit of Rs. 1-3-9 in the amount of land revenue, which was to be paid by the 12th January, 1930.

The estate was, therefore, entered in the Arrear List of the Collectorate, and sold on the 22nd March, 1930, for Rs. 700 to the appellant, Dinabandhu Chatterjee, who was the highest bidder at the auction.

Thereupon, Ashutosh Chatterjee impeached the sale on various grounds; and, after an unsuccessful appeal to the

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Commissioner, he brought the present suit in the Civil Court against the auction purchaser and his own co-sharers in the estate. The main ground, upon which the sale was attacked, was that the Collector had no jurisdiction to hold the sale on the 22nd March, 1930. This ground of attack was repelled by the purchaser, and the dispute between the parties was embodied in the following issue framed by the Court:—

"Was the sale of Taluk No. 299 by the Collector of Backergange on the 22nd March, 1930, at revenue sale, illegal, without jurisdiction, and contrary to the provisions of Act XI of 1859?"

This issue was answered in the negative by the Trial Judge, who upheld the sale and dismissed the suit. On appeal to the High Court, his judgment was set aside, and the suit was decided in favour of the plaintiff.

From the judgment of the High Court the auction purchaser has brought this appeal to His Majesty in Council, and the question which their Lordships have to determine is whether the sale was held on a date before the latest date fixed for the payment of the arrear of revenue.

What is the law which defines an arrear of revenue, and which determines the date upon which an arrear must be paid, the consequence of non-payment thereof on that date being that the estate in arrear becomes liable to sale at public auction? The law on the subject is contained in the Bengal Land Revenue Sales Act XI of 1859. By S. 2 of that statute, it is provided that:—

"If the whole or a portion of a kist or instalment of any month of the era according to which the settlement and kistbandi of any mahal have been regulated be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue."

This section refers to the kist or instalment of land revenue fixed in accordance with the terms of settlement and kistbandi of an estate, and contemplates the payment of a kist or instalment every month. It then defines an arrear of revenue. If the whole or a portion of a kist or instalment of revenue is not paid on, or before, the last day of the month, during which it was to be paid, the sum remaining unpaid on the first day of the following month shall be deemed to be an arrear of revenue.

It will be observed that the section merely defines an arrear of revenue. It makes it clear that the proprietor of an estate is allowed to pay a kist or instalment on any day during the month for which it has been fixed. The section

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does not impose any penalty for the non-payment of the revenue during the month, it merely states that if it has not been paid during the month in which it was to be paid, the sum remaining unpaid becomes on the first day of the following month an arrear of revenue. But the defaulting proprietor does not suffer any harm, even if he does not pay immediately the revenue so declared to be in arrear. The law gives him a period of grace for payment, and this concession is granted by S. 3 of the statute, which is in these terms:—

"Upon the promulgation of this Act the Board of Revenue shall determine upon what dates all arrears of revenue . . . shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts . . . shall be sold at public auction to the highest bidder."

In pursuance of S. 3, the Board of Revenue has fixed for an estate paying an annual revenue exceeding Rs. 10, but not exceeding Rs. 50, the 12th January and the 28th March in each year as the latest dates, on or before which, an arrear of land revenue must be paid. It is only when the latest date for the payment fixed under the section has expired without payment, that the estate becomes liable to sale at public auction on a date thereafter which may be fixed for the purpose.

The question, therefore, arises whether the sale in dispute was held after the expiry of the last date of payment as contemplated by the aforesaid section. Now, exhibit C, which is a certified copy of the kistbandi relating to this estate, shows that Rs. 13-1-1, the total revenue assessed on the estate, is payable in monthly instalments according to the Bengali era, that is to say, the revenue is payable by instalments each month from Baisakh to Chaitra. These instalments are called kists in S. 2 of the Act, and if any instalment is not paid during the prescribed month, the sum so unpaid becomes an arrear on the first day of the following Bengali month. But as already stated, the mere fact that there is an arrear to be paid in respect of an estate does not lead to any untoward consequence until the expiry of the last date of payment fixed under S. 3. As the mere failure to pay each instalment in the prescribed month does not entail any penalty, the details of the monthly instalments were omitted from the tauzi ledger of an estate, and only the demand for arrears, for which the estate would become liable to sale after the latest date of payment, was entered in the tauzi ledger.

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The tauzi ledger of this estate mentions Rs. 5-8-10 as the net demand payable in respect of the January Kist. The expression "Kist", as explained in the Tauzi Manual issued by the Board of Revenue, Bengal, means the period between one latest day for payment of arrears of revenue and the next, and is not used in the restricted meaning assigned to it in S. 2 of the Act. Thus, in the case of this estate, which paid revenue in two instalments the expression "January Kist" means the period beginning on 29th September, and ending on the 12th January, and the "Kist day" means the latest day of payment on which that period expires—now, 12th January, 1930, as shown in the tauzi ledger, was the latest date for payment of that sum. But it appears from the tauzi ledger that of the aforesaid net demand, Rs. 4-5-1 were duly paid on or before the 12th January, 1930; and that only Rs. 1-3-9 remained unpaid on the last day fixed for the payment of arrears. On the expiry of that day the estate became liable to sale by public auction, and the sale on the date in question, namely, 22nd March, 1930, did not infringe the law.

The judgment of this Board in *Saraswati Bahuria* v. *Surajnarayan Chaudhuri*[1] shows that their Lordships thought that the sum for the non-payment of which the property was sold in that case was a kist as contemplated by S. 2 of the Act, and that the 28th March was the date fixed for the payment of the kist. They accordingly held that the sum did not become an arrear until the 1st April. The sale held before the 7th June, the last date fixed for the payment of arrears was, therefore, invalid. That judgment cannot be taken as displacing the meaning which their Lordships have, in the present case, shown to attach to the entry of the date 12th January, 1930, under the head "date" in the tauzi ledger. It is to be observed, that the appeal in that case was heard *ex parte* and the meaning of the entry "28th March" and of the references to "Kist" was not examined in the light of the information now available. Moreover the evidence in that case included the sale proclamation issued under S. 7 of the Act, which was misleading. The case must, therefore, be regarded as proceeding upon its own facts.

The learned Judges of the High Court, who decided the present case, have wrongly assumed that what is called a net

1. (1931) 60 M.L.J. 350: I.L.R. 10 Pat. 496 (P.C.).

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demand in the tauzi ledger in respect of the estate in question was a kist as contemplated by S. 2, and that the kist was payable in January and became an arrear on the 1st February. They think that the latest date for the payment of an arrear, accruing on the 1st February, was the 28th March, 1930, and that the sale, which was held on the 22nd March, 1930, was, therefore, held before the date on which the estate incurred the liability to sale. The reasoning of the learned Judges is faulty, as it involves the assumption that Rs. 5-8-10, for the payment of which the 12th January was fixed, was an instalment under S. 2 of the Act; while it was an arrear of revenue, for the payment of which the 12th January, 1930, was fixed under S. 3. In the event of non-payment on, or before, the date fixed for the payment of arrears, the estate became liable to sale, and the sale which was held on the 22nd March, 1930, after the latest date for payment of arrears, was within the jurisdiction of the Collector.

The result of the above discussion is that the appeal should be allowed, the decree of the High Court dated the 21st June, 1935, set aside, and the decree pronounced by the Trial Judge on the 13th August, 1932, restored, with costs here as well as in the High Court. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Barrow, Rogers & Nevill.*

Solicitors for Respondents: *T. L. Wilson & Co.*

R. C. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kandaswami Goundan .. *Appellant** (*Defendant*)

*v.*

Ramai Goundan (deceased) and others .. *Respondents* (*Plaintiffs and his L. Rs.*).

Kandaswami Goundan v. Ramri Goundan.

*Civil Procedure Code (V of 1908), O. 41, r. 27 (1) (b)—Additional evidence—Admission by the Court with the consent of parties—Record of reasons by Court not adequate—Effect of order—Duty of Court—Estoppel of party consenting to admission of evidence.*

Where by consent of parties the appellate Court admitted additional evidence, and the reasons given by it did not strictly comply with the terms of O. 41, r. 27 of the Civil Procedure Code,

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* S. A. No. 361 of 1934. 30th August, 1938.

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*Held*, that the consent of the parties may be treated as an admission by both parties that the grounds for admitting additional evidence existed. Still the Judge is not absolved from the requirement of satisfying himself as to the necessity for this evidence but the consent may to a large extent cover the defects in the record of the reasons for the order.

*Kessowji Issur* v. *G.I.P. Railway Company*, (1907) 17 M.L.J. 347: L.R. 34 I.A. 115: I.L.R. 31 Bom. 381 (P.C.), distinguished.

*Jagarnath Pershad* v. *Hanuman Pershad*, (1909) 19 M.L.J. 435: L.R. 36 I.A. 221: I.L.R. 36 Cal. 833 (P.C.), relied on.

Even if the reasons recorded by the Court are deemed inadequate, the consent of the party to the admission of further evidence precludes him from questioning the admissibility of that evidence in subsequent proceedings.

*Uchant Ahir* v. *Basawan Ahir*, (1920) 55 I.C. 226, not followd.

Appeal against the decree of the District Court of Coimbatore in A.S. No. 88 of 1933 preferred against the decree of the Court of the District Munsiff of Udamalpet in O.S. No. 191 of 1932.

*K. Bashyam Aiyangar* and *S. Ramachandra Aiyar* for Appellant.

*P. V. Rajamannar* and *K. Subba Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant was the defendant in a suit on a promissory note. One of the points inconsistent with his story of discharge was the fact that though he had a receipt, he had not got the original promissory note. His explanation was that at the time when the panchayat settled the terms of the discharge and the receipt was given, the plaintiff had said that the promissory note was with his vakil but was not available. In cross-examination it was elicited that the vakil in question was the same gentleman who was conducting the case for the plaintiff. Though the defence evidence was taken first, the plaintiff did not thereafter examine his vakil with reference to the custody of the original promissory note. When the appeal had been pending for some time there was an application dated the 22nd November, 1933, by the plaintiff for admission of additional evidence by examination of the vakil in question in order to show that the promissory note was at that time in his (plaintiffs') custody. On that application the order was "By consent the appellant will be allowed to examine M. V. Subramania Aiyar". The rest of the order is irrelevant for the present purpose. On the 11th December, 1933, the present appellant applied for review of this order alleging that his advocate had exceeded his authority in consenting to the additional evidence. The learned District Judge quite

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correctly rejected the review application having regard to the fact that the defendant was himself present in Court when the consent order was made. In the result the learned District Judge found on a review of the facts including the evidence of the vakil that the defence story of discharge was untrue and he decreed the suit.

Now the main argument in appeal here is that the order of the learned District Judge allowing the taking of further evidence in appeal contravened the provision of O. 41, r. 27 (1) (*b*), Civil Procedure Code, and that the Court had no jurisdiction to pass such an order. Mr. Bashyam Aiyangar has referred to the rulings of the Privy Council in *Kessowji Issur* v. *G. I. P. Railway Co.*[1] and *Parsotim Thakur* v. *Lal Mohar Thakur*[2], the effect of which rulings is that the Court has no jurisdiction in appeal to admit additional evidence except on the grounds laid down in r. 27 and that the evidence such as is contemplated in r. 27 (1) (*b*) can only be admitted when the appellate Court itself requires that evidence to enable it to pronounce judgment. He argues that in such circumstances the consent of the parties is irrelevant and that only grounds which could justify the Court in calling for this further evidence must be the Court's own considered opinion that such evidence is necessary to enable it to pronounce judgment. It is contended that in the absence of such a considered opinion the Court has no jurisdiction to call for further evidence and that consent cannot confer jurisdiction which does not exist otherwise. Now, it must be conceded that the record made by the learned District Judge of his reasons for calling for additional evidence does not strictly comply with the terms of O. 41, r. 27. It must, however, be pointed out that in addition to the very brief consent order there is a paragraph in the judgment in the course of which the learned District Judge points out the relevance of the evidence of the vakil and, observing that there must have been some embarrassment to the gentleman in question by the way in which the defence witness brought his name forward only in cross-examination, expresses the opinion that the evidence of this gentleman was important and was therefore allowed under O. 41, r. 27 by a consent order which was recorded. It

1. (1907) 17 M.L.J. 347: L.R. 34 I.A. 115: I.L.R. 31 Bom. 381 (P.C.).
2. (1931) 61 M.L.J. 489: L.R. 58 I.A. 254: I.L.R. 10 Pat. 654 (P.C.).

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must be clearly stated that the mere fact that evidence is important is not of itself a sufficient ground for admitting that evidence in appeal and it would have been very much better had the learned District Judge stated his reasons for admitting this evidence in terms which would indicate clearly that he had applied his mind to those considerations which according to O. 41, r. 27 must govern the Court in passing such an order. At the same time I am of opinion that the consent of the parties cannot be overlooked in considering whether the District Judge's order is a proper order in the circumstances. Granting that consent cannot confer jurisdiction where no jurisdiction exists, the position is somewhat different when there is jurisdiction, but that jurisdiction can only be exercised on particular grounds stated in writing. In my opinion the consent of the parties may be treated as an admission by both parties that those grounds existed. This admission does not strictly absolve the learned District Judge from the requirement of satisfying himself as to the necessity for this evidence; but it may to a large extent cover the defects in the record of the reasons for the order. There is, moreover, good authority for the view that an objection such as has been taken by the appellant to the admission of this evidence cannot be entertained, at all in view of the consent before the learned District Judge. It is true that the ease in *Kessowji Issur* v. *G.I.P. Railway Co.*[1] in which the Judicial Committee adversely commented on the procedure of the learned Judges of the High Court in using their own personal observations as evidence in appeal in a manner not contemplated by O. 41, r. 27 was a case in which the counsel on both sides had agreed to the procedure adopted; but that was not quite the same as a consent by the parties to a procedure which in itself is a perfectly legitimate procedure, such as is contemplated in O. 41, r. 27, where the occasion for it exists. There is a definite ruling of the Privy Council in *Jagarnath Pershad* v. *Hanuman Pershad*[2], in which their Lordships have clearly held that such a consent makes it not open to argument that the admission of evidence in appeal was improper. Mr. Bashyam Aiyangar has endeavoured to distinguish this case as one falling under

1. (1907) 17 M.L.J. 347: L.R. 34 I.A. 115: I.L.R. 31 Bom. 381 (P.C.).
2. (1909) 19 M.L.J. 435: L.R. 36 I.A. 221: I.L.R. 36 Cal. 833 (P.C.).

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sub-clause (*a*) of r. 27 (1) and not under sub-clause (*b*), and it has been so distinguished apparently in a Patna case reported in *Uchant Ahir* v. *Basawan Ahir*[1]. But on a perusal of the judgment of the Privy Council, I am of opinion that this distinction is based on a misunderstanding of the facts of that case. What appears in that case is that there was an application for probate. The propounder of the will tendered two witnesses for cross-examination; the caveator objected to this procedure but the objection was overruled and thereupon the caveator declined to cross-examine the witnesses. In appeal the evidence of these witnesses was admitted by consent. Now this was definitely not a case in which evidence had been rejected by the trial Court and admitted in the appellate Court; it was a case in which the evidence, though available, had not been adduced in the trial Court, but was considered necessary by the appellate Court; that is to say, it is a case falling under sub-clause (*b*) of r. 27 and not under sub-clause (*a*) and the decision of the Judicial Committee that in such circumstances it is not open in a subsequent appeal to question the correctness of the admission of this evidence, is an authority against the position taken up by the appellant in this case. I am therefore of opinion that though one might argue that this evidence was not really necessary or of very great importance, it is not possible to hold in the circumstances that the learned District Judge did not honestly form the opinion the evidence was necessary; and even if the reasons recorded by the learned District Judge be deemed inadequate, the consent of the appellant to the examination of the further witness precludes him from questioning the admissibility of that evidence in subsequent proceedings. That finding concludes the appeal.

I must, however, in justice to a witness observe that the learned District Judge has fallen into an unfortunate error in describing D.W. 6 as a dismissed karnam. There is no foundation for this aspersion on D.W. 6 in the record and the error seems to have been due to a pure misreading of the evidence. In the result the appeal is dismissed with costs.

Leave to appeal is refused.

K. C. —— *Appeal dismissed.*

1. (1920) 55 I.C. 226.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

V. Panchapakesa Aiyar .. *Appellant** (*Plaintiff*)

*v.*

The Secretary of State for India in Council represented by the Collector of Tanjore .. *Respondent* (*Defendant*).

Panchapakesa Aiyar *v.* Secretary of State for India.

*Madras Electoral Rules, rr. 12 (3) and (4) and 48—Rule for forfeiture of deposit—If* ultra vires—*Meaning of total number of ballot papers and spoiled ballot papers in r. 12 (3) and (4)—Jurisdiction of Civil Courts—Suit that the interpretation of Election Rules by the Collector is wrong.*

A candidate for election to a seat in the Legislative Council got less than one-eighth of the total number of votes polled but more than one-eighth of the total number of valid votes. The Collector declared his deposit to be forfeited under r. 12, sub-rr. 3 and 4 of the Madras Electoral Rules framed under the Government of India Act, 1919, S. 72 (4) (*a*). The unsuccessful candidate brought a suit for return of the deposit.

*Held*, (1) that the rules enabling the forfeiture of a deposit made by the unsuccessful candidate are not *ultra vires* of the Local Government. The candidate consents to the terms and there is nothing in the nature of the seizure of the candidate's property against his will, such as is implied in the term 'forfeiture' strictly used.

*Kirk* v. *Nowill and Butler*, (1786) 1 T. R. 118: 99 E.R. 1006, distinguished.

(2) That the total number of ballot papers for the purposes of r. 12 (4) must be taken to be the total number in the box at the time when the returning officer makes his initial count. The term 'spoiled papers' cannot be taken to include all invalid votes. It refers to those papers which have been spoiled by inadvertence and handed in to the officer in charge to be exchanged in the manner laid down in r. 28 of the Rules for the conduct of elections.

(3) Civil Courts have no jurisdiction to entertain a suit which seeks in substance a declaration that the interpretation of the Electoral Rules by the Collector is wrong and the proper way of rectifying such an error is to take the course indicated by r. 48 of the Electoral Rules.

*Sarvothama Rao* v. *Chirmanai, Municipal Council, Saidapet*, (1923) 45 M.L.J. 23: I.L.R. 47 Mad. 585, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 73 of 1933 preferred against the decree of the Court of the District Munsiff of Tanjore in O. S. No. 245 of 1930.

*M. S. Venkatarama Aiyar* for Appellant.

*The Government Pleader* (*B. Sitarama Rao*) for Respondent.

The Court delivered the following

JUDGMENT.—This case arises out of a suit by the appellant for return of the deposit of Rs. 250 made with the Collector

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* S. A. No. 510 of 1934. 6th September, 1938.

Panchapakesa Aiyar *v.* Secretary of State for India.

by the plaintiff as a condition precedent to his candidature for a seat in the Legislative Council as one of the representatives of the Tanjore District. The result of the election was that the plaintiff got 1,618 votes while the total number of votes polled was 13,373, of which 12,917 were found to be valid votes. Thus the plaintiff got less than one-eighth of the total number of votes polled but more than one-eighth of the total number of valid votes. On these figures the Collector declared the deposit of the plaintiff to be forfeited under r. 12, sub-rr. 3 and 4 of the Madras Electoral Rules framed under the Government of India Act, S. 72 (*a*) (4) which empowers the making of provision by rules under the Act for certain purposes, among them being

> "the qualification of electors, the constitution of constituencies and the method of election of the Governor's Legislative Councils . . . . . and any matters incidental or ancillary thereto."

One argument in appeal is that the rules enabling the forfeiture of a deposit made by the unsuccessful candidate are *ultra vires* of the Local Government, seeing that this section under which these rules are framed contains no provision for the imposition of such a penalty. The argument on this head is based on the case *Kirk* v. *Nowill and Butler*[1], which was a case relating to the powers of the Cutlers' Company of Sheffield under its charter—which confers on the company the right to regulate the trade of the Cutlers and to impose fines for breach of its regulations. The company made a bye-law specifying the manner in which certain goods should be manufactured and enabling its officers to seize and confiscate goods made not in accordance with its rules. It was held that this was a forfeiture not provided for in the charter and that no such forfeiture could be imposed except by specific powers conferred in the charter. It seems to me that the facts of this case have very little bearing on the question which I have to decide. The rule framed by the Local Government does not purport to enable the Collector to forfeit the private property of an individual, except in so far as it requires a candidate to make a deposit as a guarantee of good faith subject to certain terms which the candidate accepts as a condition precedent to his candidature, one of these terms being that if he gets less than a certain proportion of the votes, his deposit will be

1. (1786) 1 T.R. 118: 99 E.R. 1006.

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credited to Government. The so-called forfeiture clause is no more than a provision for a cash deposit returnable only on the fulfilment by the candidate of an implied undertaking to secure a certain minimum support for his candidature. The candidate consents to the terms and there is nothing in the nature of the seizure of the candidate's property against his will, such as is implied by the term 'forfeiture' strictly used; nor can it be said, in my opinion, that the rule is not a rule reasonably framed under the rule-making powers in regard to a matter incidental or ancillary to the method of election.

The next contention is that the appellant had in fact got the minimum number of votes which would entitle him to a return of the deposit under r. 12, sub-rr. 3 and 4 of the Madras Electoral Rules. Sub-r. 3 says that the deposit should be forfeited to Government if a candidate is not elected and if the number of votes polled by him does not exceed one-eighth of the total number of votes polled. Sub-r. 4 says that for the purposes of sub-r. 3 the number of votes polled shall be deemed to be the number of ballot papers, other than spoiled ballot papers, counted. The appellant contends that the words "other than spoiled ballot papers" must be taken to mean "other than rejected ballot papers". I must confess that at first sight this interpretation appealed to me. But on going into the matter further I have come to the conclusion that the lower Courts were right in holding that the total number of ballot papers for the purposes of this rule must be taken to be the total number in the box at the time when the returning officer makes his initial count, and that the spoiled papers referred to must be taken to be those papers which have been spoiled by inadvertence and handed in to the officer in charge to be exchanged in the manner laid down in r. 28 of the Rules for the conduct of elections. It is true that in its ordinary meaning a spoiled paper would be a paper which has been in some way or other defaced so as not to be suitable for voting purposes. But the only other place in the rules where the term "spoiled papers" is used so far as I can gather is this r. 28 of the Rules for the conduct of elections first referred to where it appears to be used only with regard to papers spoiled and not put into the ballot box. There are, moreover, inherent difficulties in holding that the term "spoiled papers" in r. 12, sub-r. 4 of the Electoral Rules, can be taken to include all invalid votes. If

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one looks through the various classes of votes which must be treated as invalid under the rules, one finds at least one class which can never come under the term "spoiled papers", that is to say, papers which are put into the box blank. If in order to ascertain whether a candidate's deposit has to be forfeited, it is necessary to go through all the rejected ballot papers and decide which of them are and which of them are not spoiled papers, the returning officer would have to make a further scrutiny of the rejected ballot papers for which no provision is found in the rules. It seems to me clear, therefore, that the spoiled papers referred to in r. 12 (4) cannot include all invalid papers and in the absence of any reference to any special scrutiny of the invalid papers for the purpose of differentiating between spoiled and unspoiled, one is entitled to infer that the phrase is used merely to exclude those spoiled papers which have been handed in to the presiding officer and not put into the box at all. This interpretation is consistent with the obvious desirability of making the forfeiture depend upon a simple arithmetical process. The provision in the rules for a preliminary count of all ballot papers valid and invalid and the absence of any provision in the rules for counting spoiled papers as distinct from invalid papers fortify me in the conclusion that the spoiled papers which are excluded in calculating the one-eighth proportion which saves the deposit from forfeiture are the spoiled papers which have not come into the box and have not been included in the preliminary count by the returning officer. In this view I must agree with the lower Courts that the plaintiff did not get the necessary number of votes to entitle him to a return of his deposit.

It has further been contended for the respondent that the interpretation of the rules for election of members of the legislative councils is a matter which has been expressly reserved by r. 48 of the Madras Electoral Rules for the decision of His Excellency the Governor and that this rule provides that the Governor's decision shall be final so that the Civil Courts cannot interfere. Whether there has been any decision of the Governor in the present case seems to me not quite clear. The appellant after the adverse decision of the Collector preferred an appeal to the Secretary to the Government, Legislative Department and that officer issued an order as the order of the Government rejecting the appellant's claim. Whether the

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order of the Government so called was in fact the decision of His Excellency the Governor under r. 48, we do not know. Leaving that question aside, however, the question is whether a suit such as the present suit is barred by reason of r. 48. Had the plaintiff couched his suit in its simplest possible form merely alleging the deposit, stating that he had a right to the return of the deposit and demanding the return, it would be arguable that on the plaint no question of interpretation of the rules arose and that the mere fact that the defence raised such a question in rebuttal of the suit filed under the ordinary law would not debar the Civil Courts from determining the rights of the parties, the decision as to the interpretation of the rules being merely incidental to a suit under the ordinary law. The plaintiff however has not taken that course. In his plaint he has expressly set forth the contention that the rule has been misinterpreted and that on a strict and proper interpretation of the rule his deposit should not be forfeited and he bases his suit on the rules as interpreted by himself and asks for a decision that the interpretation thereof by the Collector is wrong. Quite clearly this is a suit which *ab initio* involves the question of the interpretation of the Electoral Rules. I am of opinion that such a suit does not lie. The rules provide a special agency for the interpretation of the rules in doubtful or disputed cases. They also provide that the decision of the Governor in cases referred to him shall be final. It is, I think, well established that where a special and exclusive machinery has been laid down by statute for remedying a wrong, the existence of that machinery excludes the ordinary remedy by the Civil Courts in the absence of clear misconduct or lack of good faith on the part of the person designated for the special purpose. There is an express ruling of a single Judge of the Nagpur High Court on precisely this point where a similar rule with reference to the elections for the Council of State has been interpreted so as to exclude the jurisdiction of the Civil Courts in the case of a suit for the refund of a deposit declared forfeited. I have also been referred to the decision in *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet*[1], where it was held that where the Local Government promulgated certain rules and embodied in those rules one which provided that any question relating to the interpretation of the

1. (1923) 45 M.L.J. 23: I.L.R. 47 Mad. 585.

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rules should be referred to the Local Government whose decision should be final, the Civil Court would have no jurisdiction in a case in which the remedy specially provided had been used and exhausted, though it might be otherwise if the authority so designated had refused to exercise the jurisdiction conferred upon it. Under these rules which we have now to construe, the remedy given to a candidate who is adversely affected by a misinterpretation of the rules is to refer the matter to the decision of the Governor. Assuming that a reference has been made in the present case (though I am very doubtful whether in fact it has) and assuming that such a decision has been given by the Governor (though again there is no evidence that any such decision has been given), that decision would be final and the remedy provided by the rules would have been exhausted. If the remedy provided by the rules has not yet been exhausted, it may still be open to the appellant to pursue it. This is a matter upon which I can express no opinion. I am, however, satisfied that the Civil Courts have no jurisdiction to entertain a suit which seeks in substance a declaration that the interpretation of the Electoral Rules by the Collector is wrong and that the proper way of rectifying such an error is to take the course indicated by r. 48 of the Electoral Rules. In this view, I dismiss the appeal with costs.

Leave to appeal is granted.

K. C. —— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE KING.

Mylswami Chetty .. *Prisoner* (Accused).*

Mylswami Chetty, *In re.*

*Criminal Procedure Code (V of 1898), Ss. 156, 157 and 162—Information as to shooting incident—Sub-Inspector recording same and proceeding to enquire—Statement made during course of investigation—Admissibility in evidence.*

A Sub-Inspector of Police was told by the Head Constable that he had heard that there was a shooting case at a particular place. Thereupon the Sub-Inspector entered the substance of that information in the general diary and then went to enquire into the matter. It did not appear who gave the Head Constable any information or what that information was. The Sub-Inspector having in the course of the enquiry recorded a statement from one of the witnesses at the house of the deceased, the question was raised whether the statement was admissible in evidence.

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* R. T. No. 6 of 1938. (Crl. A. No. 51 of 1938). 22nd February, 1938.

Mylswami Chetty, *In re.*

*Held,* that as the Sub-Inspector had no information of the commission of a cognizable offence when he went to the house of the deceased it was impossible to say that the statement was recorded by him during the course of an investigation under Chapter XIV of the Criminal Procedure Code, and that no objection could be raised as to its admissibility in evidence.

*The Public Prosecutor* v. *Chidambaram,* (1927) 55 M.L.J. 231, referred to.

Trial referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed on 7th January, 1938, upon the said prisoner in C. C. No. 162 of 1937 and appeal by the prisoner against the said sentence.

*T. S. Anantaraman, K. V. Ramaseshan* and *C. D. Venkataraman* for Accused.

*K. Venkataraghavachari* for *The Public Prosecutor (V. L. Ethiraj)* on behalf of the Crown.

The judgment of the Court was delivered by

Burn, J.

*Burn, J.*—This is a case of a somewhat unusual kind. The appellant is alleged to have gone to a house where preparations were being made for a marriage at about 1-30 A.M. on the 18th August, 1937, and there to have shot the father of the bridegroom with a revolver and killed him. The learned Sessions Judge of Coimbatore has found the appellant guilty of murder and sentenced him to death.

The facts are quite simple. The deceased was the maternal uncle of the appellant and there was bitter enmity between the two branches of the family. It was alleged that about two years ago the appellant was trying to secure for his elder brother the daughter of Sundarammal (P. W. 7) but P. W. 7 rejected this alliance as she disapproved of the appellant's family. After that it is said that about six months before this occurrence one Ponnusami who was employed by the deceased wanted to marry the same girl. His offer also was refused and he is said to have left the service of the deceased. After this a marriage was arranged between the daughter of P. W. 7 and Sitarama Chetti (P.W. 6) a son of the deceased. The time of the ceremony was fixed for 8 to 9 A.M. on the 19th August, and according to the prosecution the relations and friends assembled at the house of the deceased on the 18th. The appellant had not received an invitation. In the middle of the night at about 1 A.M. the bridegroom's mother and other relations went to fetch new pots for the marriage from the house of the potter according to mamool. While they were away from the house, the appellant, followed by two others

Mylswami Chetty, *In re.*

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who were not recognised, is said to have come in through the open front door of the house and to have shot Kuppuswami Chetti twice with a revolver. Kuppuswami Chetti was seated in the open yard behind the house. The house is on the Hardinge Market Street in Pollachi. The front gate gives access to a small open yard. Then there is a verandah at either end of which is a small room. From the middle of the verandah the door leads into the front hall. Behind that there is a second hall and behind that the open yard in which Kuppuswami Chetti was said to be seated. The appellant, according to the evidence of P. Ws. 1, 2, 4, 5 and 6 walked straight in through the gate and through both the halls to the doorway leading into the open yard. At that point he fired two shots at Kuppuswami Chetti one of which entered his left side and penetrated to the heart. Death of course must have been instantaneous. The other struck Kuppuswami Chetti on the right wrist and the bullet came out through the palm. The appellant is then said to have run across the open compound behind the house and to have made his escape by climbing over the compound wall on the eastern side.

P. W. 1 is the eldest son of the deceased. He says that he himself, the bridegroom, Sitaraman (P. W. 6), a tailor Harichandran (P. W. 5) and Dhandayudha Mudaliar (P. W. 2) were all seated in the front hall when the appellant came in. Nachimuthu a cart driver employed by the deceased, is said to have been sitting on the outer verandah. These five are the witnesses who saw the entrance of the appellant into the house. P. Ws. 5 and 6 did not see the actual shooting. P. W. 5 says that as soon as he saw the appellant with the revolver in his hand he pushed the bridegroom (P. W. 6) into one of the small rooms at the end of the front verandah and bolted the door. These two witnesses therefore merely heard the shots. P. Ws. 1, 2 and 4 saw the appellant go to the southern door near the hall and saw him fire from there. The evidence of these witnesses has been attacked on various grounds. Here as also apparently in the Sessions Court one of the principal lines of attack was based upon the size of the bullet which the doctor extracted from the body of the deceased. This bullet (M. O. 1) is a large object and the chemical examiner, Madras, to whom it was sent for examination reported (Ex. D-1) that the weapon through which the bullet could have been fired must be a gun

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of at least 12 bore. Now all the witnesses for the prosecution say that the weapon which the appellant used was a revolver. The learned Sessions Judge has explained that, when the case came up for trial before him, the learned Public Prosecutor represented that if the defence was going to make any use of this seeming discrepancy he would like to have the chemical examiner cited as a witness. The learned Sessions Judge thereupon called for an additional report from the chemical examiner and the chemical examiner replied (Ex. G-1) that by 'gun' he meant any kind of fire arm and that the bullet might have been fired from a revolver. The matter was really placed beyond the possibility of any doubt by the examination of a Sub-Inspector of the C.I.D., as a Court witness. It was in consultation with this witness that the chemical examiner had sent his first report. The Sub-Inspector said that he had had experience of revolvers of 12 bore and even larger. He said he himself had seen revolvers which could easily fire bullets like M. O. 1. He also stated that M. O. 1 had no marks of rifling on it and from this he deduced that the weapon from which it had been fired was a smooth bore and not a rifled firearm. It is of course well known that the barrels of revolvers as generally manufactured in Europe or America do not exceed ·455 inches in bore. To pass a 12 bore bullet the bore of the firearm must be according to the Court witness ·729 inches. The difference is considerable but there is not the slightest reason for rejecting the evidence of the Court witness when he said that he had seen revolvers which could easily fire bullets of the size of M. O. 1.

The appellant denied the offence and pleaded *alibi.*

[His Lordship discussed the evidence and concluded.]

In our opinion this evidence is wholly worthless. The evidence of D. W. 4 clearly conflicts violently with that of D. W. 1. D. W. 1 who came from his house close by immediately after he heard the shot found P. W. 1 in the house whereas D. W. 4 alleges that P. W. 1 had gone with the party to the potter's house and this party did not return until after the murder had taken place. D. W. 1 says that he stayed in the house 15 minutes but he apparently did not see any of the party who came back from the potter's.

The only criticisms of any force that can be levelled against the prosecution evidence are of a negative kind. The

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Sub-Inspector (P. W. 10) was told at about 2-30 A.M. by a Head Constable that he had heard that there was a shooting case in the marriage house of a Chettiar in Hardinge Market Street. The Sub-Inspector entered the substance of this information in the General Diary and then went out to enquire into the matter. It is, we think, a defect in the prosecution case that the Head Constable has not been examined, and therefore it is not known who gave the Head Constable any information or what that information was. This has led to a contention on behalf of the appellant that Ex. B, a statement recorded by the Sub-Inspector from P. W. 1 as soon as he arrived at the house of the deceased, is inadmissible in evidence. The argument is that the Sub-Inspector received information from the Head Constable which led him to suspect the commission of an offence which he was empowered under S. 156 of the Criminal Procedure Code, to investigate. S. 157, Criminal Procedure Code, provides that in such circumstances the officer in charge of a police station after sending a report of the same to a Magistrate empowered to take cognisance of the offence shall proceed in person to the spot to investigate the facts and circumstances of the case. Since Ex. B was recorded by the Sub-Inspector after he had gone to the house in order to find out the truth of the matter we are asked to say that Ex. B is a statement recorded during an investigation under Chapter XIV, Criminal Procedure Code, and therefore inadmissible under S. 162 of the same Code. We do not think that there is any substance in this contention. The question whether Ex. B was recorded during investigation or not is a question of fact. The Sub-Inspector had no information of the commission of a cognizable offence when he went to the house of the deceased. He was merely told that there had been a shooting incident. Whether the shooting was due to accident or design he did not know. When he got to the house he saw the corpse of Kuppuswami Chetti in the open yard at the back and according to this evidence he then took down a statement (Ex. B) from P. W. 1. Now it is clear only after recording the statement that the Sub-Inspector can have any real information of the commission of a cognizable offence. It is impossible to say that this statement was recorded by the Sub-Inspector in the course of an investigation into this offence. The case is very similar to the case of telegrams sent to a police station upon which the police naturally take action.

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(Vide *The Public Prosecutor* v. *Chidambaram*[1].) We are satisfied that Ex. V is not inadmissible by reason of the provisions of S. 162 of the Code.

The other criticisms of a negative kind are that one Kanni Chetti who is said to have been in the open yard at the time of the murder was not examined as well as that Nagamanikam Chetti was not examined as a prosecution witness. The Sub-Inspector of Police said that Kanni Chetti had been dispensed with though cited in the charge sheet because he had information that Kanni Chetti had been gained over and was hostile to the prosecution. As for Nagamanickam Chetti it is quite clear that he would have been a hostile witness and there was adequate reason for dispensing with him.

In our opinion the learned Sessions Judge (who has commented favourably upon the demeanour of P. Ws. 1 and 2 in the box) was justified in relying upon the evidence of P. Ws. 1, 2, 4, 5 and 6. There is no ascertainable reason why those witnesses should have falsely implicated this appellant. It is interesting to observe that one wild suggestion which was made was that the murder had probably been committed by Ponnuswami who himself had wanted to marry P. W. 7's daughter. Fortunately the learned Sessions Judge was able to give that suggestion its quietus because Ponnuswami happened to be in Court. He was made to stand up and shown to the assessors and it was observed that both in figure and feature he was of a quite different type from the appellant. We do not think there is any foundation for the suggestion that the prosecution witnesses did not know who had committed this crime.

The conviction of the appellant is, in our opinion, correct beyond the possibility of any reasonable doubt. As the learned Sessions Judge observes the only possible sentence in a case like this is the sentence of death. We therefore confirm the conviction and the sentence of death and dismiss this appeal.

B. V. V. —— *Appeal dismissed.*

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1. (1927) 55 M.L.J. 231.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE MADHAVAN NAIR.

அ. நா. Chockalingam Chettiar .. *Appellant** (*6th Defendant*)

*v.*

வெ. லெ. சப. Muthukaruppan Chettiar and others .. *Respondents* (*Plaintiff and Defendants 1 to 5 and 7 and 8*).

Chockalingam Chettiar *v.* Muthukaruppan Chettiar.

*Hindu Law—Father's partnership with strangers—Debts in course of business—Trading family—If minor members liable—Extent of liability—Decree in partition suit declaring shares—Consent decree—Decree not acted upon—Parties continuing joint as before—If division in status effected by decree.*

One *N*, a Nattukottai Chetti, started a money-lending business with his undivided brother. Later the brothers became divided and at the division the business fell to the share of *N* and *N* carried it on till his death in 1927 for the benefit of himself and his sons. *N* had two wives and in 1907 when *N* had only one son by his second wife, the sons by the first wife filed a friendly suit for partition. The suit was compromised and a decree followed on the compromise declaring that the first wife's sons were to have a half share and the sons by the second wife, born and to be born, were to have the other half. The decree did not however result in the division of the properties and it was found that it was never acted upon, not even in part. After the partition suit was settled *N* entered into a partnership called M. P. N. as representing the family with strangers and the capital for it contributed by *N* was found from the common fund of the family. *N* managed it during his life and after his death it was continued as before, the eldest son by the first wife taking his place in the partnership.

During the lifetime of *N* and in the ordinary course of business, the plaintiff deposited a sum of money with the firm and in 1930 a promissory note was executed for the amount then found due to the plaintiff by the agent of the firm. In a suit on the promissory note against the partners of *N* and his sons, it was contended by the appellant that by the decree in the partition suit *N* had become divided and M. P. N. was not a family business and even if it be that *N* entered into partnership on behalf of all the sons also, it was dissolved on his death and could not be continued so as to make him liable.

*Held*, (*i*) that the decree in the partition suit did not put an end to the joint status, as the terms of the decree were never carried into effect and the members of the family continued to live together and regarded themselves as still being joint. Even if the intention was originally to divide the family, that intention must in the circumstances be deemed to have been abandoned.

(*ii*) The contract of partnership by *N*, the manager did not *ipso facto* make the other members of the family partners, but when *N* as a manager of the trading family entered into partnership with strangers for the purpose

* Appeal No. 379 of 1933. 29th March, 1938.

of carrying on the same kind of business, the members of the family became liable to the extent of the family property for the debts binding on the manager in the partnership business.

(*iii*) The son became liable also under the pious obligation rule.

Appeal against the decree of the Court of the Subordinate Judge of Devakottah in O. S. No. 122 of 1931.

*S. Venkatesa Aiyangar* for Appellant.

*C. S. Venkatachariar* and *R. Kesava Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.— This appeal raises two questions. One is whether the minor members of a trading family can be held liable to the extent of their interests in the family properties for debts incurred in a business carried on by the father in partnership with strangers. The other question is whether a decree passed by consent in a partition suit puts an end to the joint status, notwithstanding that the terms of the decree are never carried into effect and the members of the family continue to live together and regard themselves, as still being joint.

The appellant is the son of one Narayanan, a Nattukottai Chettiar, who died in 1927. Narayanan had two wives Unnamulai and Alamelu. By Unnamulai he had three sons, A. M. A. N. Annamalai Chettiar (the third respondent), A. M. A. N. Natesan *alias* Chidambaram Chettiar (the fifth respondent), and A. M. A. N. Sambandam Chettiar (the sixth respondent). By Alamelu he had four sons. The eldest, Annamalai, predeceased his father and the youngest Yoganandam was given in adoption. The other two sons are the appellant, and A. M. A. N. Subbayya Chettiar (the seventh respondent). Many years ago Narayanan founded a money-lending business with his brother at Kuala Lampur in the Federated Malay States. Afterwards they separated and on the partition of the family properties the Kuala Lampur business fell to the share of Narayanan, who carried it on until his death for the benefit of himself and his sons. This business was continued after his death and it is not disputed that it must be regarded as a family business. In 1907 there was a disagreement between the two wives of Narayanan with regard to their Stridhanam moneys and it would appear that Unnamulai wished to make certain that her sons would not be prejudiced so far as their

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shares in the family properties were concerned as the result of other sons being born to Alamelu. At this time the only son born to Alamelu was Annamalai. As the result of the differences between the two wives a suit for partition was filed in the Court of the Subordinate Judge, Madura East, by the sons of Unnamulai, who were represented by their maternal grandfather Chidambaram Chettiar. This suit was numbered as O. S. No. 28 of 1907. The defendants were Narayanan, Unnamulai, Unnamulai's daughter Unnamulai, Alamelu's son Annamalai and Alamelu. There does not appear to be any doubt that this suit was of a friendly nature. Narayanan, his wives and children were all living together at the time and continued to live together until his death. In fact the sons have always lived in the family house. On the 30th September, 1908, a decree was passed by consent in the partition suit. It declared *inter alia* that the sons of the first wife were to have a half share of the family properties, and the sons of the second wife, including the sons to be born thereafter, the other half. The decree did not, however, result in the division of the family properties and can only be regarded as embodying arrangements to be carried into effect, if and when a partition did in fact take place. In the course of his evidence the 3rd respondent stated that the movable properties were divided, but as it is clear that he was untruthful on other points we are not prepared to attach any weight to his testimony, and it was not accepted by the learned trial Judge. I will return to this compromise decree later.

After the partition suit had been settled Narayanan entered into a partnership with the second and fourth respondents for the purpose of carrying on a money-lending business at Maubin in Burma under the vilasam of M. P. N. The capital contributed by Narayanan to this partnership must be deemed to have come from the common fund of the family. What the amount of the capital is does not appear. The books have not been produced and the appellant must share the responsibility for this. It is common ground that the business was a very successful one for many years and that Narayanan took part in its management during his life. On his death it was not wound up, but continued exactly as before, except that the 3rd respondent as the eldest son took his father's place in

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the partnership. It was not until the rebellion broke out in Burma in 1930 that the business ceased to prosper.

In the course of its business the M.P.N. firm accepted deposits from customers and paid interest on the amounts so received. During the lifetime of Narayanan and in the ordinary course of business the 1st respondent deposited a sum of money with the firm. On the 27th April, 1930, it was calculated that there was due by the firm in respect of this deposit Rs. 10,126-9-6, for which a promissory note was executed by the firm's agent and handed over to the 1st respondent. When he demanded payment the firm failed to comply and the 1st respondent was compelled to file the suit out of which this appeal arises. The defendants were Narayanan's partners and his sons. The 2nd and the 4th respondents who with Narayanan founded the firm, pleaded that the firm's agent had no power to accept the deposit. The 3rd, 5th and 6th respondents, Narayanan's sons by Unnamulai, denied that they ever had any interest in the business. Their case was that their father merely represented himself and his sons by Alamelu. The appellant and the 7th respondent contended that they had no interest in the business and that their father entered the partnership on behalf of himself and his sons by the first wife. These defences all failed and the suit was decreed with costs, the liability of the appellant and the 5th, 6th and 7th respondents being limited to their shares in the family properties.

The decision of the trial Judge is challenged by the appellant alone. He contends that the business of the M.P.N. firm cannot be regarded as being part of an ancestral business and says that unless it can be so regarded, he is under no liability to the 1st respondent. He asks the Court to hold that the family became divided as the result of the partition suit and that Narayanan did not enter into the M.P.N. partnership on behalf of himself and all his sons, but only on behalf of himself and his sons by Unnamulai. He says that even if Narayanan did enter into the partnership on behalf of all, the partnership was dissolved on his death and it could not be continued so as to make him liable. For the 1st respondent it is denied that the effect of the partition suit was to divide the family. It is contended that the interest in the M.P.N. firm must be regarded as being part of an ancestral

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business; but if it cannot be so regarded, it is said that the family being a trading family the M.P.N. business must be deemed to be part of the family business, which renders the minor members of the family liable to the extent of their interests in the family properties. It is also contended that the appellant is liable under the pious obligation rule of Hindu Law.

The business here cannot be regarded as being ancestral. It is true that Narayanan and his sons are Nattukottai Chettiars and that their family trade is money lending, but no business came to Narayanan from his forbears. So far as the evidence discloses his business career commenced in Kuala Lampur with the firm founded there by him in partnership with his brother and the only other business interest which he had was his interest in the M.P.N. firm. While in these circumstances it cannot be said that Narayanan carried on an ancestral business, it can be said that he managed a family business. This is accepted by the appellant, but he says that the family business came to an end with the compromise decree passed in O. S. No. 28 of 1907 as this decree dissolved the joint status. We do not agree. That decree made no difference to the position of the family at the time it was passed and as far as we know it has never been acted on, not even in part. In *Palaniappa Chettiar* v. *Alagan Chetti*[1], the Privy Council found that a custom existed among the Nattukottai Chetties inhabiting certain villages in the Madura district whereby when a Chettiar during the lifetime of his first wife married another wife he appropriated out of his property a part for the maintenance of his first wife and that the property so appropriated descended to her son and that the rest of the property was notionally divided, a half being allotted to the son or sons by the first wife and the other half to the son or sons by the second wife. There is no evidence of any such custom in the present case, but the judgment in *Palaniappa Chettiar* v. *Alagan Chetti*[1] shows that in some parts of the Madura district there can be a notional division of property, and we consider that the evidence here discloses that this was the intention when the compromise decree was passed. If the family separates, the separation will be deemed to continue

1. (1921) L.R. 48 I.A. 539: I.L.R. 44 Mad. 740 (P.C.).

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unless it is shown that there has been a reunion, and a person who sets up a reunion must prove it, *Babu* alias *Govindoss Krishnadoss* v. *Official Assignee of Madras*[1]. But here we are concerned with a case where the members of the family never in fact separated and the members regarded themselves as being joint even after Narayanan's death. Exs. K and III show this beyond doubt. Ex. K is an affidavit sworn by the 5th respondent on the 12th December, 1927, in support of an application to bring on the record of a suit which Narayanan had filed the names of his legal representatives. Paragraphs 3, 4 and 5 of this affidavit read as follows:—

"3. To the said late Narayanan Chettiar, his first wife's sons, *viz.*, (1) A.S. Annamalai Chettiar, (2) A.N. Chidambaram Chettiar, and (3) Minor Sambandam Chettiar, aged 16 years, and his second wife's sons, *viz.*, (4) Minor A.N. Chockalingam Chettiar, (5) Minor A.N. Subbayya Chettiar, and (6) Minor A.N. Yoganandam Chettiar, are the undivided sons of the late A. N. Narayanan Chettiar and are the heirs who have succeeded to his estate by 'survivorship' and are his 'legal representatives'.

"4. To the plaintiff A.N. Narayanan Chettiar, deceased, except we six persons, there are no other heirs.

"5. Therefore, it is just and necessary that six persons mentioned in the petition, who are the sons of the plaintiff A.N. Narayanan Chettiar, deceased, and who have succeeded to his estate by 'right of survivorship' and who are his 'legal representatives' should be brought on record as his 'legal representatives' and the case proceeded with."

There is here sworn testimony by a member of the family, who was giving evidence on behalf of the family, that Narayanan and his sons by his two wives constituted an undivided family. Ex. III is the application itself and contains similar statements. Taking into consideration the course of events from the institution of the partition suit and the exhibits to which I have just referred we are of the opinion that the partition decree was not intended to alter the joint status of the family. It did not in fact make any change and even if the intention was originally to divide the family that intention must in the circumstances be deemed to have been abandoned.

When Narayanan embarked upon the M. P. N. partnership he did so as representing the family. That did not, however, make the members of his family partners. It is well-settled law that a contract of partnership by a manager does not *ipso facto* make the other members of the family partners: *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar*[2], *Grande*

1. (1928) 55 M.L.J. 132. 2. (1904) I.L.R. 28 Mad. 344.

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*Gangayya* v. *Grande Venkataramiah*[1], *Ramanathan Chetty* v. *Yegappa Chetty*[2] and *Krishnasami Aiyar* v. *Ramanadhan*[3]. But this does not mean that where a manager of the trading family enters into a partnership with strangers for the purpose of carrying on the same kind of business the members of the family are not liable to the extent of the family property for the debts binding on the manager in the partnership business. That they are liable to this extent is pointed out in Mayne's Hindu Law, Ninth Edition, pages 398 and 399, from which I will quote the following passage:

"On the other hand, the manager of a trading family has wider powers than those of the manager of a non-trading family. There is no deviation from the fundamental principle that what is done must be for the benefit or necessities of the family, but acts such as the incurring of debts and drawing of negotiable instruments are necessities to a trading family, which they would not be to a non-trading family. . . . . . . . But with a stranger partner the members of the family who are not actively engaged in the business have no contractual relation and they can seek no direct relief against him. To the creditors of the business they will be liable to the extent of their share of the family property embarked in the business; and in the case of families whose hereditary occupation is trade, this will be tantamount to saying that their liability extends to their share of the family property as a whole. The business is conducted on the credit of the whole family property, and that property is swelled by the profits of the business, and it would be impossible to say that any particular portion of the family property, less than the whole, is to be regarded as specifically allocated to the business."

The hereditary occupation of Nattukottai Chetties is money-lending and the business which Narayanan the manager of this family embarked on with the 2nd and fourth respondents was a money-lending business. If this is to be regarded as an extension of the family business—and we regard it as such—the appellant is liable to the extent of his share in the family properties for the debt due to the first respondent. In *Ramanathan Chetty* v. *Yegappa Chetty*, Coutts-Trotter and Srinivasa Aiyangar, JJ., pointed out that there may be many cases in which family property may in one way or other be available to the creditors of a partnership carried on by the manager with others, and the present case is, in our opinion, one of them.

In *Sri Thakur Ram Krishna Murarji* v. *Ratan Chand*[4], the Privy Council had to consider a case where an ancestral

1. (1917) 34 M.L.J. 271: I.L.R. 41 Mad. 454 (F.B.).
2. (1915) 30 M.L.J. 241.
3. (1934) 68 M.L.J. 251.
4. (1931) 61 M.L.J. 665: L.R. 58 I.A. 173: I.L.R. 53 All. 190 (P.C.).

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business of a Mitakshara joint family had been carried on in partnership with another person. Upon the retirement of the stranger partner there was a dissolution and winding up of the partnership, but the business was carried on thereafter on behalf of the joint family in the same commodities and upon the same premises. This was held not to be a new business, but a continuation of the ancestral business. In the present case, the business was not an ancestral one, but it was a family one and when Narayanan died the family continued to be represented in the business of the M. P. N. partnership by the third respondent, the eldest member of the family. It was not really disputed that up to Narayanan's death the appellant was liable to the extent of his share in the family properties, but emphasis was laid on the fact that Narayanan's death effected a dissolution of the M. P. N.'s partnership. If the members of the family were all liable during Narayanan's lifetime it is difficult to see why they should not be liable after his death. The senior member of the family took his place in the partnership, and the firm continued to do business on the same basis as before. Moreover, Narayanan's death made no difference so far as the debt due to the first respondent was concerned as the debt had been incurred during Narayanan's lifetime. The learned Advocate for the appellant has suggested that the present case falls within the decision of the Privy Council in *Benares Bank, Ltd.* v. *Hari Narain*[1], but there their Lordships were considering a case where the manager had started a new business, not a case where the manager had entered on an extension of the family business. Consequently we hold that the debt to the first respondent was incurred in the course of the family business and that the appellant is liable to the extent of his interest in the family assets. His brother and his half brothers accept this position so far as they themselves are concerned.

We also consider that the appellant is liable under the pious obligation rule. It is said on behalf of the appellant that this was not pleaded and that the Privy Council refused to allow the question to be raised in *Benares Bank, Ltd.* v. *Hari Narain*[1], because it was raised for the first time before their Lordships and it involved questions of fact which had

1. (1932) 63 M.L.J. 92: L.R. 59 I.A. 300: I.L.R. 54 All. 564 (P.C.).

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not been tried. That case was a very different one. It is impossible for the appellant in this case to raise the plea that this debt was incurred by Narayanan for his own immoral purposes or that it did not come within the category of a necessity. The debt represented a deposit made in the ordinary course of the family business.

For these reasons we consider that the case has been rightly decided by the trial Court, and the appeal must, therefore, be dismissed with costs.

S.V.V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. MADHAVAN NAIR, *Officiating Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Ramanathan Chettiar .. *Petitioner* (Petitioner in P. C. C. M. P. No. 5000 of 1937—1st Respondent in Appeal No. 190 of 1931 on the file of the High Court)*

*v.*

M. A. R. R. M. Viswanathan Chettiar .. *Respondent (Respondent in do.—Appellant in do.).*

Ramanathan Chettiar v. Viswa-nathan Chettiar.

*Civil Procedure Code (V of 1908), O. 45, r. 13 (2) (d)—Mortgage suit—Preliminary decree against sons of the mortgagor and his step-brother—Appeal to Privy Council by step-brother—Final decree in the meanwhile—Execution—Application for stay of—Whether maintainable.*

O. 45, r. 13 (2) (*d*) enables the High Court in a proper case, even though no appeal has been filed against the final decree and the appeal pending before the Privy Council, as in this case, is only with respect to the preliminary decree, to pass necessary orders in order to safeguard the rights of an applicant when he asks for stay of execution of the final decree.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct stay of execution of the decree of the Court of the Subordinate Judge of Devakottai in O.S. No. 29 of 1927, so far as the petitioner is concerned, pending disposal of the appeal to His Majesty in Council, against the judgment and decree of the High Court in Appeal No. 190 of 1931 (P.C. C.M.P. No. 5000 of 1937 on the file of the High Court).

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*C. M. P. No. 2066 of 1938. 4th August, 1938.

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Madhavan Nair, Offg. C. J.

*M. Patanjali Sastri* for Petitioner.

*T. M. Krishnaswamy Aiyar* for *T. V. Ramiah* for Respondent.

The order of the Court was made by

*The Officiating Chief Justice.*—This is an application for the stay of execution of the final decree in a mortgage suit passed by the Subordinate Judge of Devakottai in O. S. No. 29 of 1927.

The second defendant in the suit is the petitioner before us. The mortgage bond was executed by the first defendant, the adopted son of one Chockalingam Chettiar. Defendants 3 and 4 are the children of the first defendant. The second defendant—the petitioner—is the natural son of the said Chockalingam Chettiar by his second wife whom he married after the death of his first wife who was the adoptive mother of the first defendant. The application is made under O. 45, r. 13 of the Code of Civil Procedure. The first Court passed a preliminary mortgage decree dismissing the suit as against defendants 2 to 4. On appeal, the High Court reversed the decree of the trial Court and passed a mortgage decree against the second defendant and defendants 3 and 4 as well.

An appeal to the Privy Council against this decree has been filed by the second defendant and it has been admitted. Subsequent to the filing of the appeal, the trial Court has passed the final decree, and now the decree-holder, it is alleged, is seeking to execute the final decree; and the petitioner asks us to stay the execution of the decree pending disposal of the appeal to His Majesty in Council.

The respondent takes a preliminary objection that this Court has no jurisdiction to stay execution of the final decree as no appeal has been filed by the petitioner against that decree. His objection is based upon the wording of O. 45, r. 13. Cl. 1 of the order says that:

"Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs."

It is said that under this clause as well as under cl. (2) which we will presently refer to in detail the stay of execution can be ordered by this Court only in execution of a decree which has been appealed against which, in this case, would be the preliminary decree; and since no appeal has been filed

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against the final decree, it is argued, proceedings in connection with the final decree should not be stayed by this Court under the provisions of these clauses. It is clear that if the appellant succeeds in his appeal before the Privy Council which he has filed against the preliminary decree, the result will render the final decree passed by the Court ineffective. But it is argued that though it may be so, with respect to the stay of execution of the decree, such stay can be granted only as against the decree that has been appealed against.

In support of the above argument, no decision directly bearing on the question has been brought before us and we have to depend upon the wording of the section. We find that under cl. (2) of O. 45, r. 13, the Court may, on special cause shown by any party interested in the suit or otherwise appearing to the Court, pass certain specific orders with reference to the decree which has been appealed from. Under sub-cl. (*a*) it may impound any movable property in dispute or any part thereof; under sub-cl. (*b*), the Court may allow the decree appealed from to be executed, taking such security from the respondent as it thinks fit for the due performance of any order which His Majesty in Council may make on the appeal. Under sub-cl. (*c*), it may stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal. We may pause here for a moment and point out that the relief to be granted by the High Court under sub-cls. (*b*) and (*c*) is in respect of "the decree appealed from". Coming to sub-cl. (*d*), the last clause, we find the Court has power to

"place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a Receiver or otherwise."

It is noticeable, under this clause, the Court has power to give whatever direction it thinks necessary respecting *the subject-matter of the appeal* as it thinks fit by the appointment of a Receiver or otherwise, whereas cls. (*b*) and (*c*) contemplate action by the Court with reference to *the decree appealed from*. Under sub-cl. (*d*), action may be taken by the Court and directions may be issued with reference to the subject-matter of the appeal. The subject-matter of the appeal in this

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case is the property involved in the suit. It is not stated that the direction is with reference to the decree that is appealed from but it is with reference to the subject-matter of the appeal. If the Court has power to pass orders which it thinks should be passed in a particular case with respect to the subject-matter of the appeal, then we think that this Court has power to pass orders with respect to the property involved in the suit, if we think on the merits such order should be passed. In our opinion, O. 45, r. 13, cl. 2 (*d*) enables the High Court in a proper case, even though no appeal has been filed against the final decree and the appeal pending before the Privy Council is only with respect to the preliminary decree, to pass necessary orders in order to safeguard the rights of the applicant when he asks for stay of execution of the final decree, as in this case. If the property which is the subject-matter of the appeal is now sold, unless the decree-holder purchases the property himself, it will be difficult for the petitioner to get his portion of it back in case he succeeds in the Privy Council appeal. It is therefore necessary that we should pass orders with a view to safeguard his interests in the case. At the same time in spite of the fact that the respondent has obtained a final decree for the sale of the petitioner's share of the property, we think the interests of the respective parties may be safeguarded by passing the following order:—

The lower Court will find out the value of the property and the petitioner will give security for the difference, if any, between his share of the value of the property and his share of the liability under the decree. The lower Court will ascertain the value of the property within three weeks from the receipt of this order and the petitioner will, when he is called upon to give security, give the same within two weeks thereafter. On such security being furnished, the execution of the decree will be stayed but only with respect to the petitioner's share in the hypotheca.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Kariparambil Yusuf Moidu .. *Appellant** (*2nd Respondent, Surety*)

*v.*

Sambanthri Haji Abdul Khader Sahib and Bros. by managing partner Haji Muhammad Meera Sahib .. *Respondents* (*Petitioners*).

Yusuf Moidu *v.* Haji Abdul Khader Sahib & Bros.

*Surety—Bond mentioning his liability to pay the debt in case the petition for setting aside* ex parte *decree failed—Liability enforcible in spite of Court's granting of time to judgment-debtor.*

If a surety's obligation under a bond was not merely to produce the debtor and to pay up if the debtor failed to do so but also to pay the debt at once if the petition to set aside the *ex parte* decree should prove unsuccessful, the surety's liability will not be affected by the granting of time by the Court to the judgment-debtor and therefore *Annadana Jadaya Goundar* v. *Konammal*, (1932) 64 M.L.J. 386: I.L.R. 56 Mad. 625, is inapplicable to such a case.

Appeal against the order of the District Court of South Malabar at Calicut dated the 26th day of June, 1936, and made in A. S. No. 280 of 1935 preferred against the order of the Court of the Subordinate Judge of Cochin dated the 29th July, 1935, and made in E. P. No. 16 of 1935 (in O. S. No. 146 of 1933, D. M. C., Calicut).

*K. S. Rajagopala Aiyangar, K. Raja Aiyar* and *C. A. Muhammad Ibrahim* for Appellant.

*P. Govinda Menon* for Respondents.

The Court delivered the following

JUDGMENT.—This is one of the too frequent cases in which a surety, when the time comes for fulfilling his obligation, displays the greatest reluctance to do so. The learned District Judge is undoubtedly right in pointing out that this is not one of the cases to which S. 135 of the Contract Act applies. There is here no question of surety being damnified by reason of a *contract* between the creditor and the principal debtor. The learned Subordinate Judge was wrong in supposing the decision in *Annadana Jadaya Goundar* v. *Konammal*[1] to be applicable; Mr. Justice Venkatasubba Rao (as he then was)

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* A. A. A. O. No. 119 of 1936. 1st September, 1938.

1. (1932) 64 M.L.J. 386: I.L.R. 56 Mad. 625.

points out that before S. 135 of the Contract Act can be applied there must be a *contract*.

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The surety's obligation under his bond in this case was not merely to produce the debtor and to pay up if the debtor failed to do so; he bound himself to pay the debt *at once*, if the petition to set aside the *ex parte* decree should be unsuccessful. The granting by the Court of time to the judgment-debtor does not affect the surety's liability.

The appeal is dismissed with costs.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Parimi Chakrapani Naidu .. *Appellant** (*Defendant*)

*v.*

Mattapalli Venkataraju (deceased) and another .. *Respondents* (*Plaintiff and Nil*).

Chakrapani Naidu *v.* Venkataraju.

*Damages—Claim of—Obstruction to plaintiff's enjoyment of rights by decision of Court in favour of defendant—Liability of defendant in the circumstances.*

It is well established that no action will lie against any one for damages resulting from an erroneous decision of the Court, merely because that person has set the Court in motion, provided that malice is not established.

*Rani Mina Kumari Debi* v. *Surendra Narain Chakravarty*, (1909) 14 C. W.N. 96, relied on.

It is also well established that the defendant is only liable for the direct consequences of his wrongful act and that the intervening act of an independant third person bound by law to make a judicial decision breaks the chain of causation.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada in A.S. No. 117 of 1930, preferred against the decree of the Court of the District Munsiff of Cocanada in O. S. No. 42 of 1928.

*P. V. Rajamannar* and *K. Subba Rao* for Appellant.

*Ch. Raghava Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The defendant in this case appeals against the decree for damages caused to the plaintiff's land by the loss of irrigation facilities, resulting from the action of the defendant in obstructing the legitimate construction of a tem-

* S. A. No. 261 of 1933. 16th August, 1938.

Chakrapani Naidu v. Venkataraju.

porary dam across an irrigation channel and in obtaining orders from the Courts which prevented the plaintiff from having the use of water to which he was entitled, pending Magisterial and Civil Courts' proceedings.

There is no doubt about the facts. The obstruction was on 31st August, 1924. After interfering with the making of this dam, the defendant moved the Magistrate and procured an order under S. 147, Criminal Procedure Code, on 21st November, 1924, restraining the plaintiff from damming the channel and taking water to his land. The plaintiff consequently had to file a civil suit to establish his right and he also applied for a temporary injunction against the defendant to restrain him from interfering with the exercise of this right. The defendant opposed the grant of any such injunction and it was consequently refused. Eventually, the plaintiff got a decree recognising his right to the water and he now claims damages for the loss of the crops which would have been harvested in January 1926, January 1927 and January 1928.

This appeal has once been heard by Cornish, J., but the judgment, unfortunately, was of no effect because one of the parties was dead at the time when the appeal was heard.

Now, quite clearly the plaintiff's claim for damages is based not on the original obstruction of the defendant in August 1924 which could not have affected the crops grown at the end of 1925, 1926 or 1927. The basis of the plaintiff's claim is the action of the defendant in procuring from the Courts orders which had the effect of preventing the plaintiff from taking the water to which he was entitled. If so much be conceded, it is difficult to see how the damages accruing to the plaintiff can have been caused at all by the extra-judicial act of the defendant. Assuming, however, that the defendant's act in obstructing the construction of the dam was the first of a series of acts which together caused the damage, it is, I think, well established that no action will lie against any one for damages resulting from an erroneous decision of the Court, merely because that person has set the Court in motion, provided that malice is not established—*Rani Mina Kumari Debi* v. *Surendra Narain Chakravarty*[1]. It is also well established that the defendant is only liable for the direct conse-

1. (1909) 14 C.W.N. 96.

quences of his wrongful acts and that the intervening act of an independent third person bound by law to make a judicial decision breaks the chain of causation. When once it is established that the party moving the Court is not, in the absence of malice, responsible for the Court's erroneous orders, it will be clear that the order of the Court, even though erroneous and even though passed at the instance of the defendant, is an act of a third party independent of the control of the defendant and bound to decide judicially. It is, therefore, a new act intervening and there is no chain of causation from the original act of the defendant which started the interference with plaintiff's rights. It seems to me unnecessary to say anything more. The case-law on the subject has been fully discussed in the judgment of Cornish, J., which unfortunately became inoperative. I agree entirely with the reasoning in that judgment and allow the appeal and dismiss the plaintiff's suit with costs throughout.



Leave to appeal refused.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Uppara Dodda Narasa .. *Prisoner** (*Accused*).



*Criminal Procedure Code (V of 1898), S. 235—Joint trial of offences under Ss. 211 and 302 of the Penal Code—Validity of.*

Where an accused was alleged to have killed a person in order to foist a false case of murder upon his enemies and immediately after committing the murder preferred a false complaint and he was tried at the same trial for offences under Ss. 211 and 302, Indian Penal Code,

*Held*, that though strictly speaking a joint trial conducted for the two offences was not illegal, they ought not to be tried together, as such joint trial would be very embarrassing to the accused and to the prosecution and might lead to failure of justice.

Trial referred by the Court of Session of the Bellary Division for confirmation of the sentence of death passed upon the said prisoner in case No. 12 of the Calendar for 1938 on 29th June, 1938, and appeal by the prisoner against the sentences passed upon him in the said case.

*A. K. Pavitran* for Accused.

*The Public Prosecutor* on behalf of the Crown.

* R. T. No. 60 of 1938.
Crl. A. No. 278 of 1938. 5th September, 1938.

Uppara Dodda Narasa, *In re.*

Burn, J.

The judgment of the Court was delivered by

*Burn, J.*—The appellant has been convicted of murder by the learned Sessions Judge of Bellary and has been sentenced to death. He has also been convicted of wilfully preferring a false complaint (S. 211 of the Indian Penal Code) and for that offence he has been sentenced to seven years' rigorous imprisonment.

This is the first time in our experience that a person has been tried at one trial for offences under Ss. 302 and 211 of the Indian Penal Code. The prosecution theory was that on the night of the 8th December, 1937, the appellant killed one Chaji Eranna, a farm labourer with the intention of foisting a false case of murder upon his enemies P.W. 11 and others. The appellant preferred the complaint Ex. A to the Village Munsiff at about 8-30 P.M. on the 8th December, 1937, in which he mentioned the names of P.W. 11 and nine others. He alleged that these persons armed with a battle-axe and stout sticks had come and attacked himself and his younger brother and Eranna while they were in the thrashing floor watching the ground-nut crop. He alleged that one Tippanna (son of P.W. 11) had cut the deceased Eranna twice with the battle-axe. It is therefore correct to say that the appellant preferred a charge of murder against P.W. 11 and his son and others. Now if the appellant himself had killed Chaji Eranna in order to foist a false case of murder upon his enemies and immediately after committing murder went to prefer a false complaint, it cannot be said that strictly speaking a joint trial held for the two offences under Ss. 302 and 211 was illegal. It can be fairly contended that the two acts were connected together and formed part of the same transaction. But it is, we should think, quite obvious that offences of this nature ought not to be tried together. It is laid down in r. 156 of the Criminal Rules of Practice that it is inconvenient for Sessions Judges to try such offences as murder and theft at the same trial. This is no doubt due partly to the fact that the offence of murder is triable with the aid of assessors while the offence of theft is triable by a Jury. But the same principle applies with equal if not greater force to such cases as the present. It is obviously very embarrassing to the accused to have to answer a charge of murder at the same time as a charge of wilfully preferring a false complaint of murder.

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It is also embarrassing to the prosecution and may lead, as we fear it has led in this case, to failure of justice. In the present case attention in the Sessions Judge's Court has been focussed entirely upon the case of murder. It is of course obvious, that if this appellant murdered Eranna, his complaint against P.W. 11 and nine others for the same offence must have been false to his own knowledge and must have been preferred with intent to cause injury to them. That is probably the reason why the prosecution in the present case has let in practically no independent evidence with regard to the offence under S. 211. The only evidence that has been let in relates to the charge of murder and even that is of the most meagre kind. There is no evidence of eye-witnesses and the sole evidence upon which the appellant has been convicted is connected with the information which he is said to have given to the police leading to the recovery of the blood-stained head of a battle-axe (M.O. 1).

The evidence relating to the statement of the accused is given by the Inspector of Police P. W. 7, the Village Munsiff P.W. 1, and a ryot of the village P.W. 2. We do not find any ground for discrediting the evidence of any of these witnesses but we hold that the evidence which they have given is inadmissible. It is clear from the statements made by these three witnesses and from the Attakshi Ex. C which was written by P.W. 2 on the 11th December that the statements made in the presence of these three witnesses on that day were not statements leading to the discovery of the axe-head (M.O. 1). We are told that the Inspector got information about the case on the 9th December when he was at Bellary. He reached the village on the evening of the 10th December. He questioned the accused (to him at that time the complainant), and inspected the scene. He then found reasons for suspecting the accused and therefore he sent for the accused and his brother Chinna Narasa to the girl's school in Halvi village. The accused and his brother, he says, came about 4-45 P.M. He questioned both of them and arrested them both at 5 P.M. He says the accused admitted that his original complaint was false. It was after this that the Inspector sent for the Village Munsiff, P.W. 2 and the karnam as Panchayatdars and further examined the accused in their presence. Now it is quite clear from this and from internal evidence in Ex.C that the accused,

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or his brother, or perhaps both, had given to the Inspector all the information in their possession before the Village Munsiff and the other panchayatdars were called in. Ex. C begins with these words:

> "The Circle Inspector of Police, Adoni, having in the usual course come to know that Dodda Narasa, son of Uppara Eranna of Halvi village *is the culprit in this case* . . . . . . "

This shows that the Inspecter already knew all about the confession of the appellant before Ex. C was recorded or before the witnesses were invited to listen to the answers which the accused would give to the questions put to him by the Circle Inspector. In these circumstances we hold, as we have held before, that the statements made by the accused in the presence of P.Ws. 1, 2 and 7 are not statements leading to the discovery of any relevant fact. The Inspector has said nothing about the information which was undoubtedly given to him by the appellant (or perhaps his brother) in the girl's school before P.Ws. 1 and 2 were called in. The evidence for the prosecution therefore simply amounts to this, that the appellant took the police officer to the house of his uncle C.W. 1 and there produced the blood-stained head of the battle-axe (M. O. 1). By itself it is quite insufficient to warrant the conviction of the appellant for murder. There is a curious omission in this case on the part of the prosecution to explain why Chinna Narasa, the brother of the appellant was arrested and kept in remand, as the Sub-Inspector D.W. 7 says he was for 15 days, or, on the other hand, if there was just cause for keeping him in remand for 15 days, why his name was not included in the charge sheet.

The evidence being thus defective, the conviction for murder must be set aside and the appellant acquitted. We have to consider whether a retrial for the offence under S. 211 should be ordered since there certainly was a *prima facie* case against the appellant for that offence. But we have decided that no further trial should be ordered since it is quite clear that it could only be ordered to enable the prosecution to adduce evidence relating to the charge under S. 211 which ought to have been adduced at the trial. As we have already said, there is no independant evidence establishing the offence under S. 211. So far as the trial before the learned Sessions Judge is concerned, if the conviction for

murder is set aside, the conviction for the offence under S. 211 must follow automatically. The appellant's appeal is therefore allowed. He is acquitted of both offences under Ss. 302 and 211 of the Indian Penal Code. He is ordered to be set at liberty forthwith.



K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE VARADACHARIAR.

A. Dhanapala Chetty .. *Appellant* (1st Defendant)*

*v.*

D. Goverchand Sowcar and another .. *Respondents (Plaintiff and 2nd Defendant).*



Res judicata—*When applicable between co-defendants—Attestation of a registered document—Tests of valid attestation—Transfer of Property Act (IV of 1882), Ss. 3, 58 and 59.*

Where in a suit on a mortgage the plea of *res judicata* of the appellant was merely based on the fact that the 1st respondent was a party to a previous suit in which the question of the appellant's minority was decided and the question was not a question between himself and the 1st mortgagee or between himself and the mortgagor but was only a question which concerned another person who filed the previous suit and the appellant in the present case, it could not be said that there was a conflict between the two defendants and therefore no question was decided so far as the 1st respondent herein was concerned in order to apply the doctrine of *res judicata* and enable the plaintiff to obtain any relief.

*Munni Bibi* v. *Tirloki Nath,* (1931) 61 M.L.J. 196: L.R. 58 I.A. 158: I.L.R. 53 All. 103 (P.C.) and *Maung Sein Done* v. *Ma Pan Nyun* (1932) 63 M.L.J. 64: L.R. 59 I.A. 247: I.L.R. 10 Rang. 322 (P.C.), referred to.

Evidence must be always taken in order to prove that the identifying witnesses to a document registered had seen the executant sign the instrument or that they had received from him a personal acknowledgment of his signature and had themselves signed in his presence.

*Veerappa Chettiar* v. *Subramania Aiyar,* (1928) 55 M.L.J. 794: I.L.R. 52 Mad. 123), F.B.) referred to.

*Ramanathan Chetti* v. *Delhi Batcha Tevar,* (1930) 60 M.L.J. 302, followed.

Appeal against the decree of the Court of the City Civil Judge at Madras in O. S. No. 342 of 1933.

*S. T. Srinivasagopalachari* for *T. D. Srinivasachari* for Appellant.

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* C. C. C. A. No. 85 of 1935. 7th April, 1938.

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Leach, C.J.

*K. V. Sesha Aiyangar* and *T. Krishnarajan* for Respondents.

The judgment of the Court was delivered by

*The Chief Justice.*—This appeal arises out of a mortgage suit filed by the 1st respondent against the appellant. There were two mortgages, one dated the 2nd April, 1921, for Rs. 600 and the other dated the 25th April, 1921, for Rs. 400. The first mortgage carried interest at 24 per cent. per annum and the second mortgage interest at 30 per cent. per annum. The property charged in each case was the appellant's half share in a house. The second respondent is a subsequent mortgagee, but he took no part in the case and he is not concerned with the questions raised in this appeal. The appellant contested both the mortgages on these grounds:—(i) that he was a minor at the time they were entered into; (ii) that this question of minority had already been decided in his favour in a previous litigation, and therefore the doctrine of *res judicata* operated; and (iii) that no consideration passed for either mortgage. He raised a further contention with regard to the second mortgage to the effect that it was not valid because it had not been attested in accordance with the provisions of S. 59 of the Transfer of Property Act. The learned Judge decided against the appellant on all these questions and decreed the suit, but he reduced the rate of interest to one per cent. per annum in each case. This reduction of the interest has not been challenged in this appeal.

I will first deal with the argument on the second point, namely, that of *res judicata*. It appears that on the 3rd February, 1921, the appellant executed in favour of one P. Ratnavelu Achari another mortgage of the same property. Ratnavelu instituted Suit No. 545 of 1922 in the City Civil Court to recover the mortgage debt. The 1st respondent was made a party to that suit on the ground that he had a second charge over the property and had therefore a right to redeem Ratnavelu's mortgage. The 1st respondent did not appear and so far as he was concerned the case was decided *ex parte*. The trial Court held that the mortgagor was a major at the time of the execution of the mortgage in favour of Ratnavelu, but on appeal to this Court that decision was reversed and the mortgage was held to have no validity, having been executed during the minority of the appellant. Ratnavelu's suit was

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——
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accordingly dismissed and the 1st respondent became the 1st mortgagee. The plea of *res judicata* is merely based on the fact that the 1st respondent was a party to the previous suit in which the question of the appellant's minority was decided. But this question was not a question between himself and the 1st mortgagee or between himself and the mortgagor. It was a question which concerned only Ratnavelu Achari and the present appellant. In *Munni Bibi* v. *Tirloki Nath*[1], their Lordships of the Privy Council pointed out that in a case of this nature there are three conditions requisite before it can be held that the doctrine of *res judicata* has operation: (i) there must be a conflict of interests between those concerned; (ii) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (iii) the question between the co-defendants must have been finally decided. This decision was re-affirmed by their Lordships in *Maung Sein Done* v. *Ma Pan Nyun*[2]. In Suit No. 545 of 1922 there was no conflict between the two defendants and therefore no question to be decided so far as the 1st respondent was concerned in order to give the plaintiff relief. The doctrine of *res judicata* could not, in these circumstances, apply.

[Their Lordships then discussed the evidence as to the minority of the appellant and came to the conclusion that the appellant had failed entirely to discharge the burden of proof resulting in the rejection of the plea of minority.]

With regard to the question of consideration, the appellant's case really rests on his denial that any consideration passed. The mortgage deeds disclose what the consideration was and the appellant's word cannot be accepted as proving that the consideration stated therein did not in fact pass. The plaintiff has produced his account books showing that he did lend the money. The fact that these account books were accurately kept in the ordinary course of business was not challenged in cross-examination. There is also no substance in this plea.

The only other question which remains to be considered is whether the 2nd mortgage is invalid for want of attestation. It was discovered in the course of the case that there were no witnesses to the appellant's signature at the foot of the docu-

1. (1931) 61 M.L.J. 196: L.R. 58 I.A. 158: I.L.R. 53 All. 103 (P.C.).
2. (1932) 63 M.L.J. 64: L.R. 59 I.A. 247: I.L.R. 10 Rang. 322 (P. C.).

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ment. But at the back there were three witnesses to his signature before the Registrar admitting the execution of the document. The appellant in his written statement acknowledged that he has executed the document though he made no admission with regard to the attestation. He did not, however, raise any objection to it until the 1st respondent was in the witness box. It was then that his learned Advocate observed that the document had not been attested in the ordinary way. The learned Judge, however, decided that the document had been rightly attested and in this connection relied on the decision in *Veerappa Chettiar* v. *Subramania Aiyar*[1]. Before discussing the judgment in that case, it is necessary to refer to S. 59 and S. 3 of the Transfer of Property Act. S. 59 provides that where the principal money secured is one hundred rupees or upwards a mortgage, other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested at least by two witnesses. S. 3 defines the word "attested" in relation to an instrument. The word means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment to his signature or mark or of the signature of such other person and each of whom has signed the instrument in the presence of the executant. In *Veerappa Chettiar* v. *Subramania Aiyar*[1], a Full Bench of this Court held that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement under Ss. 58 and 59 of the Registration Act are a sufficient attestation within the meaning of the Transfer of Property Act and its subsequent amending Acts. But in that case there was evidence that the identifying witnesses had signed in the presence of the executant, and this fact was lost sight of by the learned trial Judge in the present case. In *Ramanathan Chetty* v. *Delhi Batcha Tevar*[2], it was held that the mere endorsement by the Sub-Registrar of an admission of execution and the signature of the witnesses present at the time are not sufficient to satisfy the requirements

1. (1928) 55 M.L.J. 794: I.L.R. 52 Mad. 123 (F. B.).
2. (1930) 60 M.L.J. 302.

of S. 59 of the Transfer of Property Act, as amended by the Acts of 1926 and 1927, where there is no evidence to the effect that the signatures of the witnesses to the admission were affixed to the document in the presence of the admitting executants or any endorsement to that effect. When this question of attestation was raised in the trial Court the learned Advocate for the 1st respondent asked the learned Judge to allow evidence to be called apparently in order to prove that the identifying witnesses had seen the appellant sign the instrument or that they had received from him a personal acknowledgment of his signature and had themselves signed in his presence. The learned Judge, however, did not consider that this evidence was necessary in view of the pleadings and the decision in *Veerappa Chettiar* v. *Subramania Aiyar*[1]. We are, however, unable to share this opinion. The document as it stands does not show that the signatures of the identifying witnesses were affixed in the presence of the appellant. In these circumstances we consider that the proper course will be to send the case back to the trial Court to take the evidence which the parties may wish to offer on this question and to state its findings on the evidence. The record of the case will then be returned to this Court.

The decree of the trial Court stands so far as the mortgage of the 2nd April, 1921, is concerned. The question of the validity of the mortgage of the 25th April, 1921, will be decided after receipt of the record from the trial Court. The trial Court will submit its findings within two months. Ten days will be allowed for objections.

In pursuance of the directions contained in the above order, the principal City Civil Judge, Madras, submitted the following

FINDING.

* * * * *

This appeal coming on for final hearing after the receipt of the Finding of the lower Court, the Court delivered the following

JUDGMENT. *The Chief Justice.*—The principal City Civil Judge took evidence in accordance with our order dated the

Leach, C.J.

1. (1928) 55 M.L.J. 794: I.L.R. 52 Mad. 123 (F. B.).

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18th of August, 1937, and has submitted his findings to this Court. He has carefully considered the evidence and has come to the conclusion that the mortgage dated the 25th April, 1921 (Ex. B) was not properly attested. The learned Advocate for the 1st respondent is unable to challenge the correctness of this finding and the appeal will therefore be allowed so far as this mortgage is concerned.

The decree of the trial Court will be modified by giving the 1st respondent a mortgage decree for Rs. 600 with interest at one per cent. per annum from the 2nd April, 1921, in respect of the mortgage of the 22nd April, 1921 (Ex. A). The 1st respondent will be entitled to costs in this Court and in the Court below on the amount of the amended decree. The appellant will be entitled to his costs in this Court on the amount in respect of which he has succeeded, but we do not award him any costs in the lower Court.

The amount to be inserted in the amended decree will be calculated according to the dates given in the lower Court's decree.

K. C. —— *Appeal allowed.*

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD WRIGHT, LORD ROMER, LORD PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Bawa Faqir Singh .. *Appellant**

*v.*

The King-Emperor .. *Respondent.*

P.C. — Bawa Faqir Singh v. King-Emperor.

*Criminal Procedure Code (V of 1898), Ss. 337 and 494—Scope—Tender of pardon by Magistrate—Condition imposed for disclosing information—Approvers examined by Magistrate—Subsequent withdrawal of charges against approvers on application of prosecution—Procedure as one under S. 337—Whether remaining accused person can be tried before same Magistrate.*

S. 337 of the Criminal Procedure Code deals with the action of a judicial officer while S. 494 of the Code deals with the act of an executive officer. If the manner in which a tender of pardon is made follows in substance the method prescribed by S. 337, then the section must apply, and minor and immaterial irregularities or variations cannot be taken to affect its operation. The fact that the Magistrate has not recorded his reasons as required by sub-S. 1-A is merely an irregularity on the part of the Magistrate. In such a case the right of the accused or the approver cannot be affected because the Magistrate has failed to comply with the requirement

* P. C. Appeal No. 38 of 1938. 21st July, 1938.

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imposed for the benefit of the accused. Nor is it material that the Magistrate in tendering the pardon did so after consulting the Local Government and with its authority. The most important consequence of the section is that when a Magistrate has tendered the pardon the trial must not be by another Magistrate even though he be vested under S. 30 of the Code with power to try such an offence in question, but must be by the High Court or by the Sessions Court.

One, *B*, was charged with five others with conspiracy and with using as genuine a document known to be forged. The District Magistrate, after consultation with the Local Government, and with its consent, offered two of the persons charged, *S* and *V*, a promise of pardon if they would make true and full disclosure of facts in their knowledge relating to the offences charged. The Magistrate did not, as prescribed by S. 337 (1-A), record his reasons for offering the pardon. In due course *S* and *V* were examined by the Magistrate trying the case as witnesses for the prosecution. That Magistrate then, on application by the Public Prosecutor, allowed the latter to withdraw the prosecution against *S* and *V* under S. 494 of the Code. *B* objected to that course, and claimed that he was entitled under S. 337 to be committed for trial by the Sessions Court. His objection was overruled, and his trial continued and resulted in conviction.

*Held*, that the course taken with regard to the pardons offered to *S* and *V* was in consonance with the terms of S. 337 of the Code, that the remaining accused had the right to claim his trial by the High Court or Court of Sessions and the Magistrate who granted the pardon was not competent to proceed with the trial of the case against him.

Decision of the Lahore High Court reversed.

Appeal by special leave from conviction and sentence recorded by the Division Bench of the High Court, Lahore, dated 29th October, 1934 (*Bhide* and *Coldstream, JJ.*) on an objection raised by the appellant during his trial.

The accused, Bawa Faqir Singh, was charged with five other persons with conspiracy and with using as genuine a document known to be forged, offences under Ss. 120-B and 471 respectively of the Indian Penal Code, and was convicted and sentenced. To two of those accused with him a pardon was tendered by the District Magistrate if they would undertake to make true and full disclosure of all the facts within their knowledge regarding "the criminal activities" of the appellant. After the pardons had been accepted and the two approvers had given evidence as witnesses for the prosecution before the Special Magistrate who was trying the case, the Public Prosecutor applied to the Special Magistrate for permission to withdraw the prosecution of the approvers under S. 494 of the Criminal Procedure Code, which permission was granted. During the appellant's trial, he objected to what had been done, and claimed that S. 337 had been called into operation by it, with the result that he was entitled to be committed for trial by the Sessions Court. The Special Magistrate overruled the

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objection, and a Division Bench of the High Court upheld his ruling. The accused appealed to His Majesty in Council.

*J. M. Pringle* for Appellant.—The question for decision is whether the Magistrate had jurisdiction to try the appellant after conditional pardon had been tendered to a person who was accused with him. Counsel referred to the policy of the law in allowing the Courts in certain cases to act on tainted evidence, and referred to Ss. 339, 343, 401 and 494 of the Code of Criminal Procedure. As to S. 343, it is submitted that whenever a bargain is made with an accused whereby he gives evidence the provisions of S. 337 come into operation. In this case all the factors necessary to make S. 337 (2-A) operative were present. It cannot be said that it was not the Magistrate who tendered the pardon simply because he consulted with the Local Government before doing so, and obtained their approval. The Local Government never purported itself to tender the pardon, and had in any case no power to do so. While it is left to the Magistrate to tender pardon, he cannot do so *suo motu*, because he may well know nothing about the case involved. The nature of the case and the necessity of tendering a pardon would be matters which have to be brought to his notice by those interested. The pardons having been tendered as they were, the provisions of S. 337 were brought into operation, and could not be ignored by following the procedure under S. 494.

(*Lord Romer.*—Is the question not whether the District Magistrate was acting under S. 337 or the Public Prosecutor under S. 494? A pardon having been tendered, and a bargain made with the proposed approver, must it not be taken that it was the Magistrate who was acting, and acting under S. 337?)

*G. D. Roberts, K.C., W. Wallach* and *J. Megaw* for the Crown.—What was actually done in connection with the tendering of the pardon is really a question of fact. If the District Magistrate was acting under S. 337, then the appellant's trial was a nullity, in which case the Crown can only ask that the conviction be set aside, the Courts in India being left to take such further proceedings as they may decide on. The trial will remain lawful notwithstanding that some official may have, in tendering pardon, done something which he had no right to do. The witnesses in question having been examined, the only question is what weight should be attached to their evidence. It is submitted that the action of tendering the pardons was taken on the Local Government's power to act outside S. 337. There was the alternative procedure open of withdrawing the prosecution against one of the accused and examining him as a witness. Such procedure would not be illegal even if not desirable. Counsel referred to *King-*

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*Emperor* v. *Har Prasad Bhargava*[1], with reference to the general right of the Local Government to refrain or to promise to refrain from prosecuting. It is necessary to examine closely exactly what was done, and that, it is submitted, shews that the pardons tendered were not in terms which would bring S. 337 into operation. They contained the phrase, "The Governor in Council is pleased to direct that......no action shall be taken . . . ." That being a direct order to the District Magistrate to drop the proceedings if full disclosure is made, S. 337 would not apply. Further, no reasons were recorded by the Magistrate as prescribed by S. 337 (1-A), which is another indication that the action taken was not under that section.

(*Lord Wright.*—Can you show that in a case coming under S. 337, the Local Government have the power to jettison that section? The question is whether the section is mandatory in cases which fall under it.)

If the appeal is allowed, the order made should, it is submitted, take the form which was used in *Ras Behari Lal* v. *King-Emperor*[2].

*J. M. Pringle* in reply referred to *Paban Singh* v. *King-Emperor*[3] and *Banu Singh* v. *King-Emperor*[4]. The question whether the Local Government had power to offer a pardon is not, it is submitted, relevant here. The Government order says that the approvers "may be offered a promise of pardon. . . ." There is no direction to the Magistrate to offer a pardon. In this case there is an offence to which S. 337 applies, a pardon by a Magistrate empowered to grant a pardon, and examination as witnesses of the persons receiving the pardon. In those circumstances the Magistrate was bound to commit the appellant to the Sessions Court.

21st July, 1938. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—The appellant was convicted and sentenced on the 28th May, 1936, by the Special Magistrate of the District of Lahore under S. 120-B (conspiracy) and S. 471 (using as genuine a forged document known to be forged) of the Indian Penal Code. The sentence was a sentence of rigorous imprisonment for five years. The conviction and sentence were confirmed on appeal. The ground of this appeal is that the Special Magistrate had no jurisdiction to try the case, since it came within the provision of S. 337 of the Code of Criminal Procedure, and could only be lawfully tried in the

1. (1922) I.L.R. 45 All. 226.
2. (1933) 65 M.L.J. 513: L.R. 60 I.A. 354: I.L.R. 12 Pat. 811 (P.C.).
3. (1906) 10 C.W.N. 847 at 848.
4. (1906) I.L.R. 33 Cal. 1353.

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circumstances of the case by the High Court or Court of Session. This objection was overruled by a decision of the High Court of Lahore, and in effect it is from that decision that this appeal is brought.

The facts which are, so far as relevant, not in dispute may be shortly stated. The appellant, an advocate of the High Court, acted as counsel for G. S. Kochar, who was plaintiff in a suit in the Court of the Senior Subordinate Judge based on a promissory note. The plaintiff succeeded against two of the defendants, both before the Subordinate Judge and on appeal. Meantime complaints had been made by Durga Das, the defendant, against whom the case was dismissed, that his signature to the promissory note had been forged. On the 14th May, 1928, the District Magistrate, acting on a police report, directed the issue of warrants against six persons, including the appellant and two other persons Sain Dass and Vishwa Mitter. On the 3rd June, 1928, the District Magistrate had brought before him Sain Dass, who was then in custody, and read over to him a document which had been enclosed with a letter sent to him by the Local Government. The letter, which was in answer to a communication from the District Magistrate on the question of obtaining evidence from one or more of the accused persons, was in the following terms:—

"Subject:—Grant of a promise of pardon to SAIN DASS son of L. Nagar Mal.

"Sir,

"In reply to your unofficial note No. 751, dated the 19th May, 1928, I am directed by the Governor in Council to state that Sain Dass may be offered a promise of pardon in the terms of the enclosed draft.

"The said enclosed draft ran as follows:—

" 'PROMISE.'

"Whereas SAIN DASS son of L. Nagar Mal, caste Khatri, Manager, Central Co-operative Bank, Karnal, has undertaken to make a full and true disclosure of the whole of the facts within his knowledge regarding the criminal activities of B. FAQIR SINGH son of B. Bir Singh, Bhalla, Advocate, High Court, Lahore and other persons mentioned in the margin, and whereas His Excellency the Governor in Council is pleased to direct that on condition of the said Sain Dass making such a full and true disclosure, no proceedings shall be taken against him with respect to the

1. B. Shamsher Singh son of Bir Singh.
2. Ram Lal son of Kesho Ram, Clerk, Post Master General's Office.
3. Ganda Singh Kochar son of M. S. Kochar.

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4. Wishwa Mitter son of Dina Nath, Clerk, Ferozepore Arsenal.

said offences, the Deputy Commissioner of Lahore is hereby authorised to inform the said Sain Dass that no proceedings will be taken against him if he makes a full and true disclosure of the whole of the circumstances of the cases in question within his knowledge and repeats the same when called upon to do so in any court of justice.

By order of the Governor in Council.

(Sd.) H. M. COWAN,
Home Secretary to Government,
Punjab."

Simla.
Dated the 29th May, 1928.

Sain Dass, when the draft was read over to him, accepted the terms. The District Magistrate then recorded the following order:—

"Sain Dass present. Conditions explained to him and accepted by him. Public Prosecutor is authorised to withdraw the case against him.

(Sd.) S. H. PUCKLE,
District Magistrate,
3-6-28."

Mr. Puckle held the offices both of District Magistrate and Deputy Commissioner.

The proceedings in the case were very much delayed and protracted. Eventually, after various protests and objections by the appellant, the Public Prosecutor applied to Mr. Luthra, the Special Magistrate, to whom the case had been transferred, and who was vested with the powers under S. 30 of the Code, for permission to withdraw from the prosecution of Sain Dass. The Special Magistrate, by order dated the 4th July, 1932, allowed the Public Prosecutor to withdraw the case under S. 494 of the Criminal Procedure Code. The appellant objected to this order on various grounds, in particular that the case could only properly proceed under S. 337 whereas the prosecution were seeking to have the case tried otherwise than before the Sessions Judge as S. 337 would require. Sain Dass was thereupon called on the 9th March, 1933, as a witness for the prosecution before the Magistrate, Mr. Luthra. On the 7th April, 1933, another of the accused, Vishwa Mitter, was called before an Additional District Magistrate at Lahore, and a conditional promise of pardon was read over to him by the Magistrate, the same procedure being followed as in the case of Sain Dass. Vishwa Mitter accepted the offer. An application was then made to the Special Magistrate, Mr. Luthra, for leave to withdraw the case against Vishwa Mitter under S. 494 of the Code. Objection was made by the appellant on much the same grounds as in the case of Sain Dass, but the

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Magistrate made the order and in due course Vishwa Mitter gave evidence before the Magistrate.

On the 26th May, 1936, Mr. Luthra, having completed the prolonged proceedings, gave judgment acquitting two of the accused, but finding the appellant and one other of the accused guilty under Ss. 120-B, 467 and 471 of the Indian Penal Code, and imposing on the appellant, and the other accused who was found guilty, a sentence of rigorous imprisonment for five years. This sentence was confirmed on appeal with a variation in respect of the conviction.

During the proceedings it was clear that the Special Magistrate did not intend to commit the accused to the Sessions Court as required by S. 337. Not only did he sanction the discharge of Sain Dass and Vishwa Mitter under S. 494, but he framed charges against the appellant before the examination of the witnesses was completed, under S. 254, instead of proceeding under Ss. 206-210, which apply to committal for trial. The appellant objected to this course, claiming that he was entitled to be committed for trial under S. 337, but his objections were overruled, eventually by a Divisional Bench of the High Court consisting of Mr. Justice Bhide and Mr. Justice Coldstream, who on the 29th October, 1934, delivered judgment, rejecting the objection, with the result that the trial continued and was concluded before the Magistrate as already stated.

The question is whether S. 337 and the material sections which follow have been brought into operation by what was done by the magistrates when they offered a tender of pardon to the two approvers, and by what happened subsequently. It will be convenient to summarise briefly the relevant sections of the Code.

S. 337 is limited to certain offences, including those triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to 10 years. These latter words cover the offences with which the appellant was charged. The section empowers certain magistrates, at any stage of the investigation or enquiry into or the trial of the offence, with a view to obtaining the evidence of any person concerned in or privy to the offence, to tender to him a pardon on condition of his making a full and

true disclosure of what he knows relative to the offence. A magistrate who tenders a pardon under the section is to record his reasons for so doing, and furnish a copy to the accused if required. Every person accepting a tender under the section is to be examined in the Court of the magistrate and in the subsequent trial if any.

Sub-S. 2-A is the section vital to this case. It provides that:—

"(2-A) In every case where a person has accepted a tender of pardon and has been examined under sub-S. (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be."

S. 338 gives power to the Court to which commitment is made to tender or order the magistrate to tender a pardon on the similar condition. S. 339 deals with the trial of a person to whom a conditional pardon has been granted under Ss. 337 and 338 if the Public Prosecutor certifies that he has not fulfilled the condition of full and complete disclosure. S. 339-A provides that a person by whom a tender of pardon has been accepted, when tried under S. 339, is to be asked whether he pleads that he has complied with the conditions of the pardon, and if it is found that he has, he shall be acquitted.

Before considering the rival contentions in this appeal, it will be necessary to refer to S. 494, which it is said on behalf of the respondent is the section used in the proceedings. That section enables the Public Prosecutor with the consent of the Court to withdraw from the prosecution before the jury return a verdict or, where there is no jury, before judgment is pronounced, whereupon the accused shall be discharged if the withdrawal is made before a charge has been framed, or, if it is made after a charge has been framed or no charge is required, he shall be acquitted.

The respondent claims that it was under S. 494 that the charge was withdrawn by the Public Prosecutor, that this was done with the consent of the Court, and accordingly that the accused has no right to claim that he is entitled under S. 337 to trial by the High Court or a Sessions Court, while the approver cannot claim the benefit of the procedure for his trial provided by Ss. 339 and 339-A. Under clause (*a*) of

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S. 494 the approver is merely discharged, which means that he may again be put on trial for the same offence.

It is clear that in the case of each of the two approvers, Sain Dass and Vishwa Mitter, the application to withdraw was made and the consent of the Court was given as under S. 494. But the issue to be determined here is whether the action previously taken in tendering a conditional pardon, and, on its being accepted, examining the approvers did not constitute action only consistent with being taken under S. 337 and therefore debarring the prosecution from claiming that they were entitled thereafter to ignore the provisions of S. 337 and proceed under S. 494. Their Lordships are of opinion that the prosecution were not so entitled, and therefore it is not necessary here to discuss the precise effect of S. 494 or to consider any question which might arise in regard to S. 343, which by its express terms does not apply to S. 337, if action were not taken under that section. In their Lordships' judgment, what was done here comes substantially within S. 337. The offences charged were within the section. The tender of pardon was made by a magistrate, within the terms of the section. It was expressly made on condition of the person to whom it was addressed making a full and true disclosure of the whole of the facts (or circumstances) within his knowledge. It is next to be observed that the persons who accepted the tenders of pardon from the magistrates were severally examined before the magistrate taking cognizance of the offence. The requirements of sub-S. 2-A then automatically came into force, which are that the accused, if there are reasonable grounds for believing that he is guilty of the offence, is to be committed to the Court of Session or High Court. It is said that the magistrate has not recorded his reasons as required by sub-S. 1-A. But that is merely an irregularity on the part of the magistrate. The right of the accused or the approver cannot be affected because the magistrate has failed to comply with a requirement imposed for the benefit of the accused. Nor is it material, in their Lordships' judgment, that the magistrate in tendering the pardon did so after consulting the Local Government and with its authority. That is an internal matter of administration, which cannot affect the position of the accused or the approver. The essential fact is that the pardon was

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tendered to the approver by the magistrate. It is obvious that the proceedings so taken under S. 337 were different in character from the course which would have been taken under S. 494. This latter section belongs to a different chapter of the Code. S. 337 falls under Chapter XXIV, which deals with general provisions as to inquiries and trials. S. 494 falls under the Chapter XXXVIII, which is headed "of the Public Prosecutor," that is to say, the former section deals with the action of a judicial, the latter with that of an executive, officer. S. 494 says nothing about pardons at all. It gives a general executive discretion to withdraw from the prosecution subject to the consent of the Court, which may be determined on many possible grounds, one of which no doubt is that the person in respect of whom the charge is withdrawn may be willing to give evidence. But the whole procedure and the various consequences under S. 494 differ from those under S. 337. No doubt, at a later stage in the present proceedings the prosecution sought to bring themselves under S. 494, by purporting to take action under it, but it was then, in their Lordships' judgment, too late to change the position either as against the appellant or as against either of the approvers. It is said that the Local Government did not intend to act under S. 337, but, if their overt acts are such as to be only capable of being referred to that section, their intention not to act under it cannot matter. It is not necessary to consider whether the prosecution had a desire to reap the benefits of S. 337, while also desiring to evade the consequence of having to try the case before the High Court or Court of Session, because in their Lordships' judgment it is impossible thus to make the best of both worlds. If the manner in which the tender of pardon is made follows in substance the method prescribed in S. 337, then the section must apply. Minor and immaterial irregularities or variations cannot be taken to affect the operation of the section. Their Lordships do not seek in deciding as they do to throw any doubt on the general prerogative right to pardon. They are dealing here with the special statutory machinery provided under S. 337, with its peculiar feature that the pardon under that section is tendered as a judicial act and under the special precautions, rules and consequences which the statute sets out. One consequence, perhaps the most important, is that when a magistrate

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has tendered the pardon the trial must not be by another magistrate even though he is vested under S. 30 of the Code to try such an offence, but by the High Court or Sessions Court.

For these reasons their Lordships are of opinion that the trial was without jurisdiction and hence that the appeal should be allowed and the conviction and sentence set aside. In their opinion, the case should be remitted to the magistrate with direction to him to take the appropriate action under S. 337 (2-A).

They will humbly so advise His Majesty.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondent: *The Solicitor, India Office.*

R. C. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE HORWILL.

Siddavarapu Ramalinga Reddy .. *Appellant* in both (1st Defendant in both)*

*v.*

Rachaputi Ramalingam Setty and another .. *Respondents in both (Plaintiff 2nd Defendant in both).*

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*Partnership—Lease for a term of a mica mine—Period of lease expiring—Partnership term terminated—Fresh lease by one of the partners in his individual capacity—If enures for the benefit of partnership—Trusts Act, S. 88—Partnership in a particular venture—Second part of S. 88, Trusts Act, not applicable—Partnership Act, S. 53—Use of boiler of old partnership—Plaintiff calling upon the other partner to settle accounts—Partner refusing to settle—If can rely on S. 53 of the Partnership Act.*

Under the Indian Law, except in cases otherwise specially provided for by statute, a constructive trust can be held to arise only if the conditions of S. 88 or 90 of the Trusts Act are satisfied.

A mica mining business begun by *A* with two others in 1924 was continued after 1929 with the first defendant *B* as a partner therein. In 1925 a block of land was obtained by the partnership for a term of 5 years and on a portion of the land a mine had been opened. The lease terminated on 7th October,

* Appeal No. 310 of 1934 and Appeal No. 197 of 1935. 25th March, 1938.
(A. S. No. 52 of 1935 on the file of the District Court of Nellore withdrawn and transferred to the file of the High Court by order dated 29th July, 1935 in C. M. P. No. 1103 of 1935).

1930. There was no clause for renewal in the lease. On 10th June, 1930, *A* obtained a fresh lease for 10 years in his own favour to commence from the termination of the prior lease. Before the lease terminated, *A* gave a notice to *B* asserting that the lease was his own and asking him to settle the accounts of the partnership stating that the partnership thereby ceased and claiming that the lease to *A* must be treated as one not acquired for the benefit of the partnership. It was found that in the matter of the new lease *A* acted for himself and not on behalf of the partners and that *B* was in this matter with his friends who were competing for the lease.

*Held*, that independently of any contract or understanding between the parties and apart from any proof of misconduct on the part of the plaintiff *A* or improper use of his position in connection with the procuring of the new lease, the defendant *B* is not entitled to the benefit of the new lease on the principle of S. 88 of the Trusts Act. There is no absolute rule or irrebuttable presumption in India that when part of the assets of a firm consists of leasehold premises, one partner cannot, under any circumstances, take a new lease of those premises for his own benefit without holding it subject to the benefit of the partnership.

*Semble*.—Where the lease is not renewable by contract or custom it will not be justifiable in the circumstances obtaining in this country to raise a general presumption that in obtaining a renewal the partner availed himself of his character as partner or of the advantage of the old lease.

In the case of a partnership at will or for an indefinite term, it is possible to conceive of a conflict between the interests of the renewer as a partner and as an individual but this case is more analogous to a partnership in a particular venture and as such the case will not fall under the second part of S. 88, Trusts Act.

The plaintiff gave notice to the first defendant asking him to come and settle the accounts but he refused and when the plaintiff wanted to use the boiler which they had thertofore been using, the defendant obstructed.

*Held*, that under S. 53 of the Partnership Act a partner may, even after dissolution, restrain any other partner from using any of the property of the firm for his own benefit until the affairs of the firm have been completely wound up. But when the defendant refused to settle the accounts on notice by the plaintiff, he cannot rely on S. 53, as, to permit it will be to allow him to take advantage of his own wrong. The obstruction was unlawful and the plaintiff was therefore entitled to damages.

Appeals against the decrees of the Court of the Subordinate Judge of Nellore dated 8th May, 1934 and made in O.S. Nos. 68 of 1930 and 67 of 1930.

*The Advocate-General (Sir A. Krishnaswamy Aiyar), K. Krishnaswami Aiyangar* and *A. K. Sreeraman* for Appellant.

*S. Srinivasa Aiyangar, S. Doraiswami Aiyar, K. Umamaheswaran, R. Venkatasubba Rao* and *Alladi Ramaswami* for Respondents.

The judgment of the Court was delivered by

*Varadachariar, J.*—These appeals may conveniently be dealt with together, as was done in the Court below. In May, 1929, the appellant, who was the first defendant in both the

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suits, became a partner with the plaintiff in a mica mining business which the latter had been carrying on for some years. When the plaintiff started that business in 1924, he had two partners, namely, the second defendant, who was entitled to a four annas share and P.W. 3 who was entitled to a six annas share. The second defendant was only a working partner while plaintiff and P.W. 3 were the capitalist partners. Among the lands which they took on lease for the purpose of opening mica mines in connection with that business, was a block of land obtained under Ex. B for a term of five years from 7th October, 1925. On a portion of the land covered by this lease, they had opened a mine which they named *The Nityakalyani Mine*. For one reason or another, it was not possible for some years to work this mine to the best advantage, and, in December, 1928, P.W. 3 left the concern, assigning his six annas share (by Ex. D) to the plaintiff. The parties have put forward different versions as to the reasons that led to the plaintiff and the first defendant becoming partners in 1929. It is no doubt noteworthy that under this arrangement the first defendant agreed to advance the whole capital required for the working of the mine and to repay the moneys which the plaintiff has so far invested. But we agree with the lower Court that the arrangement was not the result of any financial difficulties of the plaintiff. This question does not however seem to us to be one of much importance, except as bearing upon a suggestion of the first defendant that he accepted such an onerous obligation only because it was represented to him at the time and he was led to expect that the lease under Ex. B would be renewed or extended and that the partnership business would be continued even for a further term. When the first defendant became a partner, the second defendant sank into the position of a person remunerated by a share of the profits, it being expressly provided in Ex. M that he should not be liable for losses.

On 10th June, 1930, the plaintiff obtained (under Ex. E) a fresh lease of most of the lands covered by Ex. B, for a term of 10 years commencing from the date of the termination of the lease under Ex. B. One of the principal questions for decision in the appeals is whether the defendants are entitled to claim an interest in this new lease. In August and September, 1930, the position was left hazy, each party

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suspecting the other and neither of them taking up a definite position. Early in October, 1930, the plaintiff sent a notice (Ex. K) to the first defendant asserting that the new lease was his own and asking him to come and settle the accounts of the partnership which according to the plaintiff was terminating on 6th October, 1930, with the termination of the lease under Ex. B. By his reply (Ex. K-2) the first defendant denied that the partnership was to come to an end on 6th October, 1930, and claimed that the lease under Ex. E should be treated as one acquired for the benefit of the partnership. As the plaintiff disputed this claim, the first defendant refused to agree to a settlement of the accounts of the partnership and on the night of 6th October, 1930, obstructed the plaintiff from working the mine by using the boiler which they had theretofore been using. The plaintiff sought the aid of the Magisterial authorities; but as they passed an emergent order restraining both parties from using the boiler or working the mine for a period of two months, the plaintiff instituted two suits on 24th November, 1930, O. S. No. 67 of 1930 (out of which A. S. No. 197 of 1935 arises) for the taking of the accounts of the partnership on the footing that it had come to an end by efflux of time on 6th October, 1930 and O. S. No. 68 of 1930 (out of which A. S. No. 310 of 1934 arises) for a declaration that the defendants were not entitled to claim any interest in the new lease—Ex. E and for an injunction restraining them from interfering with the plaintiff's working of the mine. He also claimed damages in respect of the loss sustained by reason of the 1st defendant's obstruction.

The 1st defendant denied that the partnership between him and the plaintiff had come to an end on 6-10-1930. He had however no objection to the Court declaring the partnership dissolved, if accounts were to be taken on the footing that the new lease also formed part of the assets of the partnership. He disputed the plaintiff's claim to damages and also contended that the amount claimed was excessive. The 2nd defendant had entered into a partnership arrangement with the plaintiff in respect of the new lease on 27th September, 1930 (Ex. J.) But, for some reason, he seems to have taken sides with the 1st defendant when the disputes between the plaintiff and the 1st defendant commenced. He accordingly filed written statements supporting the 1st defendant in his main contentions. The

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learned Subordinate Judge held that the partnership between the plaintiff and the defendants terminated by efflux of time on 6th October, 1930 and that the defendants were not entitled to the benefit of the new lease obtained by the plaintiff under Ex. E. He accordingly directed accounts to be taken in O. S. No. 67 of 1930 in the terms asked for by the plaintiff. In O.S. No. 68 of 1930 he gave the declaration and the injunction prayed for; he also directed the 1st defendant to pay damages to the plaintiff at the rate of Rs. 1,500 per mensem from 7th October, 1930 to 17th April, 1931, when the plaintiff was enabled to work the mine in consequence of his appointment as receiver. Against the decrees passed in the above terms, the 1st defendant has preferred these appeals.

The only point raised in A.S. No. 197 of 1935 is, that the Court below should have directed accounts to be taken on the footing that the lease under Ex. E formed part of the partnership assets. As this question arises for decision even in A.S. No. 310 of 1934, the decision on that point in A.S. No. 310 of 1934 will govern A. S. No. 197 of 1935 also. The learned Advocate-General, who appeared for the appellant, criticised some portions of the lower Court's judgment dealing with the defendant's version as to what happened when the partnership under Ex. M was entered into and when the new lease under Ex. E was obtained. But, as he did not seriously question the conclusions reached by the Court below on these points and as we are in substantial agreement with those conclusions, it will be sufficient to deal briefly with this part of the case.

In the reply notice (Ex. K-2) as well in his pleadings and evidence in these suits, it was the 1st defendant's case (*a*) that even in May, 1929, the plaintiff represented to the 1st defendant that the landlords would grant a renewal or at least an extension of the term of the first lease and it was on this understanding and by reason of that representation that the 1st defendant entered into the partnership with the plaintiff; (*b*) that sometime before the middle of 1930 there was an arrangement between the parties that in the new lease to be obtained they should have the same rights as in the old; (*c*) that in the matter of obtaining the new lease, the plaintiff negotiated on behalf of all the old partners; and (*d*) that when on the 9th June, 1930, the 1st defendant went to the lessor's house, the plaintiff sent him away saying that in connection

with the new lease he would conduct himself as before and thus prevented the 1st defendant from competing for the new lease. The plaintiff denied these allegations. We agree with the Court below that on these points the plaintiff's case is substantially true.

It is significant that no reference is made in Ex. M to the contingency of a renewal of the lease or of the extension of its term or to any other lease being taken—and in this respect it is in marked contrast with Ex. A. There can be little doubt even on the 1st defendant's own evidence, that if the business was to be continued after the termination of Ex. B, he expected this to be done on revised terms, especially in the matter of 'advances' (referred to by the witness as 'Pettubadi'). The 1st defendant's conduct in connection with Ex. Y is also significant. In respect of contracts of sale with the Madras Mica Company, the practice was to enter into *annual* contracts; but Ex. Y was expressly limited to a period of about 2 months ending with 6th October, 1930. The contemporaneous letter Ex. GG explains the reason for this course to be that the partnership was to expire on the 6th October, 1930. On the same date as Ex. Y, the plaintiff entered into another contract (Ex. Z) for sale of mica to the same company for one year commencing from 7th October, 1930 and Ex. GG states that the plaintiff and the 2nd defendant were the only two people interested in this new contract. The 1st defendant is of course not a party to Exs. Z and GG; but these documents (read with the evidence of P. W. 7) are important as showing that plaintiff never concealed his ideas or intentions in the matter and it is difficult to believe that the 1st defendant would not have become aware of them about this time. Even ignoring Exs. Z and GG, the 1st defendant is not able to explain why (consistently with his hypothesis) Ex. Y came to be limited to the period ending with 6th October, 1930. We are not prepared to accept his story that the matter of the contract Ex. Y was not talked over between the partners beforehand and that it was only when he signed Ex. Y that he noticed the limitation of the period to 6th October, 1930. The 2nd defendant deposes that it was talked over beforehand; and though no question was put to the plaintiff on this point, we accept the statement of the 2nd defendant as according with the probabilities. It must be remembered in

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this connection, that the 1st defendant admits that as early as on the 11th June he became aware of the new lease having been obtained by the plaintiff. If, as he says, it was the original understanding or at least the arrangement in June, 1930, that even after 6th October, 1930, the partnership business should be *continued*, it is difficult to believe that the 1st defendant would have agreed to or acquiesced in the course adopted by the plaintiff in connection with Exs. Y and Z.

Read in the light of the above considerations, Ex. H dated 4th August, 1930, is also instructive. The first defendant refers therein to 'doubts' arising in his mind and asks the 2nd defendant whether anything has been mooted in respect of the 2nd defendant's share in the new lease. He adds.

"Let things take their own course in future. Within these two months please see that as much quantity as possible is extracted."

This doubt and query and the further suggestion are more consistent with the hypothesis that between June and August, 1930, the 1st defendant was only expecting that the plaintiff would moot the subject of a *new* contract of partnership in connection with the work to be done under the new lease than with the view that he believed that he had an interest as of right or by virtue of the old partnership in the new lease or in the business to be done under it.

The oral evidence as to the events that happened in connection with the obtaining of the new lease is not very satisfactory and we are constrained to say that the *whole* truth has not been disclosed. We are not prepared to believe the 1st defendant's version as to what happened on the morning of the 9th June, in the lessors' house. We are also not prepared to believe that there was no real competition in the matter, on behalf of Rami Reddi. It is difficult to believe that Narasa Reddi and Mr. Sivaramiah (a leading Vakil) would have come to the house of the lessors on the 9th morning on behalf of Rami Reddi, if the latter had no serious proposal to make. Nor are we convinced as to the truth of the story (though it is spoken to by P.W. 6) that when the lessors went to Mr. Sivaramiah's house that afternoon, Rami Reddi who had admittedly come there had no serious proposal to make. Even if we accept Rami Reddi's version that he did not proceed further because of his fear of a dispute with the plaintiff, it is sufficient to show that Rami Reddi did compete or intended to compete up to a particular stage.

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We are not much impressed with the argument of the learned Advocate-General that the terms of Ex. E are less onerous to the lessee than those proposed in the draft of the 7th (Ex. O) and that accordingly there could have been no competition from others between the 7th and the 10th. The amount payable is no doubt reduced from 12 thousand to 10 thousand, but unlike Ex. O, Ex. E makes the whole amount payable by 7th April, 1932 and does not give the lessee the option of throwing up the lease at the end of 5 years so as to avoid liability for one half of the rent. It must also be noted that Ex. E excludes all lands fit for cultivation and as explained by the plaintiff it is on this very ground that one of the lessors refused to complete Ex. O. We are not therefore satisfied that the terms of Ex. E are less onerous than those in Ex. O.

While we are satisfied that Rami Reddi did compete with the plaintiff in connection with the lease of June, 1930, it is not easy to decide what exact part the 1st defendant took in that connection. We are on the whole inclined to agree with the lower Court that the 1st defendant must have been acting with Rami Reddi and his friends. It is clear from the evidence that the 1st defendant and Rami Reddi were on very friendly terms and were jointly interested in several concerns. It is also clear that on several occasions the plaintiff had reason to suspect that the 1st defendant was siding with Rami Reddi in the disputes between the plaintiff and Rami Reddi arising out of the business of the Lakshmiprasanna Mines which Rami Reddi and the plaintiff owned in common. While it may not be that there was serious estrangement between the plaintiff and the 1st defendant on this score before the beginning of 1930, it seems reasonably certain that after April-May, 1930, the relations were not by any means so cordial as to lead the plaintiff to desire the continuance of further business relations with the 1st defendant after the termination of the existing partnership. We have already stated it as our conclusion that we are not satisfied that the plaintiff agreed to or did in fact negotiate the new lease on behalf of the 1st defendant also. If in these circumstances the 1st defendant was not merely aware of the attempts of various parties to get a new lease of what he knew to be a profitable mine but did in fact go to the lessors' house on the 9th June, it seems to us more likely that he was

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co-operating with Rami Reddi's party and expected the matter to be talked over in Mr. Sivaramiah's house that afternoon. Before leaving this part of the case, we may note that certain letters relied upon by the 1st defendant as bearing on some of the questions of fact above discussed were rejected by the lower Court as not reliable and the learned Advocate-General has not asked us to consider those letters.

Before us, the appellant's claim was mainly supported on the ground that, independently of any contract or understanding between the parties and apart from any proof of misconduct of the plaintiff or improper use of his position in connection with the procuring of the new lease, the 1st defendant was entitled to the benefit of the new lease on the principle of equity embodied in S. 88 of the Indian Trusts Act. Founding himself on an observation of Warrington, J., in *Bevan* v. *Webb*[1], and on certain remarks of Lord Lindley in his treatise on the Law of Partnership, the learned Advocate-General contended that when part of the assets of a firm consists of leasehold premises "one partner cannot take a new lease of those premises and then insist on keeping that for his own benefit."

He also relied on the statement of the law in Halsbury's Laws of England (2nd Ed., Vol. 24, Title 'Partnership', S. 863). On the other side, it was maintained that the rule of equity was not 'absolute' in the sense contended for on behalf of the appellant, that the equities depended on the facts and circumstances of each case and that a person claiming such equities must (in the terms of S. 88 of the Trusts Act) show either that one of the partners has 'availed himself of his character' to gain an advantage or that the partner has gained an advantage of entering into a transaction in which 'his own interests are or may be adverse' to those of the other partners. The learned Counsel for the plaintiff contended that properly understood, the English authorities are not at variance with the rule embodied in S. 88—which leaves the question to be decided on the circumstances of each case; but he added that even if they should be found to lay down a stricter rule, this Court has only to apply the law as laid down in the Indian Trusts Act (*Hasanali* v. *Esmailji*[2]).

1. (1905) 1 Ch. 620 at 625. 2. (1907) 9 Bom.L.R. 606 at 629

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It may be conceded that as regards renewals obtained by 'trustees', the principle of equity in favour of the *cestui que trust* was laid down in unqualified terms in *Keech* v. *Sandford* (Wh. & Tud. leading cases) and the rule has ever since been adhered to. It is also true that in some of the authorities dealing with partners, the equity in favour of coparceners is considered to rest on an extension of the principle of *Keech* v. *Sandford,* and it has been sometime stated in unqualified terms. But in view of the fuller discussion of the question by the Court of Appeal in In re *Biss*: *Biss* v. *Biss*[1], and by Parker, J. (as he then was) in *Griffith* v. *Owen*[2], it does not seem to us right to take observations in any single case as an exhaustive statement of the rule or divorce such observations from the circumstances of the particular case. In *Clegg* v. *Edmondson*[3], which Lord Lindley regards as important in that it shows that the equity is not confined to cases where the partner acts *clandestinely,* Turner, L.J., observed that the authorities do not warrant the position

"that in no case can a partner during the continuance of a partnership contract for a new lease to be granted to himself, of property which is in lease to the partnership, without the new lease being held to be subject to trusts for the benefit of the partnership."

The learned Lord Justice added:

"In order to give validity to such a transaction all the parties ought to be placed upon an equal footing."

(Note also the observation of Sir William Grant in *Featherstonhaugh* v. *Fenwick*[4], on the renewing partners placing the other partner 'on equal terms with them'). This way of stating the rule was evidently due to the fact that Turner, L.J., took the principle of the decision in such cases to be 'the confidence which subsists between partners' and Sir William Grant laid stress on the unfair advantage which any other view would give to the partner who had obtained the renewal.

But another principle of decision which has been emphasised in some cases is that one put by Knight Bruce, L.J., in the course of the argument in *Clegg* v. *Edmondson*[3], in the

1. (1903) 2 Ch. 40. 2. (1907) 1 Ch. 195.
3. (1857) 8 De G. M. & G. 787: 44 E.R. 593.
4. (1810) 17 Ves. Jun. 298: 34 E.R. 115 at 121.

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following words:

"Does not the application of the rule depend on this—who were entitled to the interests the existence of which gave facilities for obtaining a new lease."

In the application of this latter principle, something amounting to a presumption of law seems to have grown up in England—at first applied to cases where the lease was renewable by contract or custom but later extended even to leases not so renewable—that the renewal was obtained only because of the old lease. This conception was in *Rakestraw* v. *Brewer*[1], embodied in the phrase as to 'coming from the same root.' In *Clegg* v. *Fishwick*[2], the Lord Chancellor observed:

"The old lease was the foundation of the new lease, the tenant-right of renewal arising out of the old lease giving the partners the benefit of this new lease; *at least the law assumes* it to be so." (The italics are ours).

In *Clements* v. *Hall*[3], Turner, L.J., himself referred to the renewed interest becoming subject to the quasi-trust because the quasi-trust attaching to the possession of the surviving partner 'draws with it the benefit resulting from the possession' held by the surviving partner. In In re *Biss*: *Biss* v. *Biss*[4], Collins, M.R., stated the foundation of some of these cases to be the theory that

"A renewal must be looked on as an accretion to or graft upon the original term arising out of the goodwill or quasi-tenant right annexed thereto."

How this presumption or theory came to be applied even to cases where the original lease itself gave no right to renewal (by contract or custom) is explained in Ashburner's Principles of Equity (2nd Edition, p. 309). Adverting to the former custom among large landholders or ecclesiastical bodies, the learned author observes:

"The owners of such a lease had no legal claim to a renewal but they had a hope or expectation of it, derived from and based upon their ownership of the original lease"

and it is added in the foot-note that 'this hope or expectation was sometimes described as a tenant-right' (*see* the distinction between college leases and private leases adverted to by Warrington, J., in *Bevan* v. *Webb*[5]. The distinction made

1. (1728) 2 P.Wms. 511: 24 E.R. 839.
2. (1849) 1 Mac. & G. 294: 41 E.R. 1278 at 1280.
3. (1857) 2 De G. & J. 173: 44 E.R. 954 at 960.
4. (1903) 2 Ch. 40 at 56.
5. (1905) 1 Ch. 620 at 627.

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in the English cases (see *Bevan* v. *Webb*[1]), between 'renewals' and 'purchases of the reversion' shows that it is not merely the 'incapacity' arising from fiduciary position but also the presumption above referred to that accounts for the terms in which the rule as to renewals obtained by one of the partners has been stated in most of the English cases. (*See* observation of Romer, L.J., and argument of Counsel in In re *Biss*: *Biss* v. *Biss*[2].)

The question was discussed at some length before the Court of Appeal in In re *Biss*: *Biss* v. *Biss*[2] in connection with the claim of certain tenants in common (including an infant) to a renewal obtained by another tenant in common. Collins, M.R., divided the cases into those where

> "the presumption of personal incapacity to retain the benefit is one of law and cannot be rebutted".

and those which rest on the presumption that:

> "A renewal must be looked on as an accretion to or graft upon the original term arising out of the goodwill or quasi-tenant right annexed thereto".

Referring to mortgagees, joint tenants and *partners*, the Master of the Rolls observed that in their case 'there is no presumption of law but at most a rebuttable presumption of fact' and he referred with evident approval to *Nesbitt* v. *Tredennick*[3],—a mortgagee's case—where Lord Manners held that there was no basis for the presumption or in any event it was rebutted. On p. 58, he added that where a person is not

> "under a personal incapacity to take a benefit, he is entitled to show that the renewal was not in fact an accretion to the original term".

Romer, L.J., referred (on p. 60) to 'dicta of judges' and 'statements in text-books' which might lead to the

> "supposition that if any person only partly interested in an old lease obtains from the lessor a renewal he must be held a constructive trustee of the new lease".

and added that 'the authorities when examined carefully do not support any such general proposition'. He groups in different categories, the cases where the renewal has been held to be in trust for others, and refers in particular to the instances where on grounds of 'public policy' the person obtaining the renewal is not allowed to rebut the presumption that in obtaining the renewal he acted in the interests of all persons

1. (1905) 1 Ch. 620.
2. (1903) 2 Ch. 40 at 53.
3. (1808) 12 R.R. 1.

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interested in the old lease. Where the person obtaining the renewal has not clearly occupied a fiduciary position, the learned Lord Justice stated the result of the authorities to be

> "that a person renewing is only held to be a constructive trustee of the renewed lease, if in respect of the old lease he occupied some special position and owed by virtue of that position a duty towards the other persons interested."

Dealing with partners, he observed (on p. 61) that a partner

> "clearly owes a duty to his co-partners not to acquire any special advantage over them by reason of his position."

and if by virtue of his position a partner obtained a renewed lease 'he will be held to have acquired it on behalf of all the partners'. Romer, L.J., then goes on to quote (without disapproval) the observations of Turner, L.J., in *Clegg* v. *Edmondson*[1], (already extracted).

In *Griffith* v. *Owen*[2], Parker, J. (as he then was) clarified the position under the English authorities. "The principle of *Keech* v. *Sandford*," he observed:

> "depends partly on the nature of leasehold property and partly on some fiduciary relationship or duty existing on the part of the person whom it is sought to declare a trustee towards the persons who seek to have the trust declared."

As regards the "personal incapacity" of the person obtaining the renewal to keep the benefit for himself, he distinguished between the cases where he is allowed and those in which he is not allowed

> "to show that in spite of the nature of the property, there is in the particular circumstances nothing inequitable in his claiming the renewed lease for his own benefit."

After referring to the judgment of Collins, M.R., in In re *Biss*: *Biss* v. *Biss*[3], the learned Judge added that

> "when once the fiduciary relationship or duty is established on the part of the person obtaining the renewal, the onus of proving that there is nothing inequitable in his claiming to retain the benefit for himself rests with him."

The implication of this judgment clearly is that except in the case of *trustees*, there is no *irrebuttable* presumption in support of the equity (*Babani Soiroo* v. *Dulba Govind*[4]). It only remains to refer to *Trimble* v. *Goldberg*[5] as establishing

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1. (1857) 8 De. G. M. & G. 787 : 44 E.R. 593.
2. (1907) 1 Ch. 195.
3. (1903) 2 Ch. 40.
4. A.I.R. 1932 Bom. 240.
5. (1906) A. C. 494.

that the equity arising from the fiduciary obligation or duty, subsisting between partners cannot be extended to cover every transaction entered into by one of them merely on the ground that there is *some* connection between the partnership and the transaction complained of; it must be shown that the transaction was 'within the scope of the partnership' or

"part of the business of the partnership or an undertaking in rivalry with the partnership or indeed connected with it in any proper sense."

On a review of the relevant English authorities it seems to us that the Statute law in India has not substantially deviated from the rules of the English law, though here and there some slight differences may result from the way in which particular cases have been dealt with in the Indian enactments. It will be noticed that some cases of constructive trusts have been provided for in S. 88 while other cases have been dealt with in S. 90 of the Trusts Act. While acquisitions by mortgagees have generally been dealt with in S. 90 of the Trusts Act, one special class of acquisitions, namely, renewals of leases by mortgagees has been provided for in S. 64 of the Transfer of Property Act, which gives the mortgagor the benefit of the new lease "in the absence of a contract by him to the contrary". (*See also* illustration (*d*) to S. 3 of the Specific Relief Act.) As regards renewals obtained by a tenant 'for life', illustration (*a*) to S. 90 of the Trusts Act provides in unqualified terms that the person so renewing 'holds the renewed lease for the benefit of all those interested in the old lease'. It is not clear whether it was the deliberate policy of the Legislature to enact an 'irrebuttable' presumption or rule of law in the case of tenants for life; if it was, it must be attributed to the adoption of the special principle stated in In re *Biss*: *Biss* v. *Biss*[1] that tenants for life 'can take only what the will or settlement under which they make title gives them . . . and that their rights to such accretion are those which they have in the term and no greater and terminate with their life'. In the case of partners, the Indian Legislature has nowhere indicated an intention to enact an absolute rule of law or an irrebuttable presumption in respect of renewals obtained by one of them. It is not without significance that illustrations (*d*) and (*e*) to S. 88 refer only to cases where the partner uses funds belonging to the partnership or

1 (1903) 2 Ch. 40 at 56.

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clandestinely stipulates for a personal benefit in a transaction negotiated by him on behalf of himself and his co-partners. Similarly, illustrations (*a*) and (*b*) to S. 258 of the Contract Act only referred to cases in which the partner acted without the knowledge of his co-partners or obtained a secret commission. It may be, as observed in Lindley on Partnership, that the clandestine character of the transaction was 'not an essential feature' of the decisions in *Featherstonhaugh* v. *Fenwick*[1] and *Clegg* v. *Fishwick*[2], but as pointed out in *Nagendrabala Dasi* v. *Dinanath Mahish*[3], the circumstance of concealment is material as leading to the inference that the partner was 'taking advantage' of his position. Even the Indian partnership Act of 1932 has not enacted or adopted any irrebuttable presumption in respect of renewals of leases by a co-partner. The decisions of the Judicial Committee in *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan*[4] (before the Trusts Act) and in *Sorabjee* v. *Dwarkadas Ranchhoddas*[5] show that except in cases otherwise specially provided for by statute, a constructive trust can be held to arise only if the conditions of S. 88 or 90 of the Trusts Act are satisfied.

Dealing with the first part of S. 88, the learned Advocate-General argued that in applying it to cases of renewals of leases, we must in the light of the English authorities at least raise a presumption that in obtaining the renewal the partner "availed himself of his character" or of the advantage of the old lease. It is difficult to say that in the circumstances existing in this country, a general presumption to the above effect will be justified in cases where the lease is not renewable by contract or custom. We do not however pause to consider this point further because the facts in the present case are sufficient to rebut such presumption if any. The evidence shows that far from imagining that the old lease gave the plaintiff any particular claim for a renewal, the landlords started negotiations with one Venkatakrishnayya for a new lease. Even after the plaintiff approached them for a new lease, they had no hesitation in entertaining Rami Reddi's

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1. (1810) 17 Ves. Jun. 298: 34 E.R. 115.
2. (1849) 1 Mac. & G. 294: 41 E.R. 1278.
3. (1923) 46 M.L.J. 532: L.R. 51 I.A. 24: I.L.R. 51 Cal. 299 at 302 (P.C.).
4. (1879) L.R. 6 I.A. 145: I.L.R. 5 Cal. 198 (P.C.).
5. (1932) 63 M.L.J. 116: L.R. 59 I.A. 366 (P.C.).

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offer to negotiate for a lease for himself. Though we have no satisfactory evidence as to the terms offered by the competitors or as to the reason for their failure to secure the lease, the evidence establishes that it is not any consideration arising out of the old lease that enabled the plaintiff to obtain a new lease. The plaintiff asserts and P.W. 6 admits that the plaintiff asked for the new lease for himself and was given the same accordingly. The negotiations were carried on by the plaintiff openly and no advantage was clandestinely obtained. The learned Advocate-General suggested that the plaintiff must be regarded as the 'managing partner' and the observations in *Clegg* v. *Edmondson*[1] as to the position of a managing partner should be held applicable here. This suggestion is opposed to the provision in Ex. M vesting the management jointly in the plaintiff and the first defendant; and there is nothing in the evidence to suggest that the plaintiff took a more prominent or important part than the first defendant in the management of the affairs of the partnership.

An attempt was made to argue that the admitted user for the new patta (obtained by the plaintiff from Government on 13th July, 1930) of the deposit of Rs. 500 which had been made under the former lease amounted to the plaintiff availing himself of the advantage of his old position. This seems to us an unsubstantial or far fetched argument. For one thing, such user in July 1930 cannot affect the character of new lease obtained in June. The former deposit was made long before the first defendant became a partner. It is true that this sum is included in the amount of Rs. 20,862-8-1 mentioned in Ex. M but there is no reason to suppose that it forms part of the Rs. 6,645-4-7 agreed to be advanced by the first defendant under Ex. M rather than of the sum of Rs. 14,217-3-6 which the parties expected the plaintiff to receive from the sale proceeds of stock already consigned. According to the terms of Ex. M, the 1st defendant must be held to have advanced the sum of Rs. 6,000 and odd under the arrangement that it was to be treated as his 'capital' for the Nityakalyani mine and he cannot say that the particular sum of Rs. 500 deposited with the Government long before he became a partner was an amount in which he had an interest. In this view, it is unnecessary to consider whether the last entry in Ex. R whereby the plaintiff

1. (1857) 8 De G. M. & G. 787: 44 E.R. 593.

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'debited' himself with the sum of Rs. 500 was properly or improperly made.

In the alternative, the learned Advocate-General contended that this case fell under the 2nd part of S. 88 and the plaintiff entered into the new lease in 'circumstances in which his interests are or may be adverse' to those of his co-partner the 1st defendant. In this connection there was some discussion as to the 'scope' of the partnership under Ex. M as Mr. Srinivasa Aiyangar relied on *Trimble* v. *Goldberg*[1], as indicating the test to be applied in determining whether in obtaining the renewal the plaintiff adopted a course in which his duty and his interest came into conflict. In the lower Court, the question was dealt with as one relating to the *duration* of the partnership (*see* issue No. 3 in O. S. 67) and the learned Judge held it 'to be likely that the parties intended that the partnership should continue so long as the lease (under Ex. B) endures.' Even looking at the question as one relating to the 'scope' of the partnership, we think the same must be the answer. Ex. M specifically refers to the old lease and nowhere refers to new leases being taken (unlike Ex. A). The provision about the 1st defendant making *all* the advances required is certainly onerous and one-sided and is more intelligible on the hypothesis that the parties contemplated the arrangement to be a short and temporary one. The 1st defendant's evidence clearly implies that in the new arrangement which he expected to be come to between himself and the plaintiff this clause about pettubadi required revision. The case is more analogous to what are referred to as partnerships in particular ventures than to an indefinite partnership for a general business which is sought to be limited merely on the ground that the premises where the business was to be carried on had been taken on lease for a particular period of time. In this view, we see nothing to suggest that in the matter of the new lease, the plaintiff placed himself in a position of conflict of duty and interest. In the case of a partnership at will or for an indefinite term, it is possible to conceive of such a conflict as a partner may be tempted to give notice of dissolution with the very object of retaining for himself the benefit of a new lease which he hoped to or was trying to obtain (see *Neilson* v. *Mossend Iron Co*[2].) That is not the position here. It must be

1. (1906) A.C. 494.
2. (1886) 11 A.C. 298 at 309.

added that the evidence in this case establishes that the plaintiff and the 1st defendant and other businessmen engaged in mica mining in the locality were in the habit of being interested in *competing* concerns even while they were partners in one concern or another; as this course must be deemed to have been followed with the knowledge and consent of each other, it cannot be suggested that the mere fact of the plaintiff obtaining a new lease before the partnership under Ex. M has come to an end was itself a breach of his duty as partner. Nor can it be said that in omitting to take the 1st defendant as a partner in the new lease the plaintiff acted unfairly towards him, when it is remembered that by that time the relations between the parties had ceased to be cordial and they had lost confidence in each other. When it is remembered that even prior to June 1930 the plaintiff had had occasions to feel that the 1st defendant was taking sides with Rami Reddi, he cannot be criticised for cutting himself away from the 1st defendant when the latter's conduct during the negotiations leading up to the new lease was calculated—as it certainly was—to lead the plaintiff to think that the 1st defendant had definitely thrown in his lot with Rami Reddi.

We accordingly agree with the lower Court that the 1st defendant is not entitled to claim an interest in the new lease under Ex. E or to insist that it should be treated as part of the assets of the old partnership. The 2nd defendant has not appealed against the decree of the lower Court; it is unnecessary to deal with his case separately. As desired by Mr. Duraiswami Aiyar we wish to make it clear that this litigation is not concerned with the rights of the 2nd defendant under Ex. J and this judgment does not therefore deal with those rights or with the plaintiff's contentions in respect of them. The lower Court has given an additional reason (in para. 27 of its judgment) for holding against the 1st defendant, namely, that he did not assert any claim to the new lease till 6th October, 1930 and that the principle of the decision in *Clegg* v. *Edmondson*[1], accordingly applied. We think it right to say that if on the general question we had come to a conclusion in the first defendant's favour, we should have hesitated to concur in the finding that the 1st defendant had lost his rights by his laches. The

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1. (1857) 8 De. G. M. & G. 787: 44 E.R. 593.

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new lease was to come into effect only on 7th October, 1930 and the appellant who asserted his right even before that date cannot be said to have waited with a view to see whether the new venture turned out to be profitable or not.

It only remains to note a contention based by Mr. Srinivasa Aiyangar on the non-registration of Ex. M. He argued that by reason of the non-registration of Ex. M, the old lease never became the *property* of the partnership consisting of the plaintiff and the 1st defendant and that no constructive trust can attach to the new lease except when the former lease was shown to be the "property" of the firm. In the view we have taken on the main question, it is unnecessary to express any opinion on this contention or examine the answers urged by the learned Advocate-General on the strength of the admissions in the pleadings and the theory of part-performance.

With reference to the claim for damages in O. S. No. 68, it was contended on behalf of the appellant (*i*) that the plaintiff was not entitled to any damages; (*ii*) that the amount awarded was excessive; and (*iii*) that in any event no damages ought to have been awarded except for the period of two months during which the plaintiff was prevented from working the mine by reason of the magisterial order passed in consequence of the appellant's obstruction. In support of the 1st contention it was urged that the 1st defendant did not prevent the working of the mine but only the working of the boiler and this he was entitled to do, as the boiler was the common property of the partners. There is not much substance in this contention. It is not disputed that the obstruction caused by the 1st defendant to the working of the boiler effectually prevented the working of the mine and it has not been suggested that within the period in question, it would have been possible for the plaintiff to have made other arrangements for the proper working of the mine. As regards the claim of common ownership of the boiler, Mr. Srinivasa Aiyangar reiterated his answer that on account of the non-registration of Ex. M the boiler which originally belonged to the plaintiff did not become the property of the partnership, because as a 'fixture' its transfer must be held to be governed by the rules applicable to the transfer of 'immovable

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property'. As we are of opinion that even on the assumption of common ownership of the boiler, the 1st defendant's conduct was not justified, we do not think it necessary to deal with this argument of Mr. Srinivasa Aiyangar. It is no doubt recognised in S. 53 of the Partnership Act that even after dissolution, any partner may restrain any other partner from using any of the property of the firm for his own benefit until the affairs of the firm have been completely wound up. Here the plaintiff invited the 1st defendant by the registered notice Ex. K (dated 2nd October) 1930, to come and settle the accounts but the 1st defendant would not agree to do so. To permit the 1st defendant in such circumstances to rely on S. 53 will amount to allowing him to take advantage of his own wrong. If he chose to take the law into his own hands he must, it seems to us, do so at his peril. But for the provision in S. 53, the plaintiff even as a common owner was entitled to use the property subject to accounting to his co-owner for his share of the profits made by the use of the common property (see *Watson and Company* v. *Ramchund Dutt*[1] and S. 37 of the Partnership Act). We accordingly hold that the obstruction caused by the 1st defendant was unlawful and entitled the plaintiff to claim damages.

As regards the quantum of damages, the learned Advocate-General is not right in his contention that the lower Court has ignored the fact that the mica is still in the mine. It has assessed damages only with reference to the loss of profits. The plaintiff had only a limited term under the new lease and his profits will depend on what use he is able to make of the mine within that period. If for part of that period he is prevented from working the mine, he is entitled to complain that his probable profits have been diminished to that extent. As regards the rate, we see no reason to think that the lower Court has fallen into an error. It has taken into account all the available information and the first defendant offered no evidence to the contrary in this matter. Nor do we see any reason to limit the award of damages to a period of two months, merely on the ground that the magisterial order extended only to two months. The plaintiff filed his suit within that period and though the petition for appointment of

1. (1890) L.R. 17 I.A. 110: I.L.R. 18 Cal. 10 (P.C.).

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a Receiver was filed only on 16th December, 1930, the attitude taken up by the 1st defendant in connection with that petition does not suggest that he would have peacefully allowed the plaintiff to work the mine if he had attempted to do so on the expiry of the magisterial order. We do not think it was the plaintiff's duty to invite the trouble from the 1st defendant by attempting to start work on the mine before the Court authorised him to do so.

The plaintiff has filed a Memorandum of Objections in A. S. No. 310 of 1934, claiming a higher amount by way of damages; but this has not been pressed. In the result, the appeals and the Memorandum of Objections are dismissed. In A. S. No. 310 of 1934, the appellant will pay the 1st respondent's costs. In A. S. No. 197 of 1935* the appellant will pay the costs of printing incurred by the 1st respondent and the costs of purchasing the printed papers; otherwise in the appeal* and in the Memorandum of Objections in A. S. No. 310 of 1934, there will be no order as to costs. In A. S. No. 310 of 1934, we allow to the 1st respondent a second set of fees, under the latter part of r. 46.

These Appeals and Memorandum of Objections having been set down to be spoken to this day the Court made the addition noted above by an asterisk.

S. V. V. *Appeals and Memorandum of Objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. MADHAVAN NAIR, *Officiating Chief Justice* AND MR. JUSTICE STODART.

K. Narasimha Bhattachariar .. *Appellant*† (*Respondent in C.C.C.A. No. 36 of 1936 on the file of the High Court*).

Narasimha Bhattachariar, *In re.*

*Civil Procedure Code (V of 1908), O. 32, r. 15—Power-of-attorney granted by plaintiff—Plaintiff incapable of protecting his interests—Suit by next friend for the revocation of—Maintainability*

Where the next friend files a suit alleging that a power-of-attorney granted by the plaintiff was on unsubstantial grounds and that it should be revoked in the interests of the plaintiff himself, and it is found that the plaintiff is mentally deficient and incapable of protecting his interests,

† L. P. A. No. 61 of 1938. 16th August, 1938.

Narasimha Bhattachariar, *In re.*

*Held*, that the next friend is entitled to institute the suit.

Appeal under cl. 15 of the Letters Patent against the judgment and decree of the Hon'ble Mr. Justice Venkataramana Rao dated the 21st day of April, 1938 and passed in C. C. C. A. No. 36 of 1936 preferred against the decree of the Court of the City Civil Judge, Madras, dated 7th May, 1936 and passed in O. S. No. 288 of 1934.

*R. Gopalaswami Aiyangar* and *S. Sankara Aiyar* for Appellant.

The judgment of the Court was delivered by

Madhavan Nair, Offg. C. J.

*The Officiating Chief Justice.*—The main question in this appeal is whether the suit has been properly instituted on behalf of the plaintiff Venkatanarasimha Bhattachari by his next friend, his wife. Her case as the next friend is that her husband is mentally deficient, is not able to look after his affairs and is incapable of protecting his interests. The relief asked for is the revocation of the power-of-attorney granted by him to the defendant. It is argued on behalf of the defendant that the next friend has no right to institute the suit, and that it should be dismissed. It was dismissed by the trial Judge on that ground, but this decision was set aside by Venkataramana Rao, J., who came to the conclusion on the evidence that the plaintiff was incapable of protecting his interests when suing or being sued.

There is ample evidence on record in support of the learned Judge's conclusion. On a previous occasion this Court treated the plaintiff as one under disability within the meaning of O. 32, r. 15 of the Code of Civil Procedure (*see* Ex. G). That rule says that the provisions contained in rr. 1 to 14 so far as they are applicable shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on enquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting their interests when suing or being sued. If the person concerned is incapable of protecting his interests as has been found in this case then to say that the next friend is not entitled to institute a suit would result in completely negativing any relief to the plaintiff with respect to actions taken by him which are detrimental to his interests. It is the case of the next friend here that the power-of-attorney was given to the defendant on unsubstantial grounds that it should be

Narasimha Bhattachariar, *In re.* — Madhavan Nair, Offg. C. J.

revoked in the interests of the plaintiff himself. We cannot accept the argument that in such circumstances the Court should deny relief to the next friend by saying that she has no right to institute the suit. We think that the decision of the learned Judge is right and accordingly we dismiss this appeal.

The stay petition is also dismissed.

K.C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE ABDUR RAHMAN.

The Calicut Bank, Limited, through its manager P.C. Gopalan .. *Appellant** (*Petitioner*).

Calicut Bank, Ltd., *In re.*

*Companies Act (VII of 1913), S. 153—Petition under—Winding up petition filed—Hearing of—If barred—Scheme not placed before shareholders and creditors.*

A petition was presented by the Directors of a Bank under S. 153 of the Companies Act asking the Court to refer a scheme which they had prepared to the shareholders and creditors for their consideration, but a winding up petition was filed subsequently by some of the creditors,

*Held*, there was no bar to the hearing of the winding up petition, though the scheme was not placed before the shareholders and the creditors by the Court as prayed for.

Appeal against the order of the Hon'ble Mr. Justice Gentle dated 30th August, 1938, and passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court in Application No. 1636 of 1938 in O. P. No. 210 of 1938 and under S. 153, sub-cl. 5 of the Indian Companies Act, 1913.

*King and Partridge, K. R. Shenoi, A. B. Nambiar, A. Sundaram Aiyar, S. Kuppusami Naidu, S. Kothandarama Nainar* and *S. Venkatachala Sastri* for creditors.

The judgment of the Court was delivered by

Leach, C. J.

*The Chief Justice.*—The appellant is a company registered under the Indian Companies Act, 1913. It carried on business as a banking concern in Colombo and Madras. By reason of a rush by depositors to withdraw their monies with the company it was compelled to suspend its business at Colombo on the 15th August last, and at Madras the next day. On the day it suspended business at Colombo the directors presented to this Court a petition under S. 153 of the Indian Companies

*O. S. A. No. 60 of 1938. 15th September, 1938.

Calicut Bank, Ltd., *In re.*

Leach, C. J.

Act asking the Court to refer a scheme which they had prepared to the shareholders and creditors for their consideration. The scheme had for its object the continuation of the company's business. At the same time an application for staying all other proceedings was filed. The case came up before Venkataramana Rao, J., on the 17th August, but was adjourned until the 19th of that month. On that day a petition was filed by certain creditors asking for an order directing the compulsory winding up of the company. When the matter came up before Venkataramana Rao, J., on that day he granted an *interim* stay which he continued on the 22nd until the 26th. The matter came before the Court on the 26th but the hearing was adjourned until the 30th August when the winding up petition also came before Gentle, J. The learned Judge ordered notice to issue on the application by the directors under S. 153 of the Act but removed the stay order. He then passed an order appointing Messrs. Fraser & Ross provisional liquidators. This order was, of course, passed on the application for winding up. The appeal which is now before us is an appeal against the order of Gentle, J., removing the stay. The directors maintain that the winding up petition should not be heard until the scheme has been placed before the shareholders and the creditors. We can see no substance whatever in this argument. There is no reason why the application for winding up should not be considered by the Court. In fact it should be considered at the earliest possible moment. Even if an order for winding up is passed it will not interfere with any proper scheme being considered. The appeal is dismissed with costs, one set.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor .. *Appellant**

*v.*

Perianna Goundan and another .. *Respondents (Accused).*

Public Prosecutor *v.* Perianna Goundan.

*Madras Prohibition Act, S. 4 (1) (a)—Undivided son offering liquor to customers of his father—If amounts to possession of liquor.*

Where the case against the second accused aged about 19 years being the undivided son of the first accused, a toddy renter, is that he offered a bottle of liquor to his father's customers along with his father, he cannot be said to

* Cr. Appeal No. 261 of 1938. 20th September, 1938.

Public Prosecutor *v.* Perianna Goundan.

have possessed the liquor, while his father alone will be guilty within the meaning of S. 4 (1) (*a*) of the Madras Prohibition Act.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) by the Second Class Magistrate of Namakkal in C. C. No. 76 of 1938 on his file.

*The Public Prosecutor* for the Crown.

*K. S. Jayarama Aiyar* and *C. M. J. Earnest* for Accused.

The Court made the following

ORDER.—This is an appeal by the Provincial Government against the acquittal of the respondents of offences under S. 4, cl. (1) (*a*) and (i) of the Madras Prohibition Act.

The first respondent was a toddy renter at Thumbankurichi till the introduction of prohibition in the District of Salem, and the second respondent is his son. They are stated to have possessed and offered illicit arrack for sale on 14th November, 1937 and the evidence of P. W. 5 the Circle Inspector which was not seriously challenged in this Court shows, that on information that the first respondent was clandestinely selling illicit arrack in the shed in his field at Thumbankurichi, the witness proceeded to the village with a party. P.W. 2 the Village Munsiff joined them at Thumbankurichi and the party went to the shed of the first respondent. The Circle Inspector noticed the respondents offering two bottles of arrack to P. Ws. 3 and 4, and on seeing the police party the respondents and P. Ws. 3 and 4 took to their heels. The respondents had each a bottle with him and the first respondent ran westwards. The second respondent ran eastwards and they were pursued. P. Ws. 3 and 4 stopped after running some distance and the first respondent was caught. The second respondent escaped and M. Os. 2 (*a*) and 2 (*b*) the bottles thrown away by the respondents during the pursuit were seized. The first respondent was taken back to the shed and questioned, and M. Os. 1 and 1 (*a*) the bottles containing illicit arrack were produced by him from inside the shed. He was arrested and released on bail, and the second respondent was arrested later.

There was no sale of liquor though it was offered for sale and the respondents were rightly acquitted of the offence under S. 4, cl. 1 (i) of the Madras Prohibition Act. But the first respondent would unquestionably be guilty under S. 4,

cl. (1) (*a*) of tbe Act and the real question is whether the second respondent can be said to have possessed the liquor. He is the undivided son of the first respondent aged about 19 years, and the evidence against him is that he offered a bottle to his father's customers along with the father. This would hardly warrant a finding of possession and his acquittal is right.

The acquittal of the first respondent is therefore set aside and he is convicted under S. 4, cl. 1 (*a*) of the Madras Prohibition Act.

As regards sentence the offence was committed in November, 1937 and a substantive sentence of imprisonment is not called for at this distance of time. The first respondent is therefore sentenced to pay a fine of Rs. 100 and in default of payment to rigorous imprisonment for six weeks.

K. C. —— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.



The Secretary of State for India in Council represented by the Collector of Tanjore .. *Petitioner* (Defendant)*

*v.*

C. S. Krishnaswami Ayya .. *Respondent (Plaintiff).*

*Civil Procedure Code (V of 1908), O. 11, r. 14—Suit against Secretary of State for India in Council represented by Collector—Petition directing Collector to produce paimash registers in his custody—Maintainability.*

The plaintiff in a suit filed against the Secretary of State for India in Council applied under O. 11, r. 14 of the Civil Procedure Code, directing the defendant to produce paimash registers, etc., in the custody of the Collector.

*Held,* that the Collector cannot be required by the terms of O. 11, r. 14 to produce the registers in original on the ground that he was an agent of the Secretary of State for India in Council, as every document in his possession cannot be deemed to be in his possession in his capacity as agent of the Secretary of State for India in Council.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsiff of Kumbakonam dated 20th January, 1938 in I. A. No. 755 of 1937 in O. S. No. 142 of 1936.

*The Government Pleader (B. Sitarama Rao)* for Petitioner.

*K. Kameswara Rao* (amicus curiae).

*C R. P. No, 273 of 1938. 26th August, 1938.

Secretary of State for India *v.* Krishnaswami Ayya.

The Court delivered the following

JUDGMENT.—This is a petition by the Secretary of State for India in Council represented by the Collector of Tanjore to revise an order of the District Munsiff of Kumbakonam dated the 20th January, 1938, on I. A. No. 755 of 1937 in O. S. No. 142 of 1936 on his file, in which the Secretary of State for India in Council represented by the Collector of Tanjore is the defendant. The plaintiff in the suit applied under O. 11, r. 14, Civil Procedure Code, for an order directing the respondent, that is to say, the defendant in the suit, to produce certain documents, namely, the paimash register of a certain village of fasli 1238, that is, of the year 1828 as well as a letter of 1867 from the Collector of Tanjore to the Inam Commissioner. The learned District Munsiff appears to have thought that because the Collector represented the Secretary of State for India in Council, the defendant in the suit, the Collector could be treated as being himself a party to the suit. The order proceeds on the assumption that the Collector's custody or possession of the documents in question is in his capacity as agent of the Secretary of State for India in Council for the purpose of defending the suit in question. I am of opinion that this assumption is not well-founded. So far as the paimash registers are concerned, it is the Collector's duty under Regulation XXVI of 1802 to keep public registers according to the forms prescribed by the Board of Revenue and to keep such registers open at all times to the inspection of persons concerned in seeing them. His custody therefore of these public registers is for the performance of a statutory duty imposed upon him, and certainly if such public registers are produced by him in the absence of a summons simply because he happens to represent the Secretary of State for India in Council in a particular suit, the stautory duty of keeping registers open for inspection to the people concerned therein cannot be performed. I am of opinion that the Court below was not justified by the terms of O. 11, r. 14 in requiring the Collector of Tanjore to produce these paimash registers in original on the ground that he was an agent of a party to the suit. Apart from this it is very undesirable that public documents of this importance should be required to be produced in Court without the protection granted to public documents produced in response to a summons (*vide* r. 76 of the Civil Rules of Practice). It is also repre-

sented that these registers are in a very dilapidated condition and that there is the danger that they may crumble to pieces by removal from one place to another and by indiscriminate handling. Even as regards the letter of 1867 it is not very clear to me that the Collector of Tanjore is in possession of this letter in his capacity as the agent of the Secretary of State for the purpose of defending this particular suit. The fact that the Collector acts as an agent of the Secretary of State for India in Council in a particular suit does not make him an agent of the Secretary of State for India in Council for all purposes. Nor can it be said that every document in the possession of the Collector in one capacity or another must be deemed to be in his possession in his capacity as agent of the Secretary of State for India in Council in a particular suit. The order of the District Munsiff is therefore set aside and this petition is allowed with costs.

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It must be however made clear that this will not prevent the Court below from directing the issue of a summons for the production of these documents if the requirements of law are satisfied and if the Court thinks it necessary to do so.

K. C. — *Petition allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

*Koneti* Desikachari (deceased) and others .. .. *Appellants** (*Plaintiffs*)

*v.*

Sri Mahant Prayag Dasji Varu .. .. *Respondent* (*Defendant*).

Desikachari *v.* Sri Mahant Prayag Dasji Varu.

*Contract—Terms of—Opposed to public policy—Lands agreed to be sold to a temple—Amount of price—'Commission' to the party—Failure on the part of the person to purchase property—Right of suit to recover return of money paid as 'commission.'*

Where by a contract entered into between appellants and the respondent it was intended that the appellants were to sell to a certain temple, of which the respondent was the mahant, two villages for a settled price, but that they were to receive only a sum less than the purchase money, the difference being retained by the respondent as his 'commission', and when the agreement was not fulfilled, a suit was filed to recover from the respondent certain sums and also damages for his failure to do his part of the bargain,

* O.S.A. No. 65 of 1936. 29th April, 1938.

Desikachari *v.* Sri Mahant Prayag Dasji Varu.

*Held*, that the contract was opposed to public policy and involved a fraud on the trust and in the circumstances the appellants were not entitled to ask the Court to enforce the return of money paid with full knowledge of the enormity of the contract.

*Taylor* v. *Bowers*, (1876) 1 Q.B.D. 291; *Parkinson* v. *College of Ambulance, Ltd., and Harrison*, (1925) 2 K. B. 1; *Petherpermal Chetti* v. *Muniandy Servai*, (1908) 18 M.L.J. 277: L.R. 35 I.A. 98: I.L.R. 35 Cal. 551 (P.C.) and *Ledu Coachman* v. *Hiralal Bose*, (1915) I.L.R. 43 Cal. 115, relied on.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Wadsworth, dated the 7th day of May, 1936, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 262 of 1933.

*A. Seshadri* for Appellants.

*A. Suryanarayaniah* for Respondent.

The judgment of the Court was delivered by

Leach, C. J.

*The Chief Justice.*—This appeal raises a question with regard to the effect of S. 84 of the Indian Trusts Act. The plaintiffs in the Court below were the 2nd and 3rd appellants and one Koneti Desikachari who is now dead and is represented by the 4th and 5th appellants. The appellants are members of a joint Hindu family of which Koneti Desikachari was the managing member. At all times material to the suit the family were the owners of two villages lying in the neighbourhood of the Thirumalai Tirupathi Devasthanam, one of the most important Hindu temples in India. This temple is in the Tirupathi hills, Chittoor District. The suit was filed to recover certain sums alleged to have been paid by Koneti Desikachari to the respondent under a contract which he failed to fulfil and for damages resulting from his breach. The respondent was the sole manager of the temple at the time. The appellants had mortgaged these two villages, and Koneti Desikachari approached the respondent with a view to the respondent buying them on behalf of the temple, as the mortgagees were pressing for repayment. The appellants allege that an arrangement was arrived at by which they were to sell to the temple their two villages for a sum of Rs. 95,000 but that they were to receive only a sum of Rs. 85,000 the remaining Rs. 10,000 being retained by the respondent as his "commission." This arrangement involved a fraud on the trust to the extent of Rs. 10,000. The sale could not be carried through without the sanction of the District Court and the appellants allege that it was agreed between Koneti Desikachari and the respondent that if the Court refused sanction to this arrangement the respondent would buy the lands himself for a sum of Rs. 85,000. No

application was made to the District Court for sanction of the sale of the villages to the temple, and the properties were left with the appellants, who say that they lost the benefit of a favourable arrangement with the mortgagees. They also allege that the respondent insisted on Rs. 10,000 being paid to him before he took steps in the matter. They say that as the result of the respondent insisting on his "commission" being paid before he took any steps they paid him Rs. 1,000 in the month of July, 1930 and Rs. 3,000 in the month of May, 1931, and executed two promissory notes, one for Rs. 2,100 and the other for Rs. 500 in his favour. The suit was filed to recover the Rs. 4,000 representing the two sums of Rs. 1,000 and Rs. 3,000 and Rs. 36,125 as damages and expenses alleged to have been suffered and incurred by the appellants as the result of the respondent having failed to carry out his part of the bargain. The defence was a complete denial of the truth of the appellants' allegations. The respondent admitted that he had received a sum of Rs. 2,500 from Koneti Desikachari, but averred that this money was paid, not for the purpose alleged by the appellants, but on account of a debt owed to him by one Chevala Kamalamma. The suit was tried by Wadsworth, J., who held that there had been a fraudulent arrangement entered into between Koneti Desikachari and the respondent of the nature alleged in the plaint—that is how we read the judgment —and that the Rs. 1,000 had been paid by Koneti Desikachari to the respondent in pursuance of this illegal agreement. He also held that Rs. 3,000 had been paid by Koneti Desikachari to the respondent, but considered that this amount had been paid out of moneys provided by Chevala Kamalamma herself and had been paid on her behalf. With regard to the sum of Rs. 1,000 the learned Judge refused a decree on the ground that the arrangement was contrary to public policy. Although the learned Judge did not discuss the matter, his judgment amounted to a rejectment of the plea that there had been an alternative agreement under which the properties were to be sold to the respondent for Rs. 85,000, if the temple did not buy them.

The appellants contend that the judgment of the learned trial Judge is wrong on all points, but their learned Advocate was compelled to admit that if the Court rejects the plea that there was an alternative agreement and that the appellants'

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case has to rest on the agreement to sell the properties in fraud of the temple no claim for damages can be sustained. We are firmly of the opinion that there was no alternative agreement of the nature alleged. We consider that it is an after-thought and has been alleged for the purpose of sustaining the claim for damages. Therefore the Court is called upon merely to consider whether the appellants are entitled to a decree for the recovery of the two sums of Rs. 1,000 and Rs. 3,000 paid under the agreement which involved a fraud on the temple. As I have indicated the learned Judge had found as a fact that both the sums were paid to the respondent by Koneti Desikachari, but that the Rs. 3,000 was paid by him on behalf of Chevala Kamalamma. It is not necessary for us to inquire whether the sum of Rs. 3,000 was paid on her behalf, because we consider that the appellants cannot maintain their claim in law, even if this sum had been paid by Koneti Desikachari for the purpose alleged by him.

The appellants' own case is that these two sums of money were paid by Koneti Desikachari for the purpose of inducing the trustee of a public trust, a trust of national importance, to defraud the trust. Such an agreement is in our opinion contrary to public policy and the Court will not order a refund of money paid under an arrangement which falls within this category. The law in this connection was clearly stated by Lush, J., in *Parkinson* v. *College of Ambulance, Ltd., and Harrison*[1]. That was a case in which the plaintiff sought to recover a sum of money which he had paid on the understanding that the payment would result in an honour being conferred on him. The honour was not conferred and he sued to recover what he had been induced to pay. Lush, J., held that the action did not lie and his reasons can be gathered from the following passage in his judgment:

"In the present case the plaintiff knew that he was entering into an illegal and improper contract. He was not deceived as to the legality of the contract he was making. How then can he say that he is excused? How can he say that he has suffered a loss through being defrauded into making a contract which he knew he ought never to have made? The answer is that he ought not to have made it. Where he was deceived was that he thought he would make a profit, derive a benefit from his unlawful act. He cannot be heard to say that. He has himself to blame for the loss that he has incurred."

That is the position in the present case. The learned advocate for the appellant would have it that the principle here

1. (1925) 2 K.B. 1.

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stated does not apply in this country by reason of the provisions of S. 84 of the Indian Trusts Act. That section reads as follows:

"Where the owner of property transfers it to another for an illegal purpose and such purpose is not carried into execution, or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

The learned Advocate for the appellant contends that the case comes under both the first and second parts of the section. He says that the appellants are the owners of the property transferred to the respondent for an illegal purpose which has not been carried into execution. He also says that they are not as guilty as the respondent.

I will deal with the second contention first because the answer is a short one. I can see no difference in the degree of the guilt of a person who instigates another to commit a fraud from which it is intended they shall both benefit and of the person who is willing to carry out the fraud.

With regard to the first contention, the learned Advocate says that there can be no doubt that the property has been transferred and that the illegal purpose for which the transfer has been made has not been effected. He says that the first part of the section applies in all cases where the purpose for which the property is transferred is illegal. If this were so, it would mean that if *A* gave Rs. 500 to *B* to murder *C* and *B* repented, or was prevented from carrying out the crime, *A* could recover the Rs. 500 under this section. The learned trial Judge has dealt in his judgment with this very question, and we agree with him that the argument is going very much too far.

It is an accepted rule of law that where property is transferred for an illegal purpose the property can be recovered when the purpose has not been carried out and the person who transfers repudiates the contract. This principle was stated in *Taylor* v. *Bowers*[1], and was accepted by the Privy Council in *Petherpermal Chetti* v. *Muniandy Servai*[2]. *Taylor* v. *Bowers*[1] was a case where there was an agreement to defraud creditors and so was *Petherpermal Chetti* v. *Muniandy Servai*[2]. In inserting S. 84 in the Indian Trusts Act the legislature could

1. (1876) 1 Q.B.D. 291.
2. (1908) 18 M.L.J. 277: L.R. 35 I.A. 98: I.L.R. 35 Cal. 551 (P.C.).

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not have intended to compel a Court to hear and decide a case which is entirely opposed to public policy. It seems to me that it had in view the principle stated in the cases to which I have just referred and this principle does not apply to the present case. The contract between Koneti Desikachari and the respondent was a contract which was opposed to public policy, and, in these circumstances, we consider that the appellants are not entitled to ask the Court to enforce the return of money paid with full knowledge of the enormity of the agreement. The Calcutta High Court gave expression to the same opinion in *Ledu Coachman* v. *Hiralal Bose*[1].

For these reasons the appeal fails and must be dismissed with costs. As the appeal has been filed *in forma pauperis* the appellant will be required to pay the requisite court-fee to Government.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Paturi Veerayya and another .. *Appellants* (Defendants 1 and 2)*

*v.*

Paturi Chellamma .. *Respondent (Plaintiff).*

Veerayya v. Chellamma.

*Hindu Law—Maintenance—Suit for enhancement of—Points to be considered—Cessation of payment under the original decree—Decree for enhancement—When to commence—Provision for pilgrimage not made in prior suit—If can be made in the suit for enhancement—Charge for maintenance—Extent of lands to be provided for.*

In a suit for enhancement of maintenance, the maximum which can be awarded to a widow will be the amount of the income of the share to which her deceased husband would have been entitled had he been alive and a coparcener at the date of the suit for maintenance.

*Manikka Mudaliar* v. *Soubagia Ammal*, (1914) 27 M.L.J. 291, relied on.

The only grounds upon which the decision of the Court which already fixed maintenance amount can be said to lose its force are such changes in the circumstances governing the widow and the family as were not foreseen and allowed for at the time when the original decree was passed. The Court is entitled to look into the changes not only in the needs of the widow but also any changes of those other circumstances to which the Court had regard in fixing the original rate of maintenance. The Court must have regard to the rise of prices; it must have regard to the additional expenses necessitated by the deterioration of the health of the maintenance-holder. It must also have regard to any reasonable change in the standard of comfort and in the

1. (1915) I.L.R. 43 Cal. 115.

* S. A. No. 4 of 1935. 19th August, 1938.

conventional necessities of the widow due to the improvement in the circumstances of the family to which she belongs. The Court must have regard to the growth of the income of the family in order to ascertain the maximum which must govern the maintenance allowance.

*Ekradeshwari Bahuasin* v. *Homeshwar Singh*, (1929) 57 M.L.J. 50: L.R. 56 I.A. 182: I.L.R. 8 Pat. 840 (P.C.), referred to.

Where no formal demand was made for enhancement prior to the filing of the suit for such purpose, the arrears should be calculated from the date of the institution of the present suit and not from the date from which former payment under the old decree ceased or the date of decree in the present suit.

*Sreeram Buttacharjee* v. *Puddomookhee Debia*, (1868) 9 W.R. 152 and *Ekradeshwari Bahuasin* v. *Homeshwar Singh*, (1929) 57 M.L.J. 50: L.R. 56 I.A. 182: I.L.R. 8 Pat. 840 (P.C.), followed.

It is unreasonable to give a charge over the whole of the family properties. It should be limited to the properties necessary to secure the payment of the maintenance.

Where payment for pilgrimage for the benefit of the soul of the deceased husband was refused in the earlier suit, not due to lack of funds, she should not be granted a lump sum for such purpose in the later suit.

Appeal against the decree of the District Court of East Godavari at Rajahmundry dated 1st October, 1934 and passed in A. S. No. 20 of 1934 preferred against the decree of the Court of the Subordinate Judge of Cocanada dated 13th February, 1934 and passed in O. S. No. 59 of 1930.

*Ch. Raghava Rao* and *M. Sriramamoorthi* for Appellants.

*P. Somasundaram* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit for the enhancement of maintenance ordered to a Hindu widow by a decree of the year 1899. The original rate of maintenance was Rs. 10 per mensem. The Courts below have raised this figure to Rs. 50 per mensem, allowing also a lump sum for pilgrimage not provided for in the original decree and another lump sum for the replacement of worn out utensils. The lower appellate Court differing from the trial Court allowed arrears only from the date of the trial Court's decree instead of arrears from the date on which payment under the earlier decree had ceased. This question of the date from which arrears are to be paid forms the subject-matter of the memorandum of cross-objections.

There are findings of fact, into which it is unnecessary for me to enter, that in the interval from the 1st decree of

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1899 to the date of the present suit, the income of the family property had arisen from Rs. 1,100 a year to a little over Rs. 7,000 a year, that is to say, the increase in the rate of maintenance allowed is something less than the proportionate increase having regard to the rise in the income of the family. The plaintiff herself in her evidence regarding the prices of the main items of expenditure during this period, estimated the rise of the price of paddy as from Rs. 60 to 150 and the rise in the price of clothes as from Rs. 5 to 12 to 15. This would indicate, if the evidence were accepted as correct, that the rise of prices of the principal commodities required for her consumption, amounts to something less than 300 per cent.

The basis upon which the maintenance of a widow is to be fixed in the first instance is well settled. It should be fixed so far as means are available, at an amount which will enable her to live comfortably, according to the standard of comfort obtaining in the community to which she belongs. In fixing the figure regard will be had to the amount of money available and the ordinary rule is that the maximum allowance which she should get would be an amount equal to the income of her husband's share in the property (*Rangathayi Ammal* v. *Munuswami Chetty*[1] and *Subbarayulu Chetti* v. *Kamalavalli Thayaramma*[2]). In the cases just quoted, the income of the husband's share was taken to be the income of the share which he would have got if a division had taken place in his lifetime. That appears also to be the basis of the decision in *Jayanti Subbiah* v. *Alamelu Mangamma*[3], where the rate of maintenance is treated as being limited to the share of the deceased husband which has come by survivorship to the coparcener. But on this question of the date with effect from which the husband's share is to be estimated, there is a very clear ruling of a Bench of this Court in *Manikka Mudaliar* v. *Soubagia Ammal*[4] which is later than the cases just referred to and, so far as I know, has not been challenged by subsequent rulings of this Court, in the 24 years which had elapsed since the decision was passed. In that case, it was definitely laid down that the maximum amount of maintenance of a widow should be fixed with reference to the income from the husband's

1. (1911) 21 M.L.J. 706. 2. (1911) 21 M.L.J. 493: I.L.R. 35 Mad. 147.
3. (1902) 12 M.L.J. 270: I.L.R. 27 Mad. 45. 4. (1914) 27 M.L.J. 291.

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share, not calculated as on the date of his death, but as on the date of the suit, regard being had to the increase of the family property which had taken place in the interval between the date of the husband's death and the date of the suit. That decision must be taken as authoritative, at least so far as I am concerned. I think it follows that in a suit for enhancement of maintenance, the maximum which could be awarded to the widow would be the amount of the income of the share to which her deceased husband would have been entitled had he been alive and a coparcener at the date of the suit for enhancement.

What are the considerations which must govern the Court in dealing with a claim for enhancement of maintenance already fixed by the Court's decree? Clearly, the matter must not be treated as *res integra.* The Court cannot proceed to fix the maintenance without any regard to the judicial decision already passed and binding on both the parties. The only grounds upon which this decision can be said to lose its force are such changes in the circumstances governing the widow and the family, as were not foreseen and allowed for at the time when the original decree was passed. It has been argued by Mr. Raghava Rao for the appellants that it is only a change in the needs of the widow and the prices of those needs that should be taken into consideration. That, to my mind, is overstating the case of those who have to pay the maintenance. In assessing a claim based on the changes of circumstances the Court is entitled, in my opinion, to look into the changes not only in the needs of the widow but also any changes of those other circumstances to which the Court had regard in fixing the original rate of maintenance. For instance the Court must have regard to any rise of prices; it must have regard to additional expenses necessitated by the deterioration of the health of the maintenance holder; it must also have regard to any reasonable change in the standard of comfort and in the conventional necessities of the widow due to the improvement in the circumstances of the family to which she belongs. If it is obvious that in fixing the original rate of maintenance, you have regard to those conventional necessities and conventional comforts which can reasonably be expected by a member of the community to which the widow belongs, any change in those circumstances can be made a ground for

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enhancement or reduction of maintenance in a subsequent suit, always provided that these changes were not foreseen or allowed for in the original decree. To this extent, a change in the wealth of the family is a valid factor for it is common experience that conventional standards of comfort and conventional necessities grow with the growth of income. Finally, the Court must have regard to the growth of the income of the family in order to ascertain the maximum which must govern the maintenance allowance having regard to the rule laid down in *Manikka Mudaliar* v. *Soubagia Ammal*[1].

It does not seem to me that these principles have to any considerable extent been ignored by the lower appellate Court. In fact, to a very large extent, they are set forth clearly and succinctly by the learned District Judge and the learned District Judge has quite rightly referred to the observations of the Privy Council in *Ekradeshwari Bahuasin* v. *Homeshwar Singh*[2] in which their Lordships deprecate interference with a lower Court's estimate as to what is a proper rate of maintenance, provided that the principles on which the rate has been calculated are sound. There is, to my mind, no apparent error in the application of the correct principles so far as the basic rate of maintenance allowance is concerned. It is true that the rate has been raised five-fold whereas, according to the evidence, prices have risen something less than three-fold. But the Court was entitled to take into consideration, as it did, the fact that the declining years of the widow and the weakness of her health made it necessary for her to have extra comforts in the shape of a servant to attend upon her and the Court was also entitled to take into consideration the fact the family has very greatly increased in wealth and consequently, the widow could reasonably expect a standard of comfort higher than that which was permissible in 1899 and similar to that which the other members of the family have enjoyed after their income has very greatly appreciated. Moreover, the Court was also entitled to take into consideration the facts that the amount available for providing the widow with maintenance is something like six times the amount which was available in 1899 and that consequently, there was no financial necessity to

1. (1914) 27 M.L.J. 291.
2. (1929) 57 M.L.J. 50: L.R. 56 I.A. 182: I.L.R. 8 Pat. 840 (P.C.).

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stint the widow in the matter of satisfying her conventional needs and providing her with the conventional standard of comfort, such as presumably prevailed when the first decree was passed.

I am therefore of opinion that there are no grounds for interfering with the decision of the lower appellate Court so far as the basic rate of maintenance is concerned. But in my opinion, the Courts below have erred in granting to the widow a lump sum to pay a pilgrimage for the benefit of the soul of her deceased husband. If the necessity for such pilgrimage exists now, it existed even in 1899 and it is not apparent that any such expenditure was refused at the time of the original suit on grounds of lack of funds. Nor do I see why the widow should be allowed a lump sum for the replacement of utensils which have worn out in the interval between 1899 and 1933. It must be inferred that when the original maintenance decree was passed, the Court would make provision for reasonable replacements which could be foreseen and there is no more justification, to my mind, for allowing a fresh suit every time the utensils wore out than there would be for allowing a fresh action whenever the widow's clothes wore out. To the extent of these two minor items, I therefore set aside the decree of the lower Courts, confirming the decree for the amount allowed for maintenance pure and simple.

On the question of the memorandum of cross-objections, it seems to me that both the Courts were wrong in the fixation of the date from which arrears should be calculated. The trial Court adopted as its starting point the date when the payments under the old decree ceased. A mere cessation of payment is no ground for an enhancement of maintenance and it does not appear that any formal demand was made for enhancement to the rate now claimed prior to the filing of the suit. The appellate Court has fixed the date from which arrears should be allowed as the date of the lower Court's decree. This, as is pointed out by the Privy Council in *Ekradeshwari Bahuasin* v. *Homeshwar Singh*[1] is a very dangerous date to adopt, for the adoption of such a criterion is an incentive to the defendants in a suit for maintenance to use every means at their disposal to delay the trial of the suit. As a matter of fact, the trial of the present suit was delayed from

1. (1929) 57 M.L.J. 50: L.R. 55 I.A. 182: I.L.R. 8 Pat. 840 (P.C.).

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the beginning of 1930 until February 1934. I do not see why the plaintiff should be made to pay for the dilatoriness of the proceedings in the trial Court. Incidentally, the matter is covered by the expressed authority of a decision in *Sreeram Buttacharjee* v. *Puddomookhee Debia*[1], though it is not apparently a case of enhancement of maintenance decreed in a previous suit, but merely one of an enhancement of maintenance fixed by a family arrangement. But the principle enunciated in that case, namely, that the date from which arrears should be calculated should be the date of the suit and not the date from which former payment ceased, holds good.

In the result, therefore, the appeal is allowed and the lower Court's decree will be modified so as to exclude the sums decreed for the cost of pilgrimage and the cost of replacement of utensils.

The memorandum of cross-objections is allowed and the date from which arrears will be calculated will be the date of the institution of the present suit. In other respects, the lower Court's decree is confirmed. Parties will pay and receive costs in both the appeal and the memorandum of cross-objections proportionate to their failure and success.

I am reminded that the decree of the lower Court gives a charge over the whole of the family properties. It seems to me unreasonable to encumber the family properties to a greater extent than is necessary to secure the payment of the maintenance. The charge will therefore be limited to properties sufficient to yield an income of Rs. 1,200, which will allow a sufficient margin in case there is any difficulty in realisation. If the parties can agree as to the properties which shall be charged, they may file a statement in this Court within one month; otherwise further proceedings in this matter will go on in the trial Court.

Leave to appeal is refused.

*Appeal and memo. of objections allowed and decree modified.*

K. C.

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1. (1868) 9 W.R. 152.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Thirumalai Tirupathi Devasthanams Committee (represented by its Commissioner and authorised agent, Rao Bahadur K. Sitarama Reddiar Avergal) .. *Appellant** (*Plaintiff*)

*v.*

Pujali Komarappa Mudali and others .. *Respondents* (*Defendants*).

Thirumalai Tirupathi Devasthanams Committee *v.* Pujali Komarappa Mudali.

*Madras Estates Land Act (IX of 1908), S. 3 (11)—Occupancy ryot—Meaning of—Proof as to—Presumption how far.*

Where the land in the suit was cultivable land eight years prior to the passing of the Madras Estates Land Act but either at the time when the Act came into force or very shortly afterwards it ceased to be used for agricultural purposes but was occupied by houses and there was no proof of the consent of the landholder to this arrangement,

*Held*, that it was not right to draw a presumption that the purpose for which the land was held in 1900 continued in 1908 when the Act came into force and that the persons who occupied the land on the 1st of July 1908 and probably occupied it purely for the purpose of residence in the houses built thereon, acquired the statutory position of occupancy ryots liable to pay rent by reason of an alleged right to use the land for agricultural purposes. In order to get the benefit of the rule in 25 M.L.J. 50 the plaintiff should at least show that the lands had been ryoti lands at some period while the Act had been in force in order to justify the inference that the occupant had the right to use the lands for an agricultural purpose and was liable to pay rent for them within the definition in S. 3 (11) of the Madras Estates Land Act.

Appeals against the decrees of the District Court of Chittoor in A. S. Nos. 44, 45 and 46 of 1935 respectively preferred against the decrees of the Court of the Special Deputy Collector of Chandragiri Division in R. S. Nos. 417, 416 and 414 of 1934.

*T. Kumaraswamiah* for Appellant.

*C. S. Venkatachariar* and *D. Ramaswami Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT.—These three appeals arise out of suits under the Madras Estates Land Act for rent on land which according to the common case of both parties is now occupied by houses, though it is alleged by the landholder (the plaintiff) to be ryoti land available for cultivation.

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*S. As. Nos. 177, 178 and 179 of 1935. 16th August, 1938.

Thirumalai Tirupathi Devasthanams Committee *v.* Pujali Komarappa Mudali.

Second Appeal No. 179 has to be allowed, for it is established that the respondent who was the appellant in the District Court, died on 10th June, 1935, that is to say, some two months before the appeal was heard by that Court and no legal representative was brought on record. The appeal therefore had abated at the time when the learned District Judge heard it and his judgment must be treated as void and the decree of the Deputy Collector has to be restored. I make no order as to costs in this Court.

With reference to the other two second appeals, there is no real dispute as to the facts established by the evidence. The question is rather as to the inference to be drawn regarding those matters upon which the evidence is silent. It is established that in fasli 1310, that is to say, approximately the year 1900, the suit lands were cultivated and that at some subsequent date houses were built upon the lands and streets were formed. The plaintiff's witness the karnam says that the houses were built more than twenty years ago; the defendant's witnesses put the period as about 25 or 30 years ago. There is no record of any rent having been collected in respect of the suit lands in recent years nor of any pattas having been exchanged. In point of fact this estate has been involved in litigation for many years until recently, a fact which may be an explanation for the vagueness of the evidence with regard to the suit lands. The position therefore is that for at least 20 years past the suit lands have been occupied by houses and no rent has been paid for them nor has any patta been tendered. There is no record of the suit lands ever having been reserved expressly as village site, but the plaintiff's witness is unable to say positively that the former landholder did not give permission for the construction of houses. It will be seen on this state of the evidence that no one can say with any certainty whether the lands in suit were or were not occupied by houses at the time when the Act came into force, namely, 1st July, 1908, or whether the use of these lands for residential purposes was with or without the consent of the then landholder. Now what is the legal position on these facts? The definitions with which we are concerned are those of "rent", "ryot" and "ryoti land", in S. 3 of the Estates Land Act. Rent is that which is lawfully payable to a landholder for the use or occupation of land in his estate for the

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purpose of agriculture. A ryot is a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent. Ryoti land is cultivable land in an estate other than private land, but does not include village sites or other lands situated in any estate which are set apart for the common use of the villagers. Under S. 6 of the Act a permanent right of occupancy is conferred upon a ryot in possession of ryoti land not being old waste on the date on which the Act comes into force. These provisions have been frequently considered in judicial decisions and it has been established (vide *Appalaswami* v. *Rajah of Vizianagaram*[1] and *Ramasami Servaigaran* v. *Athivaraha Chariar*[2]), that the definition of "rent" does not require that the land shall be actually used for agriculture at the time when the money claimed in the suit accrues due and that it is sufficient that the land is ryoti land and that the ryot has the right to use it for agricultural purposes, though he may choose to use it for some other purpose. It is also established in a series of cases (*Ramachandra Mardaraja Deo* v. *Dukko Podhano*[3], *Venugopala Rice Mill* v. *Rajah of Pittapuram*[4] and *Chandrasekhara Bharati Swamigal* v. *Duraiswami Naidu*[5]), that when land which was once ryoti land has with the consent of the landholder, express or implied, been devoted to some purpose other than agricultural purposes, whatever is payable for that land is not rent within the definition in S. 3 (11) of the Madras Estates Land Act. In the present case we have a position which is not, so far as I know, covered by precise authority. The land was cultivable land some eight years prior to the passing of the Madras Estates Land Act. Either at the time when the Act came into force or very shortly afterwards it ceased to be used for agricultural purposes but was occupied by houses. There is no proof of the consent of the landholder to this arrangement. But the fact that for at least twenty years no rent has been paid for this land in my opinion goes a long way to support an inference that the occupation of this land by houses was with the consent of the then landholder. Now it is incumbent upon the plaintiff, in order to establish his claim for rent, to prove that the land is ryoti land and that the

1. (1913) 25 M.L.J. 50.
2. (1918) M.W.N. 340.
3. (1915) 31 I.C. 852.
4. (1929) 59 M.L.J. 74: I.L.R. 53 Mad. 367.
5. (1931) 61 M.L.J. 648: I.L.R. 54 Mad. 900.

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money which he claims is rent. If, as here, the land is admittedly not now used for agricultural purposes and can only be notionally regarded as land held for the purpose of agriculture, the plaintiff is bound to establish those facts which would justify the conclusion that the occupant of these lands is a ryot holding them for the purpose of agriculture, though he does not actually use them for that purpose. I doubt very much whether the Court would be justified in drawing such an inference merely because it has been proved that the lands were cultivable lands in the remote past. After all the plaintiff's claim and the jurisdiction of the Revenue Court to adjudicate upon it, both depend upon the statute which came into force on the 1st July, 1908, superseding a law which was in many respects quite different. I do not consider that it is right to draw a presumption that the purpose for which the land was held in 1900 continued in 1908 and that the persons who occupied the land on the 1st July, 1908, probably occupied it purely for the purpose of residence in the houses built thereon, acquired the statutory position of occupancy ryots liable to pay rent by reason of an alleged right to use the land for agricultural purposes. In my opinion in order to get the benefit of the rule in *Appalaswami* v. *Rajah of Vizianagaram*[1] the plaintiff should at least show that the lands have been ryoti lands at some period while the Act has been in force in order to justify the inference that the occupant has the right to use these lands for an agricultural purpose and is liable to pay rent for them within the definition in S. 3 (11) of the Madras Estates Land Act.

It has been suggested that if the suit is held to be one which is not cognizable by the Revenue Court, the plaint should have been returned for presentation in a Civil Court under the provisions of O. 7, r. 10, Civil Procedure Code. To my mind that contention is erroneous, for the plaint as framed proceeds purely on the footing that the defendant is a ryot holding lands for which rent is payable by virtue of the provisions of the Madras Estates Land Act. If the suit were to be converted into one for damages for use and occupation or some similar claim, the plaint would have to be entirely re-drafted. In such circumstances it is not in my opinion proper

1. (1913) 25 M.L.J. 50.

to return the plaint for presentation to a Court which certainly would have no jurisdiction to entertain the claim as it has been put forward in the plaint.

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In the result, Second Appeals Nos. 177 and 178 of 1936 are dismissed with costs.

Leave to appeal is granted.

K. C. *Appeals dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Monni Aidruz .. *Appellant** (*Appellant*)

*v.*

Sappani Mira Mohideen and others .. *Respondents* (*Respondents*).

Monni Aidruz v. Mira Mohideen.

*Civil Procedure Code (V of 1908), O. 21, rr. 85 and 86—Default in deposit of purchase money within fifteen days after sale—Obligatory on the part of Court to re-sell property.*

Under O. 21, r. 86, Civil Procedure Code, if there is default in payment of the balance of the purchase money as required by O. 21, r. 85, Civil Procedure Code, it is obligatory on the Court to re-sell the property. This discretion vested in the Court is only with regard to the forfeiture of deposit.

*Nawal Kishore* v. *Buttu Mal*, (1934) I.L.R. 57 All. 658, followed.

Appeal against the order of the District Court of Tinnevelly dated 18th April, 1934 and made in A. S. No. 20 of 1934 (E. P. No. 138 of 1933 on the file of the District Munsiff of Tinnevelly in S. C. No. 75 of 1930, Sub-Court, Tinnevelly).

*T. R. Thiagaraja Aiyar* for Appellant.

*A. Swaminatha Aiyar* and *S. Thiagaraja Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The question involved in this appeal is whether the order of the District Munsif of Tinnevelly directing a re-sale of the property under O. 21, r. 86, Civil Procedure Code, in execution of a decree obtained by the appellant against the first defendant is valid. The relevant facts are not in dispute. In execution of the said decree the property was sold on the 15th of September, 1933 and purchased by the 3rd respondent in this case. He deposited 25 per cent. of the purchase-money on the same date but committed default in payment of the balance of the purchase-money within 15 days

* A. A. A. O. No. 95 of 1934. 31st March, 1938.

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as required by O. 21, r. 85, Civil Procedure Code. He deposited the amount one day later. After the amount was so deposited the decree-holder applied for confirmation of the sale and for payment to him of the amount deposited in satisfaction of his decree. Notices were issued to the judgment-debtor and also to the Official Receiver who was appointed Receiver of the property of the judgment-debtor because of his having been adjudicated insolvent on the 6th of October, 1933. Both the judgment-debtor and the Official Receiver objected to the confirmation and the learned Judge thereupon directed re-sale under O. 21, r. 86. It is contended that it is open to the Court to confirm the sale even though deposit has not been made within 15 days as required by the section and therefore re-sale should not have been directed. It seems to me that under O. 21, r. 86, if there is default in payment of the balance of the purchase-money as required by O. 21, r. 85, it is obligatory on the Court to re-sell the property. The language of the section is "the property *shall* be sold". The discretion vested in the Court is only as regards the forfeiture of deposit. The language used in connection therewith is:

"The deposit *may*, if the Court thinks fit, be forfeited."

This is the view taken by a Bench of the Allahabad High Court in *Nawal Kishore* v. *Buttu Mal*[1] with which I agree. The order directing re-sale is therefore perfectly valid and in accordance with the plain language of O. 21, r. 86, Civil Procedure Code. Mr. Thiagaraja Aiyar relied upon decisions of this Court and of other High Courts where it was held that even though the deposit as required by O. 21, r. 85 was not made within the time limited, with the consent of all parties the Court might confirm the sale, and if the Court confirmed the sale it was only an irregularity. But those decisions do not throw light on the question in dispute, namely, if the Court declines to confirm the sale but passes an order directing a re-sale, whether the Court was not justified in doing so. In the result this appeal is dismissed with costs.

Leave refused.

K. C. —— *Appeal dismissed.*

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1. (1934) I.L.R. 57 All. 658.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Bonagiri Sreeramulu .. *Appellant** (*2nd Respondent*)

*v.*

Karumuri Venkatanarasimham and others .. *Respondents* (*Decree-holder and Respondents 3 and 4*).

Sreeramulu *v.* Venkatanarasimham.

*Decree-holder—Acceptance by him of sale by Official Receiver—Reprobation later—Right of parties to approbate and reprobate.*

Where the first respondent, the decree-holder against a father and his three sons, at first objected to the sale by the Official Receiver in insolvency of the father, of the sons' three-fourths share in the joint family properties, but then allowed it and took part in the bidding and after the sale was concluded protested against it, but later withdrew his protest, subsequently taking from the Official Receiver his share of the sale proceeds and in his execution petition giving credit to the judgment-debtors for the amount he took from the Official Receiver as his share of the sale proceeds,

*Held,* that the acts of the decree-holder indicated that he approved of the sale and having done so he could not be permitted to say afterwards that the sale was void.

*Verschures Creameries* v. *Hull and Netherlands Steamship Co.,* (1921) 2 K.B. 608; *Ramaswami Chettiar* v. *Chidambaram Chettiar,* (1927) 26 L.W. 527 and *Venkatarayudu* v. *Chinna Ramakrishnayya,* (1929) 58 M.L.J. 137, relied on.

*Narayanaswami Aiyar* v. *Subramania Pillai,* (1935) 69 M.L.J. 673, disapproved.

Appeal against the order of the Court of the Subordinate Judge of Narsapur, dated 7th November, 1936 and made in A.S. No. 27 of 1936 preferred against the order of the Court of the District Munsiff of Narsapur dated 23rd December, 1935 and made in E. P. No. 255 of 1934 in O. S. No. 247 of 1924.

*Ch. Raghava Rao* for Appellant.

*M. Appa Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal from the order of the Subordinate Judge of Narsapur in Appeal No. 27 of 1936. The appellant was the second judgment-debtor in O. S. No. 247 of 1924 on the file of the District Munsiff of Narsapur. In that suit the first respondent in this appeal got a decree for money against a father and three sons. Before judgment on the 16th October, 1924, the joint family property belonging to the

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*A.A.A. O. No. 48 of 1937. 17th August, 1938.

defendants in the suit had been attached. After the attachment a partition suit was filed by the sons against their father and the matter is also further complicated by the fact that after the attachment an insolvency petition was brought against the father and in that petition the father was adjudicated. The Official Receiver sold the father's one-fourth share in the joint family property and proposed to sell the shares of the three sons. The first respondent the decree-holder in O. S. No. 247 of 1924 objected to the sale of the three-fourths share belonging to the sons but his objection preferred to the Official Receiver was dismissed for default. The sale was held by the Official Receiver and the first respondent took part in the bidding. The first respondent subsequently filed O. P. No. 19 of 1928 to have the sale of the sons' three-fourths share set aside but he allowed this petition to be dismissed for default. The Official Receiver then distributed the proceeds of the sale to the creditors in Insolvency of whom the first respondent was one. Subsequently the purchaser at the sale held by the Official Receiver sued the sons for possession in O. S. No. 36 of 1931 (Sub-Court, Narasapur) but his suit was dismissed on the ground that the sale of the sons' shares by the Official Receiver was void. The vendee preferred an appeal but the appeal was not pressed because he and the three sons entered into a compromise by which the vendee paid the sons Rs. 800 and the sons executed in his favour a deed of release or relinquishment undertaking not to dispute his rights in future. This deed was executed on the 22nd September, 1933. In 1934, the first respondent presented the execution petition which has given rise to this appeal. He sought to bring to sale the three-fourths share in the joint family property belonging to the three sons. In 1935 the District Munsiff of Narasapur ordered execution to proceed. The second judgment-debtor (present appellant) appealed to the Subordinate Judge of Narasapur and in A. S. No. 31 of 1935 the order for execution was set aside and the execution petition remanded to the Court of the District Munsiff for fresh disposal. The District Munsiff was ordered to consider the question of the validity of sale of the three-fourths share belonging to the sons. Thereupon another District Munsiff considered the question afresh and although he held that the sale of the three-fourths share by the Official Receiver was certainly illegal and invalid, he dismissed the

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application for execution on the ground that the decree-holder was not entitled to proceed in execution against the same property which had been sold by the Official Receiver since the decree-holder had taken his share of the dividend out of the sale proceeds. On appeal the present learned Subordinate Judge of Narasapur reversed the decision of the District Munsiff and held that the decree-holder is entitled to proceed against the three-fourths share. The learned Subordinate Judge therefore sent back the execution petition for further proceedings in execution. The second judgment-debtor has preferred this appeal.

The appellant's position is simple ; he contends that the decree-holder approved of the sale held by the Official Receiver after it was held and that he cannot now be allowed to say that the Official Receiver's sale was void. The position of the 1st respondent decree-holder is equally simple. He says that the sale held by the Official Receiver was undoubtedly void so far as the three-fourths share belonging to the sons is concerned and that nobody can prevent him from alleging the invalidity of that sale and nobody can prevent him from proceeding against the property which is still the property of the 2nd, 3rd and 4th judgment-debtors in his suit. The law in my opinion is sufficiently clear that a party who seeks the assistance of the Court is not entitled to approbate and reprobate or blow hot and cold, as it is sometimes put. The principle is clearly stated in *Verschures Creameries* v. *Hull and Netherlands Steamship Co.*[1], Scrutton, L.J., puts it in this way:

> "A plaintiff is not permitted to approbate and reprobate. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election, namely, that no party can accept and reject the same instrument. The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction."

The principle has been followed in this Court (*vide* the case of *Ramaswami Chettiar* v. *Chidambaram Chettiar*[2] and of *Venkatarayudu* v. *Chinna Ramakrishnayya*[3]). Those are cases of orders passed by Courts involving the payment of costs to the successful party by the unsuccessful

1. (1921) 2 K.B. 608. 2. (1927) 26 L.W. 527.
3. (1929) 58 M.L.J. 137.

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party. It was held that if the successful party receiv the costs ordered to be paid by the unsuccessful party, could not afterwards come to Court and say that the ord itself was passed without jurisdiction. In *Narayanaswa Aiyar* v. *Subramania Pillai*[1], Cornish, J., drew a distincti which with all respect I am unable to appreciate. Cornis J., held that an order setting aside an *ex parte* decree aft the expiry of the period of limitation was without juri diction and that even if the receipt of Rs. 10 in the shape costs by the plaintiff's vakil could be regarded as an adopti of the order such an adoption of an order made witho jurisdiction could not have the effect of making that order o which the Court was competent to pass. With all respect think the learned Judge did not appreciate the point of t decision in *Venkatarayudu* v. *Chinna Ramakrishnayya* It is of course obvious that acquiescence in an ord passed by a Court will not render the order valid if it an order passed without jurisdiction but the princip followed in *Venkatarayudu* v. *Chinna Ramakrishnayya*[2] is th a person who has chosen to adopt an order cannot subsequent be allowed to object to it. As Ramesam, J., puts it, if the fac indicate that the person has adopted the order, he cann object to it afterwards. The question is really one of fa whether there has been approbation or not. If there has bee approbation, reprobation is not permitted.

On the facts in this case it seems to me clear that t decision of the learned District Munsiff was right and that the learned Subordinate Judge wrong. It is clear that the 1 respondent (the decree-holder) at first objected to the sale b then allowed it to proceed, and took part in it by biddin After the sale was held, he first protested against it and th withdrew his protest and subsequently took from the Offici Receiver his share of the proceeds of the sale. In his executi petition he gave credit to the judgment-debtors for the amou which he had taken from the Official Receiver as his share the sale proceeds. These acts of the decree-holder indica that he approved of the sale and having done so he is n permitted afterwards to say that the sale was void. Mr. Ap Rao who has appeared for the decree-holder contends that is entitled to ignore the sale held by the Official Receiver an

1. (1935) 69 M.L.J. 673. 2. (1929) 58 M.L.J. 137.

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to treat it as null and void. This would be correct if it were not for the fact that he had at an early stage approbated the sale. Having done so, he is not entitled now to ignore it. Moreover as I have already stated, he does not ignore the sale at all but treats it even now as being a valid sale since in the execution petition he gives credit to the judgment-debtors for the amount which he took from the Official Receiver.

Mr. Appa Rao for the first respondent contends that the appellant who is the second judgment-debtor has no right to raise such objections as he has raised. His argument on this part of the case is practically that if questions of approbation and reprobation are to be considered the second judgment-debtor is far worse than himself. This, however, is not relevant to the present case. Mr. Appa Rao has drawn my attention to the case of *Ammakannu Ayi* v. *Murugayya Odayar*[1] and of *Jai Barham* v. *Kedar Nath Marwari*[2], but I do not think they have any application to the doctrine of election or approbation and reprobation.

Another point taken for the first respondent is that the execution petition was remanded to the District Munsif by the learned Subordinate Judge of Narasapur in his judgment in A. S. No. 31 of 1935 only for one specific purpose, namely, to consider the validity or otherwise of the sale by the Official Receiver of the three-fourths share belonging to the sons. He contends that that being so, the learned District Munsiff was not justified in dismissing the execution petition on the ground that the decree-holder had elected to abide by the sale. It is not however possible to say that learned District Munsiff after remand order did anything that was beyond his jurisdiction and in any case the question would have come up to this Court in its present form no matter what the decision of the District Munsiff had been.

In the result this appeal succeeds and is allowed and the order of the District Munsiff restored and the execution petition dismissed. The first respondent will pay the costs of the appellant throughout.

Leave refused.

K.C. —— *Appeal allowed.*

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1. (1924) 47 M.L.J. 85: I.L.R. 47 Mad. 850.
2. (1922) 44 M.L.J. 735: L.R. 49 I.A. 351: I.L.R. 2 Pat. 10 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. MADHAVAN NAIR, *Officiating Chief Justice* AND MR. JUSTICE STODART.

Kozhikote Patinhare Kovilakath Mahadevi *alias* Kunhi Thamburatti *alias* Valiya Thamburatti Avergal styled Viyathen Notti .. *Appellant** (*1st Plaintiff*)

*v.*

Kozhikote Patinhare Kovilakath Kulapura Thavazhi Karnavan and Manager Veerarayan *alias* Marumakan Thamburan and others .. *Respondents* (*Defendants and 2nd Plaintiff*).

Mahadevi *v.* Veerarayan.

*Court-fees—Landlord and tenant—Suit for recovery of possession of property—Decree passed conditional on payment of value of improvements—Appeal by plaintiffs regarding compensation amount—Court-fee if need be paid as on the relief of possession—Court-Fees Act (VII of 1870), Sch. I, Art. 1.*

The plaintiffs sued for recovery of possession of certain properties from the defendants their tenants. The trial Court decreed the suit but on condition that they should pay a certain sum of money for the value of the improvements. The plaintiffs appealed against the compensation amount that they were ordered to pay and contended that no compensation amount should have been decreed against them. They valued the appeal treating it as one for possession ignoring the fact that the subject-matter of the appeal was the value of the improvements that they were called on to pay.

*Held*, that the plaintiffs-appellants were liable to pay court-fee on the value of the improvements that they had been directed to pay.

In re *Paidal Nayar*, A.I.R. 1926 Mad. 225, approved.

*Reference under Court-Fees Act, S. 5*, (1899) I.L.R. 23 Mad. 84, considered and distinguished.

Appeal against the order of the District Court, South Malabar dated 6th August, 1936, (in A. S. No. of 1935,) preferred against the decree of the Court of the District Munsiff of Calicut in O. S. No. 398 of 1933.

*K. Kuttikrishna Menon* for Appellant.

*D. A. Krishna Variar* for Respondents.

The judgment of the Court was delivered by

Madhavan Nair, Offg. C. J.

*The Officiating Chief Justice.*—The legal representative of the 1st plaintiff is the appellant. In this second appeal the

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* S. A. No. 1199 of 1936. 18th August, 1938.

Mahadevi *v.* Veerarayan.

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question is raised as regards the court-fee that should have been paid by the appellant on the memorandum of appeal that he presented to the lower Court. As there is a conflict of authority on the question the case has been posted before us for decision at the instance of Lakshmana Rao, J., before whom the second appeal came originally for hearing.

The facts are these: The plaintiffs sued for recovery of possession of properties from their tenants. The trial Court decreed the suit, but on condition that they should pay Rs. 8,000 for value of improvements. The plaintiffs appealed against the compensation amount that they were ordered to pay. According to them no compensation should have been decreed against them. They valued the appeal treating it as one for possession ignoring the fact that the subject-matter of the appeal was the value of improvements that they were called upon to pay and not the right to recover possession of the property. The District Judge ordered that court-fee should be paid by the plaintiffs-appellants on the value of improvements. As that court-fee was not paid in time the appeal was rejected.

In second appeal it is contended that the lower Court was wrong in ordering that the appellants should pay court-fee on the value of improvements and reliance is placed on the decision in *Reference under Court-Fees Act, S. 5*[1]. In that case the plaintiff sued for recovery of land from defendants 1 to 3. The contesting defendant (defendant No. 2) contended that the land was not liable to be surrendered and also claimed compensation for improvements. The District Munsiff disallowed the claim for improvements and decreed the surrender of the land. The contesting defendant appealed and paid for court-fee, a sum which was the fee payable on the value of the land. The question was whether the value of improvements should also be taken into account for the purpose of levying the court-fee, the subject-matter of the appeal being the same as that in the suit,—the question of improvements being raised incidentally. The learned Judges held that the value of the improvements should not be taken into consideration for calculating the court-fee. They held that, as the claim for improvements was not the subject-matter of the suit but

1. (1899) I.L.R. 23 Mad. 84.

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was merely incidental to the decree for possession and on grounds of convenience the fee payable by the appellant should be that payable in a suit for possession of land. They also stated in the judgment:

"We think the proper answer to the reference is that on appeal even where the only question raised is as to the value of the improvements, the appellant should not be called upon to pay any fee other than that payable in a suit for possession of land."

It is clear that on the facts the present case is different from the decision in *Reference under Court-Fees Act, S. 5*[1], in as much as the question as regards the right to possession has not been raised in appeal and could not be raised in the present case; and the only question appealed against is as regards the value of improvements. Mr. Kuttikrishna Menon relies on the observation in the judgment we have just quoted that

"on appeal even where the only question raised is as to the value of the improvements, the appellant should not be called upon to pay any fee other than that payable in a suit for possession of land,"

in support of his argument that he should not be called upon to pay court-fee on the value of improvements. It is clear that the observation of the learned Judges is only *obiter* and it was not necessary for them to have made that observation for the decision of the case before them. This observation was treated as an *obiter dictum* in *Paidal Nayar*, In re[2], where the specific question now raised in the present appeal arose for decision. In that case the plaintiff filed a suit for redemption of a kanom. He obtained a decree for recovery of possession of property subject to the payment of the kanom amount and the value of improvements. In appeal there was no dispute as to the plaintiffs' right to redeem, but he appealed against the value allowed for improvements—as in the present case. The question was, what was the proper court-fee payable on the memorandum of appeal. It was held on an exhaustive consideration of the authorities that the plaintiff should pay court-fee in proportion to the value of the relief he sought in appeal and that the court-fee payable in the case before them must be determined in accordance with the value of improvements which the appellant sought to avoid. We accept the reasoning adopted by the learned Judges and have nothing to add to it. They have given sufficient reasons to show why the

1. (1899) I.L.R. 23 Mad. 84. 2. A.I.R. 1926 Mad. 225.

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appellant should pay court-fee on the value of improvements when that is the only question raised in the appeal. The decision *Pathumma Umma* v. *A. Mohideen*[1] refers to In re *Paidal Nayar*[2] with approval and treats the observation in *Reference under Court-Fees Act, S. 5*[3], as an *obiter dictum*. We agree with the reasoning of the learned Judges in *Paidal Nayar*, In re[2], and hold that in a case where in appeal the only question involved relates to compensation for improvements and no question for possession is raised, the appellant should pay court-fee on the value of improvements. The decision of the lower Court is right and this second appeal is dismissed with costs.

We give the appellant one month's time from to-day to pay the proper court-fee to the lower Court—as we observe that the appellant had filed a Civil Revision Petition to this Court questioning the order of the lower Court before the expiry of the 5th August, which was the ultimate time allowed to him by the lower Court to make the payment. If the court-fee is not paid in time the appeal will be rejected.

B. V. V. ——— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Sheik Dawood Rowther .. *Petitioner** (*Respondent*)

*v.*

Abdul Kadar Rowther .. *Respondent* (*Petitioner*).

Sheik Dawood Rowther *v.* Abdul Kadar Rowther.

*Civil Procedure Code (V of 1908), O. 21, r. 45 (2)—Attachment order—Crops ripe for being cut—No clear directions regarding them in the order of attachment—Judgment-debtor's action in cutting them whether wrong—Complaint under S.476 of Criminal Procedure Code whether could lie—Fraudulent intention under S. 206, Indian Penal Code, whether could be made out.*

Where certain crops belonging to the petitioner were under attachment by order of Court, 25th September, 1936, but were harvested by him on the 8th of October, 1936 and the Court relying mainly on the order of attachment and the receiver's report that a *prima facie* case was made out under S. 206, Indian Penal Code, against the petitioner, ordered a complaint to be filed under S. 476, Criminal Procedure Code,

*Held*,(1) that in the circumstances that the harvest was ripe for being cut and that it was necessary for the judgment-debtor as much in his own interests as in those of the attaching decree-holder that they should be cut particularly when no directions were given in the attaching order of Court, the lower Court was wrong in ignoring the provisions of O. 21, r. 45 (2), Civil Procedure Code.

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1. A.I.R. 1928 Mad. 929.
2. A.I.R. 1926 Mad. 225.
3. (1899) I.L.R. 23 Mad. 84.

*C. R. P. No. 1130 of 1937. 19th August, 1938.

Sheik Dawood Rowther *v.* Abdul Kadar Rowther.

(2) Moreover the absence of fraudulent intention could not bring him under S. 206, Indian Penal Code.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of West Tanjore dated 10th August, 1937 and made in C. M. A. No 11 of 1937 preferred against the order of the Court of the Subordinate Judge of Kumbakonam, dated 29th January, 1937 and made in O. P. No. 41 of 1936 in S. C. S. No. 139 of 1934.

*J. V. Srinivasa Rao* for Petitioner.

Respondent not represented.

The Court made the following

ORDER.—The Subordinate Judge of Kumbakonam ordered a complaint to be made against the petitioner on the ground that certain crops which were already attached on 26th September, 1936, under the orders of the Court were harvested by him on or about the 8th of October in that year. The Court relying mainly on the order of attachment and the receiver's report held that a *prima facie* case was made out under S. 206, Indian Penal Code, against the petitioner and ordered a complaint to be filed against him under S. 476, Criminal Procedure Code. The order of the learned Subordinate Judge was perfunctory and did not seem to comply with the requirements of the section. An appeal against this order was dismissed by the learned District Judge who tried to read into the order things which were not mentioned there. He however came to a distinct finding that the prosecution was expedient in the interests of justice. The petitioner has now come up in revision.

It appears to be rather strange that the provisions of O. 21, r. 45 (2), Civil Procedure Code, were not noticed by either of the Courts below. The crops are perishable and it has been for that reason provided in the above-stated rule that the judgment-debtor may tend, cut, gather and store the produce in spite of an order of attachment, subject to such conditions as may have been imposed by the Court either in the order of attachment or in any subsequent order. I have seen the order of attachment issued by the Court and no condition was imposed in that order. Nor was any condition imposed on the judgment-debtor subsequently. It is found by the learned District Judge that the evidence showed that the harvest was ripe for being cut by the 6th of October. If it were so, the crops would have been

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ruined if allowed to remain standing for any length of time—and it was necessary for the judgment-debtor as much in his own interests as in those of the attaching decree-holder that they were cut particularly when no directions were given by the attaching Court either at the time of ordering attachment or subsequently.

This is not all. Before a person can be ordered to be prosecuted under S. 206, Indian Penal Code, there must be some evidence to show that he had fraudulently removed, concealed, transferred or delivered to any person any property or any interest therein intending thereby to prevent the property or interest from being taken in the execution of the decree which was passed against him. Not to say of any evidence on the point that the petitioner had removed, concealed, transferred or delivered the crops which had been cut by him either fraudulently or otherwise, there is no allegation that he ever did or intended to do so. The mere harvesting of crops would not bring him within the scope of S. 206 unless it were shown that he did one of the things mentioned above with a fraudulent intent. It might be said that the petitioner appears to have made an attempt to commit the offence. But even then it would have to be shown that he did so with the intention of preventing the crops from being taken in the execution of decree and not merely with the intention of saving them, as appears to have been the case here. The point was taken by the petitioner before the learned District Judge but no attention seems to have been paid by him to this part of the case.

In the end, there is nothing to show on the record that the petitioner knew of the crops having been attached under the orders of the Court. The facts that certain other persons knew of the attachment cannot be sufficient to prove that the petitioner had any knowledge. Nor is the fact that his crops were attached on previous occasions relevant to show that they were attached on this occasion.

If I were not satisfied about the errors of law having been committed by the Subordinate Courts I would not be interfering in revision. But since the Subordinate Judge does not appear to have taken the matter seriously or in any case failed to consider the various matters which he was required to consider before taking such a serious step and since the learned District Judge did not pay sufficient attention to the petitioner's

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contentions that there was no intention on his part to remove the crops clandestinely and that his action was *bona fide* and lastly the requirements of O. 21, r. 45 were not kept in mind by the Court ordering attachment, I hold that the order under S. 476 was not justified. I would therefore vacate the order. The complaint if filed will now be withdrawn.

K. C. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Vakkalanka Kondamma .. *Petitioner* (Plaintiff)*

*v.*

Kasaneedi Venkatarayadu and others .. *Respondents (Defendants).*

Kondamma *v.* Venkatarayadu.

*Promissory note—Suit note in renewal of earlier note—Insufficient stamp—Plaintiff seeking amendment of plaint for basing claim on the earlier cancelled note—Endorsement of cancellation sufficient acknowledgment of liability—Question of limitation—Amendment—Circumstances justifying.*

Where a promissory note was executed on 9th August, 1929, in renewal of an earlier note dated 11th August, 1926, but owing to insufficient stamp became inadmissible in evidence under S. 35 of the Indian Stamp Act and hence the plaintiff applied for an amendment of the plaint seeking permission to base his cause of action on the earlier note which had been cancelled and superseded by the later note, which was refused by the lower Court, on the question whether the amendment sought could be allowed,

*Held*, that the endorsement of cancellation on the earlier promissory note amounted to a valid acknowledment of liability on the date of the later note.

*Salig Ram* v. *Radhay Shiam*, (1931) 134 I.C. 254, followed.

The plaintiff's claim under the previous note was not barred on the date of the suit, as the endorsement on the insufficiently stamped note acknowledged the liability on the previous note and could be relied on for saving limitation.

*Chokkalingam Chetty* v. *Annamalai Chetty*, (1915) 34 I.C. 417, followed.

As the petitioner's application for amendment of the plaint would not introduce a new cause of action and the defendant could not legitimately plead that he had been deprived of the plea of limitation as the cause remained the same, the circumstances of the case justifying the amendment, the refusal of the amendment was wrong on principle.

*Muthammal* v. *Guruswami Nayakan*, (1934) 67 M.L.J. 921; *Muthiah Chettiar* v. *Chidambaram Chetty*, (1916) 31 M.L.J. 6F8; *Official Assignee of Madras* v. *Kuppuswami Naidu*, (1936) 71 M.L.J . 250 (F.B.) and *Chellam Sakka Raja* v. *Muthuswami Mooppar*, (1936) 71 M.L.J. 166, referred to.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, Cocanada, in S. C. S. No. 204 of 1935.

* C. R. P. No. 1656 of 1935. 10th May, 1938.

Kondamma *v.* Venkata-rayadu.

*D. Suryaprakasa Rao* and *K. Bhimasankaran* for Petitioner.

*G. Balaparameswara Rao* and *S. Kanakam* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the petitioner. Her suit was for the enforcement of a promissory note dated 9th August, 1929, executed by the first defendant, the undivided father of defendants 2 to 5. The promissory note bears an endorsement on the back of part payment, dated 6th July, 1932. The plaint was filed on 28th June, 1935. The suit note was insufficiently stamped and was inadmissible in evidence under S. 35 of the Indian Stamp Act. The plaintiff therefore on 30th July, 1935, applied for an amendment of the plaint seeking permission to take his cause of action on the promissory note dated 11th August, 1926, which had been cancelled and superseded by the execution of the suit note which was renewal of this note. This note also had been filed along with the suit note. The application for amendment was refused by the learned Judge on the ground that the endorsement dated 6th July, 1932 can only refer to the suit note and cannot be taken as an acknowledgment of the prior promissory note debt. The order further stated:

" Even assuming that the endorsement has such an effect, the claim on the prior pronote became barred after the expiry of three years from the date of endorsement, that is, 6th July, 1932. The plaintiff cannot be allowed to get over the difficulty of limitation by obtaining the amendment."

The amendment having been refused the suit was dismissed. In the Civil Revision Petition the main argument has been that in the circumstances of the case, the amendment should have been allowed.

The granting of an amendment is left to the discretion of the Court under O. 6, r. 17, Civil Procedure Code. As a general rule leave to amend will be granted to enable the Court to determine the real question in issue between the parties provided that the amendment will occasion no injury to the opposite party except such as can be compensated for by costs or other terms to be imposed by the Court. Consideration of the question whether any injury will be caused to the defendant in the present case will entail practically a decision of the plaintiff's case; and if in the course of the discussion it is found that the defendant is not deprived of any legitimate

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plea that he can raise, including of course the plea of limitation, I think the amendment should be granted. I would therefore proceed to consider the case on its intrinsic merits before deciding whether the amendment should be allowed or not.

It is clear that no new cause of action is introduced in the suit if the plaintiff is allowed to rely upon the earlier promissory note dated 11th August, 1926. The debt was originally incurred under that note and afterwards it was renewed on 9th August, 1929, by the suit note. The suit note therefore embodies the original claim and in seeking the amendment the plaintiff is only asking for the enforcement of that claim, which he should be allowed to enforce if such enforcement will not prejudice the defendant—in putting forward any legitimate plea which the defendant might have. The plea relied on by the defendant is the plea of limitation. We shall proceed to examine how far this plea can be availed of by the defendant in the circumstances of the case.

The suit upon the earlier note dated 11th August, 1926, will be barred on the date of the plaint if the debt is not in the first place acknowledged before the expiry of three years from the date of the note. The first acknowledgment relied on is on 9th August, 1929, the date of the suit promissory note. Even if an acknowledgment is established on that date, the plaintiff will have to rely on yet another acknowledgment to bring the suit within time; about this, later. About the first acknowledgment, it is argued by the respondent that the suit note executed on 9th August, 1929, being insufficiently stamped, cannot be relied upon for any purpose and so cannot serve as an acknowledgment on 9th August, 1929, of the original liability. But it is urged on behalf of the plaintiff that it is not necessary for her to rely upon the suit note for establishing the acknowledgment on 9th August, 1929, for she can rely on the cancellation continued in the earlier promissory note as an acknowledgment. At the end of the earlier promissory note dated 11th August, 1926, there is this memorandum:

"This note is cancelled as a fresh promissory note was executed on 9th August, 1929, for the principal and interest due up to date on this note."

The fresh note executed is the suit promissory note. It is argued that the mention of the fact that the original note was cancelled by the execution of a fresh note on 9th August, 1929, amounts to an acknowledgment of the liability on that date

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under the cancelled note, that is, the note dated 11th August, 1926. If this position is correct, then it is not necessary that the plaintiff should rely upon the insufficiently stamped suit note to prove the acknowledgment on 9th August, 1929. The decision in *Salig Ram* v. *Radhay Shiam*[1], completely supports the contention of the plaintiff on this point. In that suit the defendant had executed a promissory note to the plaintiff on the 10th November, 1922. On the 7th September, 1925, another promissory note was executed in renewal of the previous one and an endorsement was made to the following effect on the previous note:

"On 7th November, 1925, in lieu of the present promissory note a second promissory note of the amount of Rs. 1,350 has been executed and this promissory note has become void."

It may be mentioned that this promissory note became void as it was not properly stamped under S. 35 of the Stamp Act. The plaintiff instituted a suit in 1927 on the second promissory note and finding that it was not properly stamped amended the plaint by basing the suit on the promissory note of 1922 and relying on the endorsement on it as an acknowledgment. It was held that the meaning of the endorsement was that there was a subsisting debt though a new security was being substituted and it contained a valid acknowledgment of liability (*see* the head note). It is clear from this decision that the endorsement of cancellation on the previous note in the present case, that is, the note dated 11th August, 1926, amounts to a valid acknowledgment of liability, on 9th August, 1929.

Having thus far kept alive the original liability, the plaintiff next contends that the endorsement on the suit note, though the note itself is insufficiently stamped, on 6th July, 1932, before the expiry of three years from 9th August, 1929, gives her another three years from 6th July, 1932, for the enforcement of her claim, and that the suit having been instituted on 28th June, 1935, within this period of three years is not barred by limitation. The question is whether the plaintiff can rely on the endorsement on the insufficiently stamped promissory note as a valid endorsement acknowledging the original liability. It is argued that the promissory note itself being insufficiently stamped and inadmissible in evidence, the

1. (1931) 134 I.C. 254.

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instrument cannot be used in evidence for any purpose under S. 35 of the Stamp Act. But it was held in a decision of this Court in *Chokkalingam Chetty* v. *Annamalai Chetty*[1], that though the promissory note itself is inadmissible the endorsements of payment appearing on it can be availed of as acknowledgments of the liability upon the original debt. If so, in this case it is clear the suit is not barred by limitation as it was instituted within three years from 6th July, 1932, the date of the endorsement. Nothing has been said to shake the strength of this decision. S. 35 of the Indian Stamp Act says, that

> "no instrument chargeable with duty shall be admitted in evidence for any purpose . . . . . . unless such instrument is duly stamped."

Under this section an insufficiently stamped instrument is inadmissible in evidence. 'Instrument' is defined in the Indian Stamp Act (II of 1899) to

> " include every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded"

(*see* S. 2, cl. 14) and "document" is defined in the General Clauses Act (X of 1897) as follows:

> " 'Document' shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter."

From this it follows that the instrument that is inadmissible under S. 35 of the Stamp Act is the "matter written on the substance" by means of letters described as the promissory note. For the purpose of extending the period of limitation what is relied on is not the writing which constitutes the promissory note and which is inadmissible, but the endorsement on the insufficiently stamped note. So long as it acknowledges the liability under the original note I can see nothing in law to prohibit its admission in evidence. That the endorsement acknowledges the original liability under the previous promissory note and that it can be relied on for the purpose of saving limitation though it appears on an insufficiently stamped promissory note have been both clearly laid down in *Chokkalingam Chetty* v. *Annamalai Chetty*[1], just referred to, and the present suit has been instituted within three years from the date of the endorsement, that is, 6th July, 1932. For the above reasons it follows that the plaintiff's claim under

1. (1915) 34 I.C. 417.

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the previous promissory note dated 11th August, 1926, is not barred on the date of the suit. What she now asks for is that the suit promissory note being insufficiently stamped she may be allowed to fall back upon the prior promissory note. As already stated, this plea if allowed does not introduce a new cause of action and the defendant cannot legitimately plead that he has been deprived of the plea of limitation as the cause of action remains the same. The circumstances of the case justifying the amendment being clear I do not think it is necessary to refer to cases of this Court which have allowed amendments on this principle. (See *Muthammal* v. *Guruswami Nayakan*[1], *Muthiah Chettiar* v. *Chidambaram Chetty*[2] and also *Official Assignee of Madras* v. *Kuppuswami Naidu*[3] and *Chellam Sakka Raja* v. *Muthuswami Mooppar*[4].) I do not propose here to discuss those cases in detail as the principle to be applied is clear and the decision of each case should depend upon its special circumstances.

For the above reasons I would set aside the decision of the lower Court, allow the amendment asked for by the petitioner and remand the case to the lower Court to be disposed of according to law and in the light of my observations.

As regards costs, I think the petitioner should pay the respondent all the costs he has incurred up to date. Knowing that the suit note was insufficiently stamped he should have filed the suit in the first instance on the cancelled note. There are other reasons also for making him pay the costs. It would appear in the amendment application the insufficiently stamped suit note was relied on as containing the first acknowledgment of the liability under the original promissory note. This plea is of course untenable. Till the date of the argument before me it was never pleaded that the acknowledgment of the original liability for the first time was contained in the cancellation of that promissory note by the execution of the suit promissory note dated 9th August, 1929, written on it. Even when the case was posted for argument before the late Chief Justice this argument does not seem to have been present to the mind of the learned Counsel. It has now been put forward before me for the first time, and without proving that

1. (1934) 67 M.L.J. 921.
2. (1916) 31 M.L.J. 688.
3. (1936) 71 M.L.J. 250 (F.B.).
4. (1936) 71 M.L.J. 166.

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there was a valid acknowledgment on 9th August, 1929, which she could prove only by relying on the cancellation and not by relying on the suit note, the petitioner could not succeed. For these reasons, I think this is a proper case in which the petitioner should compensate the respondent by paying him the costs up to date for obtaining the liberty of amending the plaint now accorded to him.

K. C. —— *Petition allowed.*

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, LORD ROMER, LORD SALVESEN, SIR LANCELOT SANDERSON AND SIR GEORGE RANKIN.

Srimati Rajlakshmi Dassi .. *Appellant**

*v.*

Bholanath Sen and others .. *Respondents.*

P.C. —— Srimati Rajlakshmi Dassi *v.* Bholanath Sen.

*Civil Procedure Code (V of 1908), S. 11—Representative suit—Claim by female Hindu life tenant to possession of part of estate—Question of title settled in her favour in previous suit—Claim to possession founded on reasons relating to life tenant only—Failure of claim on question of possession—Subsequent claim by reversionary heir to compensation awarded in respect of acquisition of part of property in dispute—Whether barred by life tenant's previous suit.*

An estate owner died leaving him surviving a widow who had been his third wife, and three grandchildren by his second wife who had predeceased him. By authority given to her by her husband's will, the widow adopted a son, *J*, who died leaving a widow, *K*, and a daughter by *K*, named *R*. In 1903, *K* instituted a suit and obtained a decree in the Court of the Subordinate Judge pronouncing her to be entitled as against the three grandchildren to the whole of the estate. While an appeal by the grandsons was pending, a compromise was effected, and incorporated in a decree, whereby *K* took a share of 6 annas, the grandsons 4 annas, and *K's* father 6 annas in the property. Shortly afterwards, *R*, in order to protect her reversionary interest, instituted a suit in which she obtained a decree setting aside as invalid the compromise decree in so far as it affected her reversionary interest, and restoring the earlier decision of the Subordinate Judge. No question was decided in that suit as to the right of the three grandsons to remain in possession of the 4 annas share during *K's* lifetime. In 1919 *K* instituted a suit claiming possession of the 4 annas share, that suit being dismissed on the ground that, although the Subordinate Judge's decree of 1903 was good as a declaration of her right in respect of title, yet she had been out of possession of the property for more than twelve years. That decision was confirmed by the High Court on appeal. *R* instituted a suit claiming the compensation money awarded on the acquisition of part of certain premises included in the share of the estate in the grandsons' possession, and the grandsons resisted

* P. C. Appeal No. 107 of 1936. Bengal Appeal No. 29 of 1935. 18th July, 1938.

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the claim on the ground that the matter was *res judicata* in view of *K's* suit in 1919.

*Held*, that the title to the estate had been finally decided by the decree of the Subordinate Judge in 1903 which was restored by the High Court in 1910, and that *K* had no right to submit it to a fresh adjudication as against the grandsons in 1919 so far as the rights of the reversionary heir were concerned.

*Held, further*, that *K* in her action in 1919 was suing only in her own interest and not as representing the reversionary heirs, and that the judgment given against her, dealing as it did merely with a question of possession and not with title was not one which affected or could affect *R's* reversionary right to the property.

*Katama Natchiar* v. *Rajah of Shivagunga*, (1863) 9 M.I.A. 539; *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami*, (1893) L.R. 20 I.A. 183: I.L.R. 21 Cal. 8 (P.C.); *Chaudhri Risal Singh* v. *Balwant Singh*, (1918) 36 M.L.J. 597: L.R. 45 I.A. 168: I.L.R. 40 All. 593 (P.C.); *Vaithialinga Mudaliar* v. *Srirangath Anni*, (1925) 49 M.L.J. 769: L.R. 52 I.A. 322: I.L.R. 48 Mad. 883 (P.C.) and *Jaggo Bai* v. *Utsava Lal*, (1929) 57 M.L.J. 160: L.R. 56 I.A. 267: I.L.R. 51 All. 439 (P.C.), considered.

Appeal from a decision of the High Court, Fort William, Bengal, dated 8th March, 1935 (judgment of the Court delivered by *Mitter, J.*) affirming a decision, dated 15th May, 1930, of the Special Land Acquisition Judge of the 24 Parganas on a reference to him under S. 18 of the Land Acquisition Act (I of 1894) by the Second Land Acquisition Collector, Calcutta.

*A. M. Dunne, K.C.* and *J. M. Pringle* for Appellant.—The respondents here argue that, if a Hindu widow has failed in a suit to recover her husband's estate because she was barred by limitation, the reversioners are bound by that adverse decision. But the present case is entirely different. Here the widow in 1903 instituted a suit in which she was successful in obtaining a decree which established her title. The suit of 1919 in which she was unsuccessful was merely one for possession of that portion of the estate—the 4 annas share—which she had allowed to remain in the hands of the respondents, the Sens, for more than 12 years after she had obtained the decree in the suit of 1903. In *Chaudhri Risal Singh* v. *Balwant Singh*[1], a Hindu woman who had purported to adopt a son to her husband instituted a suit claiming the estate which vested in her on the death of her husband and infant son, basing her claim on the ground that the adoption had been invalid. Although the Board held that she was estopped from denying the validity of the adoption, it went into the evidence and held that the adoption was valid. The reversionary heir having, on the widow's death, brought an action to recover the estate and alleged that the

1. (1918) 36 M.L.J. 597: L.R. 45 I.A. 168: I.L.R. 40 All. 593 (P.C.).

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adoption was invalid, it was held that the matter was *res judicata* by virtue of the widow's suit. But a case can only fall within the principle there laid down if the question determined in the earlier suit is one affecting the title to the estate itself. If the matter determined by the earlier suit is merely one relating to the rights of a life tenant, *Chaudhri's case*[1] is distinguishable, and the reversionary interests are not affected. *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami*[2] decided that if a widow's right was held to be barred by limitation in an action to recover the estate, the bar was effective against the reversioner, the fact that the failure was due to a time bar not affecting the principle. There was no right in the widow there which survived. Again the present case is distinguishable because all that was barred by time was a right to possession which was personal to the widow, the general question of title, which affected also the reversioner, having in a previous suit been decided in her favour once and for all. The widow's right to possession was barred because she had given up possession for too long. The right to the estate itself was not in issue in the suit in which she failed. Counsel referred, further, to *Vaithialinga Mudaliar* v. *Srirangath Anni*[3], *Jaggo Bai* v. *Utsava Lal*[4], *Subbi* v. *Ramkrishna Bhatta*[5], *Braja Lal Sen* v. *Jiban Krishna Roy*[6], *Mohima Chunder Roy Chowdhri* v. *Ram Kishore Acharjee Chowdhri*[7], *Baijun Doobey* v. *Brij Bhookun Lall Awusti*[8] and *Jugol Kishore* v. *Jotindro Mohun Tagore*[9].

*Wallach* (*amicus curiae*).—The authorities cited for the appellant are in point. The law, it is submitted, is clear. The reversioners will be bound by an adverse result in a suit which the widow has in good faith instituted in the interest of the estate. The question for determination is whether in the present case Katyani, the widow, did, in the suit of 1919, litigate for the estate as well as for herself. It is submitted that she did, and that the appellant is bound by the decision which was given against her in that suit.

18th July, 1938. Their Lordships' judgment was delivered by

Lord Thankerton

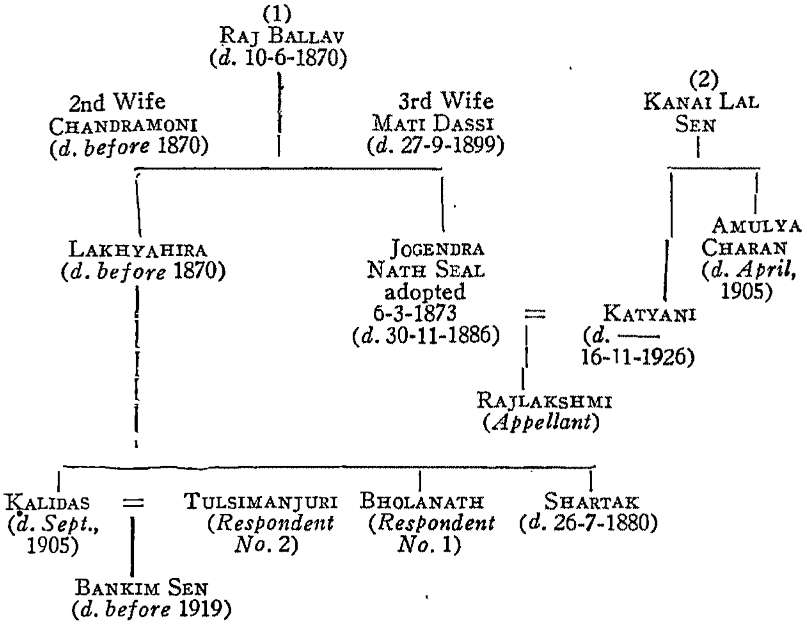
LORD THANKERTON.—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William

1. (1918) 36 M.L.J. 597: L.R. 45 I.A. 168: I.L.R. 40 All. 593 (P.C.).
2. (1893) L.R. 20 I.A. 183: I.L.R. 21 Cal. 8 (P.C.).
3. (1925) 49 M.L.J. 769: L.R. 52 I.A. 322: I.L.R. 48 Mad. 883 (P.C.).
4. (1929) 57 M.L.J. 160: L.R. 56 I.A. 267: I.L.R. 51 All. 439 (P.C.).
5. (1917) I.L.R. 42 Bom. 69.
6. (1898) I.L.R. 26 Cal. 285.
7. (1875) 15 Beng.L.R. 142.
8. (1875) L.R. 2 I.A. 275: I.L.R. 1 Cal. 133 (P.C.).
9. (1884) L.R. 11 I.A. 66: I.L.R. 10 Cal. 985 (P.C.).

in Bengal dated the 8th March, 1935, which affirmed the judgment and decree, dated the 15th May, 1930, of the Special Land Acquisition Judge of the 24 Parganas on a reference made to him under S. 18 of the Land Acquisition Act (I of 1894) by the Second Land Acquisition Collector, Calcutta.

The question in the appeal is whether the appellant is entitled to the compensation money awarded in respect of the acquisition of part of the premises 2, Deb Lane, in the Town of Calcutta, as successor to the estate of Raj Ballav Seal, of which the said premises formed part.

Raj Ballav died on the 10th June, 1870, leaving him surviving his widow Mati Dassi and three grandsons, who were sons of a predeceased daughter by another wife, of whom one died in 1880 unmarried. Respondent No. 1 is another grandson, and respondent No. 2 represents the third grandson, who died in 1905. The grandsons' line is hereinafter called "the Sens". Respondents Nos. 3-11 represent the mortgagee of the Sens. The following pedigree shows the descendants of Raj Ballav:—




Raj Ballav left a will giving his widow Mati Dassi authority to adopt a son to him, and giving benefits to the said widow, to the son to be adopted, and to the Sens. On Raj Ballav's death in 1870, Mati Dassi entered into possession of the estate and adopted Jogendra Nath Seal in 1873, under the authority

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conferred on her. Jogendra married Katyani and the present appellant is their only child; Jogendra died in 1886, when the appellant was less than one year old.

Mati Dassi died in 1899, and the Sens appear to have then taken possession of the estate. Shortly after the death of Jogendra, Mati Dassi had purported to adopt Amulya Charan, the brother of Katyani, in further exercise of the authority conferred on her, and in 1901 Amulya brought a suit against the Sens and Katyani claiming the estate; the suit was dismissed in both Courts on the ground that Mati Dassi's power of adoption had been exhausted with her adoption of Jogendra, and the High Court further held, on construction of the will, that there was an intestacy as to the corpus of the estate, which vested in Jogendra as legal heir, and on his death passed by succession to his widow Katyani. In this suit a receiver had been appointed to the estate pending the disposal of the suit. The decision of the High Court which was dated the 28th March, 1905, is reported in *Amulya Charan Seal* v. *Kali Das Sen*[1].

Meantime, after the decision of the Subordinate Judge in Amulya's suit, Katyani brought suit No. 11 of 1903 against the Sens, Amulya and the Receiver in Amulya's suit, claiming three-fourths of the estate and partition, which she later amended to a claim for the whole estate, after the decision of the High Court in Amulya's suit. The suit was defended by the Sens, and on the 21st December, 1905, the Subordinate Judge decreed the suit in Katyani's favour, ordering and declaring "that the plaintiff's title in the whole 16 annas' share of the immovable properties in dispute as specified in Schedule B (2) of the plaint be declared and she do recover possession therein." The Sens appealed to the District Court and, without authority, joined Kanai, the father of Katyani and Amulya, as respondent in the appeal; they also obtained leave to join a representative of the mortgagee. A petition of compromise was filed in the District Court on the 9th January, 1907, under which the Sens, with their mortgagee, Kanai and Katyani agreed to divide the inheritance, Katyani taking 6 annas, the Sens 4 annas, subject to the mortgagee's rights, and Kanai 6 annas. On the 24th January,

1. (1905) I.L.R. 32 Cal. 861 at 864.

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1907, a consent-decree on the basis of the compromise was made by the District Court, and partition was directed; subsequently, on the 15th September, 1907, as directed by the Court, the receiver made the partition and made over possession of the respective shares in terms of the compromise. The premises 2, Deb Lane, compensation for a part of which is the subject of the present appeal, was included in the 4 annas, of which the Sens got possession.

Less than three months after the consent-decree of the District Court in suit No. 11 of 1903, the present appellant, in order to protect the reversionary interest, instituted on the 18th April, 1907, suit No. 59 of 1907 against the parties to the compromise and the receiver, for declaration that the compromise and the consent-decree of the District Court dated the 9th January, 1907, were void and inoperative and that the reversioners were not bound by the partition proceedings taken in execution of the decree. The Subordinate Judge dismissed the suit, but, on appeal, the High Court set aside this decision, by a judgment and decree dated the 8th August, 1910, and declared "that the consent-decree made on the 9th January, 1907, is void and inoperative as against the plaintiff appellant and that she is in no way bound by the partition proceedings which have taken place in execution of that decree". This decision is reported in *Rajlakshmi Dasee* v. *Katyayani Dasee*[1]. It is clear that the main ground of decision was that the District Court had no jurisdiction and that accordingly the consent-decree was void and inoperative. The Court did not decide any question as to the right of the Sens to retain possession of the 4 annas during the life of Katyani, who had a widow's right in the estate, because of the compromise agreement, to which she was a party, or on some similar ground.

It is important to get a clear view of the position of the estate after the decision of the High Court of the 8th August, 1910, the effect of which, *inter alia*, was to annul the consent-decree of the District Court in No. 11 of 1903, and to leave the decree of the Subordinate Judge dated the 21st December, 1905, which has been already quoted, as final and binding. This decree declaring Katyani's title to the whole estate was

1. (1910) I.L.R. 38 Cal. 639.

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clearly a decree in Katyani's favour as representing the whole interests in the estate, and it has rightly been so regarded by both the Courts below in the present case; and it formed *res judicata* in any question with the Sens. As regards possession of the estate, while the decree made an order for recovery of possession, the possession given under the partition of 1907 continued, the Sens being in possession of the four annas. It seems clear that possession under an agreement which was not binding on the reversionary heirs could not avail the Sens in a question with a reversionary heir, whose right to possess could not arise until the succession opened to such heir.

In that position, it appears to their Lordships that, unless something thereafter occurred during the life of Katyani which affected the title to the whole or part of the estate, which took such whole or part of the estate away from Katyani and vested it as matter of title in the Sens, mere possession of such whole or part of the estate by the Sens would afford them no answer to the appellant's claim as reversionary heir, on Katyani's death, founded on the decree of the Subordinate Judge in No. 11 of 1903, as set up by the decree of the High Court in 1910 in her own suit, No. 59 of 1907.

The respondents maintain that the appellant's claim in the present suit is excluded by reason of the subsequent decision in suit No. 115 of 1919, instituted by Katyani against the Sens and their mortgagees for recovery of the four annas; that suit was dismissed by the Subordinate Judge and, on appeal, by the High Court. The respondents maintain that Katyani, in that suit, was suing on behalf of the reversioners as well as herself, and that the decision is *res judicata* against the present appellant. Both Courts below have accepted this contention and have dismissed the appellant's suit, and the appellant now challenges their ground of decision, which is largely founded on certain decisions of this Board, which they have held to be applicable, and to which reference will be made later.

In the first place, the title to the estate having been finally decided, in any question with the Sens, as above stated, their Lordships are of opinion that the widow, Katyani, had no right to submit it to fresh adjudication by the Courts as against the Sens, so far as the right of the reversionary heirs

was concerned, or to affect their right by any such action. In the second place, their Lordships are satisfied, on a scrutiny of the proceedings in suit No. 115 of 1919, that Katyani was only suing in her own interest, and not as representing the reversionary heirs.

In the plaint, dated the 15th September, 1919, Katyani clearly founded on the decree of the Subordinate Judge in suit No. 11 of 1903, dated the 21st December, 1905, as set up by the High Court decree in suit No. 59 of 1907, dated the 8th August, 1910, as forming *res judicata* against the defendants, the Sens, on the question of title; she then proceeded to deal with her own personal difficulty, namely, the compromise, as to which she alleged that it had been obtained from her by the undue influence of her father Kanai, in fraudulent collusion with the Sens. The written statement of the Sens has not been made available. The Subordinate Judge in a judgment dated the 24th August, 1921, rejected the plaintiff's allegations of fraud and held the compromise to be binding on her so as to prevent recovery of possession by her. This clearly could only relate to Katyani's possession during her life, as the compromise had been finally held not to be binding on the reversionary heirs.

On appeal, the High Court, in a judgment dated the 21st and 24th July, 1925, did not refer to the question of the compromise, but they state, in reference to suits No. 11 of 1903 and 59 of 1907, that, as a result of the compromise decree's being held to have been without jurisdiction, the decree of the Trial Court in the suit of Katyani (No. 11 of 1903) must be treated as a good decree and that that decree declared her right, but the Court held that Katyani had been out of possession for more than 12 years and could not recover possession, and affirmed the dismissal of the suit. Again their Lordships are unable to regard this judgment as affecting the right of the reversionary heir to possession.

An examination of the decisions of this Board, on which both the Courts below have relied, will show that the decree against a female holder of the estate which has been held to be binding on a succeeding heir, has in each case involved the decision of the question of title, and not the mere question of possession. In none of the cases had the prior female holder

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of the estate already obtained a decree of her title to the estate against the defendants. In *Katama Natchiar* v. *Rajah of Shivagunga*[1], the following passage occurs in the judgment of the Board, delivered by Turner, L. J., at page 603:

"It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Anga Mootoo Natchiar's lifetime, would have bound those claiming the Zemindary in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have heen successfully impeached on some special ground, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Anga Mootoo Natchiar. For assuming her to be entitled to the Zemindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindoo widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

Anga Mootoo Natchiar, the widow, had claimed in the previous litigation a Hindu widow's estate in the Zemindary as self-acquired by her late husband, and maintained that it was not part of the impartible estate. Quite clearly the question of title was in issue, and her failure carried the estate away from the reversionary heirs, and the observations of the Board were directed to a litigation as to the title of the estate.

In *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami*[2], the decree against a preceding female heir was founded on limitation, on the ground that she had never been in possession since the death of the widow in 1855, some 26 years before, when the succession had opened to her. It was held by this Board that the fact that the decree was founded on limitation did not take the case out of the ruling laid down in the *Shivagunga case*, which is quoted above. Art. 141 of the Limitation Act of 1877 had first appeared in a more limited form in Art. 142 of the Act of 1871, being then confined to the death of a widow. The judgment of the Board, delivered by Sir Richard Couch, after referring to these changes, states in reference to Art. 141 of the Act of 1877:

"the words 'entitled to the possession of immovable property' refer to the then existing law. Under that law the plaintiff, being bound by the decree

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1. (1863) 9 M. I. A. 539.
2. (1893) L.R. 20 I. A. 183: I.L.R. 21 Cal. 8 (P.C.).

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against Sampurna, would not be entitled to bring a suit for possession. The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. The purpose of the Second Schedule in each of the Acts is only to prescribe the period of limitation for the suit."

Here again it is clear that Sampurna had held no previous decree as to title, and that her title was in issue in the litigation which was instituted on behalf of herself and the reversionary heirs.

In *Chaudhri Risal Singh* v. *Balwant Singh*[1], a Hindu female, in whom an estate vested on the death of her husband and infant son, had purported to adopt Balwant Singh as son to her husband; subsequently she instituted a suit for a declaration that the adoption was invalid. It was held by this Board that she was estopped by her conduct from denying the validity of the adoption, which was the ground of decision in both the Courts below, and also, that upon the facts the adoption was valid. On the widow's death, the reversionary heir sued for recovery of the estate, alleging that the adoption was invalid. It was held that the reversionary heir was bound by the previous decision against the widow as *res judicata.* There could be no doubt that the widow in her suit had represented the reversionary heirs, and that the decision that the adoption was valid negatived any right of the reversionary heirs as well as the right of the widow.

In the case of *Vaithialinga Mudaliar* v. *Srirangath Anni*[2], the widow, Chokkammal, had made an adoption in 1862 to her husband, Arunchala, who had died in 1849. The widow died in 1902, and in 1905, the suit under appeal was instituted by the plaintiffs as reversionary heirs of Arunchala against the defendants, who were successors of the adopted son and were in possession of the estate, and who relied mainly upon the defences that the suit was barred by *res judicata* and limitation. The former defence was founded on a decree in 1892 in a suit by the mother of the adopted son, against Chokkammal and others, for possession of the estates, which she alleged had been forcibly taken from her by Chokkammal in 1884—three years before the suit—prior to which date the adopted son, his widow and the plaintiff had held possession since the adoption in 1862. It was held by the High Court, by the decree of 1892, that

1. (1918) 36 M.L.J. 597 : L.R. 45 I.A. 168 : I.L.R. 40 All. 593 (P.C.).
2. (1925) 49 M.L.J. 769 : L.R. 52 I.A. 322 : I.L.R. 48 Mad. 883 (P.C.).

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the adoption was invalid, but that the plaintiff's claim of adverse possession for 12 years was established and they affirmed the decree for possession which the Subordinate Judge had given. The defence of *res judicata* founded on this decree was sustained by the Board, on the ground that Chokkammal, as defendant, had represented the estate, and the decree of adverse possession bound the reversionary heirs. Again it is clear that the decree excluded the title of both the widow and the reversionary heirs. The Board also based their decision on Art. 129 of the Limitation Act, 1871, but that part of the decision is not material for present purposes. In the course of the judgment, which was delivered by Sir John Edge, the judgment of Macpherson, J., in the Full Bench decision in *Nobin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty*[1], was quoted with approval and was as follows:—

"I also concur in the proposed answer. But a very great difference exists between the case immediately before us and the case in which a mother or other Hindu female having an estate similar to that of a childless widow has herself alienated property belonging to the estate which she has taken as heiress, without sufficient reason for making such alienation. In the latter case, the alienation is good as against her, and so far as her own life interest is concerned. Therefore, in fact, no cause of action necessarily arises at all with respect to her alienation so long as she lives. The cause of action does not arise until her death, when the reversioner's cause of action for the first time accrues. In the case before us, the property having never reached the hands of the mother (the Hindu widow) at all, having been throughout held adversely to her, the cause of action (of the reversioner) accrued in the mother's lifetime, and therefore a suit to recover possession, by whomsoever it may be brought, is barred unless instituted within twelve years from the commencement of the adverse possession."

Lastly, in *Jaggo Bai* v. *Utsava Lal*[2], it is sufficient to quote a passage from the judgment of the Board, delivered by Lord Tomlin, which, after a reference to the case of *Hurrinath Chatterji, supra cit.*, states:

"It is therefore established by this decision that where a decree founded upon the law of limitation is obtained against the widow in her lifetime the reversionary heir is barred and does not get the benefit of Art. 141. The question raised by the present case is whether the same result follows where there has been no decree, though at the death of the widow a stranger has been in adverse possession for 12 years or more. In their Lordships' judgment where there has been no decree against the widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession on the widow's death, the heir is entitled, after the widow's death, to rely upon Art. 141 for the purpose of the determination of the question

1. (1867) 9 Suth.W.R. 505 at 510.
2. (1929) 57 M.L.J. 160: L.R. 56 I. A. 267: I.L.R. 51 All. 439 (P.C.).

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whether the title is barred by lapse of time. To hold otherwise would, in their Lordships' opinion, in effect, compel the Court in determining a question within the scope of the article to ignore the express words of the article."

Accordingly, the question in the present appeal is whether the decree in the suit No. 115 of 1919 deprived the appellant of the right to possession. As already stated, their Lordships are of opinion that the appellant's right to possess was established as *res judicata* against the Sens by the decree of the Subordinate Judge in suit No. 11 of 1903, as set up by the judgment of the High Court in the appellant's suit No. 59 of 1907, and Katyani's suit for possession No. 115 of 1919 could not, and did not, affect the appellant's right to possession.

In their Lordships' judgment, therefore, the appeal succeeds, and the judgment and decrees of both Courts below should be set aside, and the appellant should have a decree for the amount of the compensation money in suit, and their Lordships will humbly advise His Majesty accordingly. The appellant will have the costs of the appeal and of the proceedings in both Courts below.

Solicitors for Appellant: *W. W. Box & Co.*

R. C. C. —— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE ABDUR RAHMAN.

Swami Arunagirinathar .. *Appellant** (*Prisoner*).

Swami Arunagirinathar, *In re.*

*Criminal Law Amendment Act (XXIII of 1932), S. 7—Effect of Amending Act XX of 1937—Exercise of powers by Governor-General—Validity of Act—Government of India Act, 1919, S. 67-B (2)—Extension of S. 7, Criminal Law Amendment Act, 1932, to Madras—Re-notification after amending Act if necessary—Offence of picketting relating to public official—Abetment of offence—Penal Code (XLV of 1860), Ss. 41 and* 117.

The Criminal Law Amendment Act of 1932 has not been repealed in its entirety by the Repealing and Amending Act (XX of 1937). The effect of S. 4 of the Act of 1937 and S. 6-A of the General Clauses Act XIX of 1936 is to leave the Criminal Law Amendment Act of 1932 so far as S. 7 is concerned intact.

As regards the exercise of his powers under S. 67-B (2) of the Government of India Act, 1919, the Governor-General is the sole Judge and he is not bound to give any reasons for promulgating an ordinance such as the Criminal Law Amendment Act of 1935, which when once promulgated becomes a lawful Act.

As the extension of S. 7 of the Criminal Law Amendment Act of 1932 to the Province of Madras has been duly notified and as that section is still on

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* Crl. A. No. 319 of 1938. 30th August, 1938.

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the statute book it continues to apply and there is no need for a re-notification by the Government of Madras extending it to the Madras Province.

There is no justification for the plea that the offence contemplated by S. 7 (1) (*a*) of the Criminal Law Amendment Act of 1932 should go unpunished when it is committed in respect of a public official.

The Criminal Law Amendment Act of 1932 is a special law within the meaning of S. 41 of the Indian Penal Code, and a person can be convicted for abetting an offence under S. 7 of the Criminal Law Amendment Act.

Appeal against the sentence of the Third Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras, in C. C. No. 972 of 1938.

*S. Muthiah Mudaliar* and *S. G. Rangaramanujam* for Appellant.

*The Advocate-General* (*Sir A. Krishnaswami Aiyar*) and *The Crown Prosecutor* (*T. S. Anantaraman*) on behalf of the Crown.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The appellant in this case has been convicted on three charges under S. 7 (1) (*a*) of the Criminal Law Amendment Act, 1932, read with S. 117 of the Indian Penal Code, and has been sentenced on each charge to one year's rigorous imprisonment, the sentences to run concurrently. S. 7 (1) (*a*) reads as follows:—

"Whoever with intent to cause any person to abstain from doing or to do any act which such person has a right to do or to abstain from doing, obstructs or uses violence to or intimidates such person or any member of his family or person in his employ, or loiters at or near a place where such person or member or employed person resides or works or carries on business or happens to be, or persistently follows him from place to place, or interferes with any property owned or used by him or deprives him of or hinders him in the use thereof, shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both."

Therefore a person who with intent to cause any person to abstain from doing or to do any act which he has a right to do or to abstain from doing, loiters near that person's residence is guilty of an offence and renders himself liable to punishment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both imprisonment and fine. S. 117 of the Indian Penal Code provides that whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

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The Criminal Law Amendment Act, 1932, added, to the list of crimes what is now known as "picketing". It is not necessary to inquire into the circumstances which led to this addition. The addition was made, and that suffices so far as the Court is concerned. Nor is the Court called upon to inquire into the policy of applying this Act. All that the Court has to consider is the section and the facts which the prosecution says constitute the offence described in the section. If the proved facts constitute an offence within the meaning of the section the Court must apply it and it cannot enter upon a discussion whether other means exist of vindicating the law. With these preliminary observations I will turn to certain of the facts which have been proved.

On the 21st April, 1938, the Government of Madras issued an order in these terms:—

"The Government have decided that Hindustani should be taught to all pupils in Forms I to III of Secondary Schools. They direct that this decision be given effect to in the School year 1938-39 in the 125 Secondary Schools mentioned in the list submitted by the D. P. I. with his letter read above.

2. "The Director is requested to circularise the Schools concerned and address Government separately on the question of the employment of a Hindustani Teacher in each of these Schools and also on the payment of Provincial grants for the purpose to non-Government Schools."

It will be observed that the language referred to in this order is Hindustani, but in the agitation which followed the issue of this order the language has always been referred to as Hindi. It is not necessary to dwell on the points of difference between Hindustani and Hindi. This order aroused a great deal of resentment in parts of the province and a league called the Anti-Hindi Propaganda League was formed. Public meetings were called, volunteers were enrolled to resist the introduction of Hindi in the Schools and appeals were made for subscriptions. The headquarters of the league were established in Madras and arrangements were made for the boarding and lodging of the volunteers within the city. Three public meetings were addressed by the appellant who took a prominent part in the movement. On the 11th June, 1938, one Sivananda Adigal described as "the dictator" of the league was arrested and his place was taken by the appellant, who led the agitators in Madras until his own arrest on the 21st June, 1938. When the appellant was in charge of the movement he was also referred to as "the dictator". The appellant addressed three public meetings in Madras, one on

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the 10th June, 1938, in the Cathedral Road, another on the 13th June, 1938, in the Nattu Pillayar Koil Street, George Town, and the third on the 14th June, 1938, in Vepery. The case for the prosecution is that at these meetings the appellant incited his hearers to picket the house of the Honourable Mr. Rajagopalachari, the Premier of Madras, with a view to compelling him to take steps to withdraw the order which the Government had issued with regard to the teaching of Hindi in the Schools of the Province. From the 1st June to the 29th June, 1938, extensive picketing took place in front of the Premier's house. As soon as one band of picketers was dispersed another took its place and the picketing was certainly more than peaceful.

On the arrest of the appellant charges were framed under S. 7 (1) (*a*) of the Criminal Law Amendment Act, 1932. The first charge was that the appellant in furtherance of the Anti-Hindi Propaganda Movement on the 10th June, 1938, abetted the commission of the offence under S. 7 (1) (*a*) of the Criminal Law Amendment Act, 1932, by Tamilians numbering more than 10 persons by inciting them by means of speeches made to volunteer their services to loiter in front of the Premier's house, No. 48, Bazulullah Road, Mambalam, and picket the place and offer Satyagraha in order to cause the Premier to cause the cancellation of the order of Government introducing Hindi in Schools in this Presidency which the Premier had a right to abstain from doing and thereby committed an offence punishable under S. 117 of the Indian Penal Code. The two other charges were similarly worded and had reference to the other two meetings. After a lengthy inquiry by the Third Presidency Magistrate the appellant was found guilty and the sentences already referred to were imposed upon him.

In the Court below and in this Court a number of legal arguments was advanced on behalf of the appellant. In this Court the legal arguments were confined to these:—(1) The Criminal Law Amendment Act, 1932, was no longer in force, it having been repealed by Act XX of 1937, known as the Repealing and Amending Act, 1937; (2) the Criminal Law Amendment Act, 1935, was invalid because the Governor-General had not taken the steps contemplated by the first clause of sub-S. 2 of S. 67-B of the Government of India Act;

(3) the extension of the Criminal Law Amendment Act, 1932, to the Province of Madras had not been properly notified and even if it had been so notified the notification had lost its validity; (4) even if S. 7 (1) (*a*) of the Criminal Law Amendment Act, 1932, is in force the Act does not apply to the picketing of the house of a public servant; and (5) there can be no abetment of an offence under S. 7 (1) (*a*) of the Criminal Law Amendment Act, 1932.

The Criminal Law Amendment Act, 1932, was passed by the Indian Legislature and was made to extend to the whole of British India, including British Baluchistan and the Sonthal Parganas. As it originally stood the Act was to remain in force for three years from its commencement, which was the 19th December, 1932. S. 1 (4) provided that the whole of the Act, except S. 4 and S. 7 should come into force at once, and the Local Government might by notification in the local official Gazette, direct that S. 4 or S. 7 should come into force in any area on such date as might be specified in the notification. On the 26th December, 1932, the Government of Madras issued a notification directing that S. 7 should come into force throughout the Presidency as from the 27th December, 1932, but as an error had crept into the notification the necessary correction was made on the 10th January, 1933. In 1935 a Bill which afterwards was enacted as the Criminal Law Amendment Act, 1935, was introduced into the Indian Legislature. Certain sections of the Criminal Law Amendment Act, 1932, were repealed, but S. 7 was not repealed. S. 1 (3) which limited the duration of the Act to three years was repealed. The Bill was introduced into the Assembly on the 2nd September, 1935 and was rejected on the 12th September, 1935. It was, however, passed in its entirety by the Council of State on the 28th September, 1935, and on the 4th October, 1935, it was certified by the Governor-General under the powers conferred upon him by S. 67-B of the Government of India Act. By Act XX of 1937, the Act of 1935 was repealed, but there was express provision continuing the Criminal Law Amendment Act, 1932, as amended by the Act of 1935. By Act XIX of 1936 the General Clauses Act had been amended and it also expressly continued in force the amendment of the Act of 1932. I will refer to the relevant provisions of the Act of 1937 and the Act of 1936 in more detail in a moment.

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With regard to the first contention advanced on behalf of the appellant, the Criminal Law Amendment Act, 1932, was validly amended by the Act of 1935 and this has been accepted, but it is said that inasmuch as the Act of 1937 repealed the Act of 1935 the whole of the Act of 1932 has disappeared. S. 4 of the Act of 1937, however, stated:—

"The repeal by this Act of any enactment shall not affect any Act or Regulation in which such enactment has been applied, incorporated or referred to: and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability already acquired, accrued, or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing; nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed."

Act XIX of 1936 inserted in the General Clauses Act S. 6-A which reads as follows:—

"Where any Act of the Governor-General in Council or Regulation made after the commencement of this Act repeals any enactment by which the text of any Act of the Governor-General in Council or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal."

In the face of S. 4 of the Act of 1937 and of S. 6-A of the Act of 1936 it is not open to the appellant to contend that the Criminal Law Amendment Act, 1932, has been repealed in its entirety. These sections leave the Criminal Law Amendment Act of 1932 so far as S. 7 is concerned, intact. This disposes of the first point.

It is said that the Criminal Law Amendment Act, 1935, is nevertheless invalid because the Governor-General did not follow the procedure contemplated by S. 67-B (2) of the Government of India Act. By sub-S. (1) of that section where either chamber of the Indian Legislature refuses leave to introduce, or fails to pass in a form recommended by the Governor-General, any Bill, the Governor-General may certify that the passage of the Bill is essential for the safety, tranquillity, or interest of British India or part thereof and thereupon if the Bill has already been passed by the other chamber, the Bill shall on signature by the Governor-General notwithstanding that it

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has not been consented to by both chambers forthwith become an Act of the Indian Legislature in the form of the Bill as originally introduced or proposed to be introduced in the Indian Legislature or (as the case may be) in the form recommended by the Governor-General; and if the Bill has not already been so passed, the Bill shall be laid before the other chamber, and if consented to by that chamber in the form recommended by the Governor-General, shall become an Act on the signification of the Governor-General's assent, or if not so consented to, shall, on signature by the Governor-General become an Act. Sub-S. (2) provides that every such Act shall be expressed to be made by the Governor-General, and shall, as soon as practicable after being made, be laid before both Houses of Parliament, and shall not have effect until it has received His Majesty's assent, and shall not be presented for His Majesty's assent, until copies thereof have been laid before each House of Parliament for not less than eight days on which the House has sat; and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor-General, the Act shall have the same force and effect as an Act passed by the Indian Legislature and duly assented to. The learned Advocate for the appellant says that inasmuch as the Governor-General did not cause the Act to be laid before Parliament it was not lawfully passed, but this argument ignores the proviso to sub-S. (2). The proviso is to the effect that where in the opinion of the Governor-General a state of emergency exists which justifies such action, the Governor-General may direct that any such Act shall come into operation forthwith, and thereupon the Act shall have force and effect subject, however, to disallowance by His Majesty in Council. Now it is not suggested that His Majesty in Council has disallowed the Act referred to and it is a fact that the Governor-General on 17th December, 1935, in exercise of the powers conferred upon him by the Proviso directed that the Act should come into operation forthwith. All that is required in such circumstances is that the Governor-General shall exercise his powers. The question whether those powers shall be exercised is a matter for the Governor-General alone to decide. In *Bhagat Singh* v. *The King-Emperor*[1], the Privy Council had to consider an Ordinance made by the Governor-General under

1. (1931) 61 M.L.J. 279: L.R. 58 I.A. 169: I.L.R. 12 Lah. 280 (P.C.).

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the Government of India Act, 1915, S. 72 which authorises him in cases of emergency to promulgate Ordinances for the peace and good Government of British India. The Judicial Committee held that it could not be disputed that an emergency existed and that the Ordinance was one for the peace and good Government of British India. The Governor-General was the sole Judge in such matters and was not bound to give any reasons for promulgating such Ordinances. The same principles apply. The Governor-General did exercise his powers and having exercised them the enactment became a lawful Act.

The learned Advocate for the appellant contends that as the Criminal Law Amendment Act, 1932, was only intended to be in operation for a period of three years at the time of the issue of the notification by the Government of Madras extending S. 7 to the Presidency it was of a temporary nature and the notification must also be deemed to be of a temporary nature. He says that as there was no re-notification after the Act had been amended to give permanent effect to S. 7 the Act as it now stands has not been validly notified. The notification which was issued by the Government of Madras applied S. 7, and the Criminal Law Amendment Act, 1932, so far as S. 7 is concerned is still on the statute book. I hold that there was no necessity for re-notification and that S. 7 applies to this province.

This brings me to the fourth contention of the learned Advocate for the appellant. As I have indicated this is to the effect that the Act cannot be deemed to apply to picketing of a public servant but must be deemed to apply only to picketing of private individuals. It was conceded that for the purposes of deciding the extent of the application of S. 7 only the Act itself could be examined. There is no indication within the Act that a public servant whose house is picketed cannot claim the benefit of the section. All that the Act requires before a person is convicted under S. 7, is that the offender shall loiter at or near the place where the person resides or works or carries on business or happens to be, with intent to cause that person to abstain from doing or to do any act which he has a right to do or to abstain from doing. There is an explanation to the section which states that encouragement of indigenous industries or advocacy of temperance, without the commission of any of the acts prohibited

by the section is not an offence under the section, but the explanation stops there. Because a person holds a public office the law does not allow him to be molested at will even for political purposes. He is as much entitled to protection as anybody else. I can see no justification whatever for the plea that the offence contemplated by S. 7 (1) (*a*) of the Criminal Law Amendment Act, 1932, when committed in respect of a public official, whether high or low, should go unpunished.

With regard to the contention that there can be no abetment of an offence under S. 7 (1) (*a*), S. 109 of the Indian Penal Code provides that whoever abets any offence shall, if the Act abetted is committed in consequence of the abetment, and no express provision is made by the Code for the punishment of such abetment, be punished with the punishment provided for the offence, and as I have already pointed out, S. 117 provides for additional punishment where a person abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, which was the case here. S. 40 of the Penal Code provides that the word "offence" denotes a thing made punishable under the Code or under any "special" or "local" law as defined in the Code. S. 41 defines a "special law" as being a law applicable to a particular subject, and S. 42 defines a "local law" as a law applicable only to a particular part of British India. It is admitted that if the Criminal Law Amendment Act, 1932, is to be deemed to be a special law within the meaning of S. 41 then there can be an abetment of an offence under S. 7(1) (*a*) of the Criminal Law Amendment Act, 1932. I am in agreement with the opinion expressed by the learned authors of Ratanlal's Law of Crimes, 14th Edition, page 78, that the special laws contemplated in Ss. 40 and 41 are laws such as the Excise, Opium, and Cattle Trespass Acts creating fresh offences, that is, laws making punishable certain things which are not already punishable under the Penal Code. There it is pointed out that the Whipping Act is not a special law in this sense, but merely provides a supplementary or alternative form of punishment for offences which are already punishable primarily under the Penal Code. The Act of 1932 deals with picketing and makes picketing in certain circumstances an offence. I hold that the appellant was lawfully charged with abetment.

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Coming now to the merits of the case it has bee that at the public meeting of the 10th June, 1938, the in the course of his speech observed:

"If you were true heroes, all of you should be prepared to o graham in front of the house of the Prime Minister from to-morr upon your listening to this speech you should come forward and names entered",

and later on said:

"Now amongst these, namely, Camam, Petam, Dhanam and (which have been translated as conciliatory measures, sowing d gifts and punishment) we have come to the stage of Thandam (pu If you do not now enlist yourselves in this war (agitation) we wil turn our eyes towards your face."

At the second meeting, that is, the meeting of June, 1938, the appellant said:

"If you are true Tamilians at least hundred of you should com Satyagraha. We are now sending men in batches of two. The which the policeman undergoes in the hot sun for us cannot be He asks whether all of us could not come in a body. They said ' not come in a body to-morrow, we will beat you with this margosa this war, you should sacrifice your life, or should give away your All mothers should cause their sons to take part in this war and We have not now committed any offence. We have not committ Therefore you should all come forward to offer Satyagraha."

At the third meeting, the appellant said:

"If you are all true Tamilians young men should come in to-morrow and offer Satyagraha in front of his house and go to p . . . . You should assist us with your body, wealth and labo who are willing to come as volunteers may raise their hands. Yo your names. You may give money. I finish by saying that by thu us, you may save the honour of the Tamil Nad and the Tamil lang . . . . My heart burns to see you remaining in this manner. I r to offer assistance."

These speeches were taken down in shorthand shorthand writers were not cross-examined as to their a No evidence was led with a view to showing that the st had not been made. In fact the learned Counsel appellant made no attempt to dispute the accuracy evidence. It has also been proved that these meetin attended by large numbers of people and there can be that the appellant did incite his hearers to loiter in fro house of the Premier with a view to compelling him t an order which the Government had passed. The was entitled to say that he would not move to ch order. Rightly or wrongly the order embodied th of the Government and he could not be compelled t

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it by the means adopted by the appellant and his supporters. The evidence discloses that for nearly a month picketers in considerable numbers assembled before the Premier's house and loitered there within the meaning of the section, for the purpose of compelling him to do something which he had the right to abstain from doing. The action of the people who assembled in front of the Premier's house was not confined to loitering, but for purposes of this section we do not require to go beyond loitering. In my opinion the offences with which the appellant has been charged have been fully proved, and he has been rightly convicted by the Trial Magistrate. He abetted an offence which falls within the four corners of the section and he has rendered himself liable to punishment.

It is said that the punishment awarded by the Trial Magistrate is excessive and should be reduced. Inasmuch as these constitute first offences of the appellant and can collectively be described as a "first" offence and inasmuch as the circumstances are unusual we consider that the sentence of 12 months' rigorous imprisonment is not called for. We consider that the ends of justice will be met if the sentence is reduced from one of 12 months' rigorous imprisonment to one of four months' rigorous imprisonment. This will apply to each charge and the sentences will run concurrently.

Abdur Rahman, J.

*Abdur Rahman, J.*—I agree with the conclusion arrived at by my Lord the Chief Justice and should like to make a few observations in regard to the legal points raised by the learned Counsel for the appellant.

The Criminal Law Amendment Act (XXIII of 1932) came into operation on the 19th of December, 1932. It was a temporary measure and S. 1 (3) of the Act had provided that it would be kept in force for a period of three years. The whole of the Act was extended to British India and was with the exception of Ss. 4 and 7 brought into force at once; but these sections were to be brought into effect by the various Local Governments separately as and when they decided to apply them to any area within their respective jurisdictions. The Government of Madras directed S. 7 to come into force in the whole of this Presidency on the 27th of December, 1932, and a notification to that effect was duly published in the *Fort St. George Gazette* on that date. An error had crept in this notification and this was rectified in the notification dated

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4th January, 1933, which was duly published in the Gazette on the 10th January, 1933.

A Bill proposing a repeal of S. 1 (3) of the Act (XXIII of 1932) was introduced in the Central Legislative Assembly in September 1935. The object of that Bill was to place the Criminal Law Amendment Act permanently on the Statute Book of India. It was rejected by the Legislative Assembly but was passed by the Council of State. S. 67-B of the Government of India Act, 1919, had provided that if either Chamber of the Indian Legislature failed to pass a Bill in a form recommended by the Governor-General, he might certify that the passage of the Bill was essential for the safety, tranquillity or interests of British India and the Bill if it had already been passed by the other chamber, would when signed by him become an Act of the Indian Legislature. Since the Bill was, as stated above, refused by the Legislative Assembly and passed by the Upper chamber, the Governor-General exercised his authority and certified the Bill and when signed by him on 4th October, 1935, it became an Act of the Indian Legislature.

S. 67-B (2) of the Government of India Act, 1919, had also provided that every such Act would be expressed to have been made by the Governor-General and should, as soon as practicable after it had been so made, be laid before both Houses of Parliament for a period of at least eight days on which each House was sitting and then presented for His Majesty's assent. Upon the signification of such assent by His Majesty in Council and the notification thereof by the Governor-General the Act was to come into operation and was to have the same force and effect as an Act passed by the Indian Legislature.

A proviso to this sub-section authorised the Governor-General to direct that any act made by him was to come into operation immediately, if, in his opinion, a state of emergency existed which justified such an action. Acting under this sub-section His Excellency the Governor-General declared that an emergency existed which justified his action and directed the Act to come into operation immediately. The Governor-General gave his assent on the 17th of December, 1935 and it consequently was brought into force on that day.

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It has now been contended by the learned Counsel for the petitioner that inasmuch as this Act was made by the Governor-General on the 4th of October, 1935, he could not bring it into operation by his own declaration after a lapse of two months and thirteen days. It is urged that the proviso to the sub-section being in the nature of an exception should not have been availed of by the Governor-General, who should have seen that steps were being taken for complying with the requirements of sub-S. 2 and for laying the Act before both the Houses of Parliament and receiving His Majesty's assent for which the period between the 4th of October and the 17th of December, 1935, was sufficient.

A reference to the words used in S. 67-B (2) of the Government of India Act would show that it was the opinion of the Governor-General in regard to the existence of a state of emergency which entitled him to act and bring the act into operation. It is not for this tribunal, or for a matter of that for any other tribunal, to ascertain whether any state of emergency existed at the time. The question whether there was any emergency or not was to be determined by the Governor-General and no other tribunal could or can possibly sit in judgment and decide whether his opinion was correct or otherwise. It was his opinion alone in regard to the existence of the state of emergency that mattered. The words used in the section are absolutely clear and are capable of no other interpretation. In a case which went up to the Judicial Committee of the Privy Council a similar contention was raised in regard to another section of the Government of India Act. It was summarily rejected by their Lordships. (See *Bhagat Singh* v. *King-Emperor*[1].) S. 67-B did not lay down that a declaration by the Governor-General in regard to the state of emergency must necessarily synchronise with the date on which the Act was certified or made by him. In fact it is possible to conceive of cases in which no state of emergency might have existed at the time when the Act was made by the Governor-General but it might have come into existence subsequently when he might have been obliged to bring it into operation at once. Can it be seriously argued that as some time had elapsed since the Act was made, the Governor-General had lost his power to declare

1. (1931) 61 M.L.J. 279: L.R. 53 I.A. 159: I.L.R. 12 Lah. 280 (P.C.).

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the existence of a state of emergency although one might have come into existence in the meantime? We do not know what steps were taken by the Government to place this Act before the two Houses of Parliament and whether it was possible or not to comply with the procedure provided in the section and obtain His Majesty's assent within the period that had elapsed between the date on which the Bill was made by the Governor-General and the date on which he directed it to be brought into force. But even if it be assumed that no steps were taken for that purpose, it is impossible to hold that the mere inaction on the part of the Government had taken away the power from the Governor-General to express an opinion that a state of emergency had come into existence, and to order the Act to be brought into force immediately. If he had decided to bring the Act into operation on the 4th of October, 1935, the order, it is conceded, would be unassailable. It has also been admitted that if he had done so within a reasonable time after that date, no exception could have been taken to that order. If that be so, and if he were the sole Judge of the fact whether a state of emergency existed or not on a particular day, how can his powers be held to have come to an end by the passage of time during which the Act was not in force? He must be presumed to have had sufficient material before him to express an opinion on the subject and as we are only concerned with the expression of his opinion, it appears to be futile to argue that the evidence on which he formed his opinion should have now been placed before the Court in order to determine whether his action was justified. This would necessitate an investigation which the Court is not competent to make. It is unnecessary therefore to go into the reasons which must have decided the Governor-General before expressing an opinion in regard to the existence of the state of emergency and ordering the Act to be brought into operation. One fact, however, is obvious. Had this Act not been brought into force on that day or the next day, the principal Act, that is, the Criminal Law Amendment Act of 1932 would have expired on the 19th of December, 1935 and this Act of 1935 would have been rendered ineffectual and useless. If the passage of the Bill were essential for the safety, tranquillity or interests of British India and if no exception could be taken to its being certified by the Governor-General, as it has not been taken before us,

and if it were not possible to receive His Majesty's assent during the next two days, it was apparent that a state of emergency might have been considered to have come into existence which justified such an action. He must have had sufficient reasons for acting in the manner in which he did and it is entirely unnecessary to indulge in surmises. It must therefore be held that this objection is devoid of any force and must be overruled.

It is then contended that this power had been conferred on the Governor-General under a proviso which should not be taken to be effective until an attempt was proved to have been made to comply with the requirements of the main clause to which it must be taken to have been appended as subordinate. It is not possible to accede to this contention either. A perusal of S. 67-B(2) of the Government of India Act would show that the proviso was added to the sub-clause with the object of dispensing with the procedure laid down in the sub-clause under certain circumstances. If those circumstances were found to be existing, the Governor-General was authorised to bring the Act into operation at once without waiting for the period which would have elapsed if the Act were to be laid before both the Houses of Parliament for a given number of days when they were in Sessions and then presented to His Majesty for assent. There is nothing in the section which would entitle one to hold that these powers could be exercised by him only at a particular time. On the contrary the language of the section is clear and is to the effect that if he discovered a state of emergency at any time before the Act had come into force, he was authorised to function and bring the Act into operation at once. In that case His Majesty in Council has full authority under the proviso to the sub-clause itself to disallow the Act if it did not meet with his approval. Viewed in this light the proviso must be taken to be in the nature of a condition on the provisions of the sub-clause itself and cannot be held to depend on it for its enforceability. In other words, the Act was required to be submitted to both the Houses of Parliament and then to His Majesty for assent only when the Governor-General did not consider that a state of emergency existed which would authorise him to enforce the Act made by him earlier. There was nothing in S. 67-B which could have prevented the Governor-General from applying the Act even if it had been submitted to

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the House of Parliament, and before it had received His Majesty's assent. That this should have been so is entirely consonant with reason. After all the ultimate duty of governing the country and maintaining law and order was his and it was therefore not only proper but necessary that he should have had the power to bring a particular law into operation if he were satisfied of the existence of a state of emergency in which he considered it necessary to act under the proviso to sub-clause 2 of S. 67-B of the Government of India Act. There can thus be no doubt that as laid down in *Rex* v. *Dibdin*[1]:

> " The proper way to regard a proviso is as a limitation upon the effect of the principal enactment."

The third point urged on behalf of the petitioner was that the Act of 1935 was itself repealed by Act XX of 1937 and the Criminal Law Amendment Act of 1932 should therefore be held to have been restored to its original position and would be of no use in 1938 as it was brought into existence for a period of three years only. If we remember the nature of the Act passed in 1935 the argument advanced by the learned Counsel for the appellant would lose its force. The Act of 1935 was, as stated above, brought into existence with the object of repealing S. 1 (3) of the Criminal Law Amendment Act of 1932 and thus doing away with its temporary nature. Once the Act of 1935 came into force, S. 1 (3) of the principal Act must be held to have been taken out of that Act and the words regarding the temporary nature of the Act having been thus deleted, the Act of 1932 must be regarded to have been placed on the statute book of India permanently. Having fulfilled its purpose, the Act of 1935 thus remained of no value and any further retention of the same would have led to confusion and would have been in any case useless. It was for that reason that it was repealed by Act XX of 1937. This is not however all. S. 4 of the Act (XX of 1937) provides that the repeal by this Act of any enactment shall not affect any act in which such enactment has been applied or incorporated. When faced with this provision, the learned Counsel for the petitioner contended that it had no application since the word "applied" must be taken to refer to the application of an earlier enactment to a later enactment and cannot be taken to imply, include or contemplate the

1. (1910) P. 57: 26 T.L.R. 150: 101 L.T. 722.

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alteration of the earlier enactment by the operation of the latter. He contended similarly that the word 'incorporated' must not be taken to mean anything else except when certain provisions of an enactment have to be inserted in or combined to another and not when certain existing provisions of an Act have to be deleted. First of all there is no justification for us to give to the words used in the section the narrow meaning which the learned Counsel for the appellant has been trying to do. Not having been defined by the General Clauses Act or by the Act in which they have been used, they should be deemed to have been used in their ordinary sense and there is no reason to hold that the application of an enactment necessarily means the application of an earlier enactment to the latter. Secondly we are concerned just now with the effect of the application of or even of incorporation of a later enactment in the former. It is immaterial for this purpose if, as a result of a subsequent enactment, some provision is either added to or subtracted from an earlier Act. It may have been either, and S. 4 of Act XX of 1937 provides that the repeal of any enactment—Act of 1935 being the enactment in this case shall not affect any Act, that is, Act XXIII of 1932 in which such enactment (that of 1935) has been applied or incorporated. Our attention has been drawn in this connection to an amendment of the General Clauses Act, S. 6-A by Act XIX of 1936. This provision in the General Clauses Act makes the position still clearer that the effect of Act XX of 1937 could not have been as argued by the learned Counsel for the appellant.

The next contention urged on behalf of the appellant was to the effect that even if these objections were decided against him, it must be held that, so far as S. 7 of the Criminal Law Amendment Act was concerned, it had no force in this province after the expiry of three years for which the principal Act was passed by the legislature. The argument has been put thus: This Act of 1932 was brought into force for a period of three years. The notification issued by the Government of Madras in 1932 must therefore be taken to have been for three years only. Although the temporary nature of the Act was gone as soon as the Act of 1935 was passed, nothing has been done in this Presidency to continue the operation of S. 7 after December 1935. The contention has obviously no force. When the Local Government applied S. 7 of the

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Criminal Law Amendment Act to this Presidency, no period was fixed by it for which this section was to be in force in this part of the country. If the Criminal Law Amendment Act had died by efflux of time a natural death or had not been made permanent, the operation of S. 7 in this Presidency would have certainly come to an end in December 1935. But once we find that the statute containing S. 7 continued to remain in force even after December, 1932, it would have been superfluous for the Madras Government to issue another notification to bring into operation a section which was already in force in this Presidency.

It was then attempted to be argued that the Criminal Law Amendment Act was brought into force in peculiar circumstances which prevailed at the time when the Act was passed and S. 7 of the Act must not therefore be applied to circumstances which were not then under contemplation. It was suggested that the Act was brought into operation to prevent boycott, or what has come to be described in ordinary parlance as 'picketing' and was never intended to be applicable to the set of circumstances in which these prosecutions have been started. We are thus asked to interpret the statute in accordance with the intention of those who made it. It must be remembered that if the words of the statute are unambiguous, no more is necessary than to interpret them in their ordinary or what is usually known as literal or grammatical sense—bearing in mind that the words employed by the framers can best declare their intention. Moreover we are not really concerned with the intention of the framers but with the intendment of the Act itself and which can only be taken to refer to the meaning of the words used therein; and when we find that the language employed in the section, which we have now been called upon to interpret, is clear and admits of only one meaning the task of interpretation can be hardly said to arise. In these circumstances it is unnecessary to speculate on the intention of the framers of the Act. This rule has been laid down by Lord Halsbury in *Leader* v. *Duffey*[1] in the following words:—

"Whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained . . . . and it is arguing in a vicious circle to begin by assuming an intention apart from

1. (1888) 13 A.C. 294 at 301.

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the instrument itself and having made that fallacious assumption to bend the language in favour of the assumption so made."

It is quite true that the Act which we have now been called upon to interpret is penal in its nature and we have therefore been asked to construe the section strictly. The rule of strict construction requires that the language should be construed in such a manner as not to bring cases within the ambit of the section which do not fall within the reasonable meaning of its words or terms. It only means as held in *London County Council* v. *Aylesbury Dairy Co.*[1], that

> "no violence must be done to its language to bring people within it but rather care must be taken that no one is brought within it who is not brought within it in express language."

Bearing these principles of interpretation in mind and applying them to the section which we have now been called upon to construe, the first question is if there are any words employed by the framers of the Act in the section which can be so interpreted as to show that the Act imputed to the appellant is not covered by them. I have read and re-read the section with care and find nothing therein which would justify me in putting the construction which we have been asked to place on it. If the Premier were entitled to move the Legislature or the Government to repeal the order which was passed to introduce the compulsory teaching of Hindi and if people were loitering in front of his house with the object of forcing him to move in the matter in order to have the order cancelled, which he had a right to do or abstain from doing, the action imputed to the accused would apparently fall within the mischief the section was designed to prevent. Is it possible for us, sitting as interpreters, to say that the words of the section would not bring such a conduct within its plain meaning? For this purpose it is impossible to read or import words into the section which are not there. It was suggested that the Act referred to in S. 7 must be that of a private individual which the person is entitled to commit or abstain from doing as distinguished from the act of a Government officer or that of a public servant. But is there anything in the section which would justify our interpreting the word 'right' in the manner suggested by the learned Counsel for the petitioner? I find nothing to that effect and would therefore agree in holding

1. (1898) 1 Q B. 106.

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that the conduct imputed to the appellant is covered by the language employed in the section.

It was argued in the end that the accused was not being prosecuted for an offence under S. 7 of the Criminal Law Amendment Act of 1932 but for the abetment of that offence and since it was not an offence under the Indian Penal Code or under a special law as defined in S. 41, Indian Penal Code, the abetment of the same was not punishable. Having heard the learned Counsel for the appellant and the learned Advocate-General on this point, there is no doubt in our minds that the Criminal Law Amendment Act falls well within the definition of special law as defined in S. 41, Indian Penal Code. A special law has been defined in the Code as being applicable to a particular subject. The Indian Penal Code was passed in 1861 and attempted to define the offences which were according to the then prevailing state or conditions of the society considered to be punishable. After all it presented the minimum which could be expected to be observed by the citizens of the state at the time. It is only natural that with the growth of new ideas and development of new conditions, new circumstances would come into being calling for protection and new acts would have to be brought within the list and declared as offences. This could only be done by either amending the Indian Penal Code or passing Local or Special Laws. If it were required to deal with a special class of cases and if it were considered advisable not to amend the Indian Penal Code, but to pass a separate Act for the purpose, the Act would fall within the definition of Special Law as defined by S. 41, Indian Penal Code and an abetment of the same would be punishable under Chapter V of the Penal Code.

Reliance was placed by the learned Counsel for the petitioner on a number of cases and he attempted to show that when certain acts did not fall within the definition of an offence under the Penal Code, their abetment would not be punishable. This is obvious. But as we are holding the Criminal Law Amendment Act to be a Special Law within the meaning of S. 41, Indian Penal Code, no useful purpose would be served by examining the cases cited on behalf of the appellant in detail.

B. V. V. —— *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Alapati Narasimham .. *Appellant** (*Plaintiff*)

*v.*

Ailoori Babu Rao (dead) and others .. *Respondents* (*Defendants and Nil*).

Nara-simham *v.* Babu Rao.

*Evidence Act (I of 1872), S. 63 (3)—Secondary evidence—Copy of a copy —Depositions in Court—Printing of record in High Court—Originals not compared with—Admissibility of printed record in evidence.*

The present practice in the printing of the records in the Madras High Court is to send to the Government Press typed copies of the record, from which the printed record is made and the correcting of proofs is done in the Government Press by comparison with the typed copy and not with the original depositions. Therefore it follows that the High Court record under the present procedure is not a copy made from or compared with the original but a copy of a copy and it cannot be treated as good secondary evidence under S. 63 (3) of the Evidence Act.

*Ganapathi Aiyar* v. *Sakharayappa Mudaliar*, A. I. R. 1929 Mad. 187, considered.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla in A. S. No. 52 of 1932 preferred against the decree of the Court of the District Munsiff of Bapatla in O. S. No. 679 of 1928.

*V. Govindarajachari* for Appellant.

*Vepa Subramaniam* and *K. Krishnamoorthi* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit in which the only real question was whether the second defendant was or was not the adopted son of the plaintiff. Plaintiff denied the adoption. In the course of the arguments, two documents were exhibited on behalf of the defence, namely, Exs. XI and XI (*a*).

Ex. XI is a copy of a deposition by the plaintiff in a criminal case, forming part of the printed record of the revision proceedings in the High Court. Ex. XI (*a*) is a copy taken from that printed copy. In this deposition the plaintiff makes an admission which if the copy is correct, practically puts an end to his case. He admits that the second defendant was his adopted son. When the plaintiff was in the box, he was asked whether he had made such a statement and he said:

"I did not admit there that second defendant was my son. I said that he was by courtesy my son as he married my wife's brother's daughter."

Evidently when the plaintiff was cross-examined the printed copy of the deposition was not available and was not actually

* S. A. No. 121 of 1934. 29th August, 1938.

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used in cross-examination. The only contention in second appeal which has any basis is the contention that Ex. XI, the printed copy of the plaintiff's deposition, is not secondary evidence of that deposition in that it is not a copy made from or compared with the original (*vide* S. 63 (3) of the Indian Evidence Act). Both the lower Courts on the authority of the decision of Ramesam, J., in *Ganapathi Aiyar* v. *Sakharayappa Mudaliar*[1] have held that printed copies of High Court record are in practice compared with the original deposition at the time when the proofs are corrected and that therefore they are good secondary evidence under S. 63 (3) of the Evidence Act. Both the lower Courts overlooked the fact that in the case just referred to, Ramesam, J., was dealing with the procedure followed in the printing of the High Court's records prior to 1922. I have ascertained from the Translation and Printing department of the High Court that the procedure which formed the basis of this judgment came to an end shortly after the work of printing the High Court records was transferred from the Press in the High Court to the main Government Press, and this transfer took place on 4th of January, 1923. It would appear that for a few months thereafter the checking of proofs with the originals continued. Thereafter it ceased and the present practice which has been going on for many years is to send to the Government Press typed copies of the record, from which the printed record is made and the correcting of proofs is done in the Government Press by comparison with the typed copy and not with the original depositions. Therefore it follows that the High Court record under the present procedure is not a copy made from or compared with the original but a copy of a copy and unless there is evidence of some comparison with the original which is not the usual practice, the inference would be that the printed record is in the absence of consent not good evidence of the original. Ex. XI was a deposition in a case which came up to the High Court on 22nd April, 1924, that is to say, a year and a quarter after the transfer of the printing to the Government Press. The case was actually disposed of in April 1925. It would seem probable therefore that the present procedure was followed and that the printing was done from the typed copy and it is not likely that there would have been a comparison with

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1. A.I.R. 1929 Mad. 187.

the original deposition. Both the Courts were wrong in assuming on the strength of Ramesam, J.'s observations that the practice referred to by him still continued at the time that Ex. XI was printed. It seems to me to follow that unless the defence are in a position to prove that in fact this record was checked with the original, Exs. XI and XI (*a*) were wrongly admitted in evidence.

I have been asked to go into all the evidence in the case and hold under S. 167 of the Evidence Act that excluding Exs. XI and XI (*a*), there is sufficient evidence to support the finding of the Courts below. It seems to me undesirable to do so in the present case. I do not for a moment wish to state that the evidence apart from Exs. XI and XI (*a*) is insufficient to establish the defence case. But what I would observe is that when one takes away a piece of evidence of the importance which Ex. XI obviously occupies in the defence, one cannot accept the findings of the Courts below on the rest of the evidence for the defence, findings which may have been coloured by inferences from these two documents; and I do not think it is desirable in second appeal to go into the whole of the voluminous record in order to come to a decision on the question of fact without any assistance from the Courts below. Moreover I think it is also desirable that the defendants should have an opportunity of replacing the important piece of evidence which may have to be excluded on a very technical objection. In this particular case there is some doubt as to the stage at which the objection was taken in the trial Court. The documents were marked in the course of the arguments and the objection must have been taken before the arguments were concluded, for this objection is discussed at length in the trial Court's judgment. But the stamp on the back of the document Ex. XI contains the note that the document is marked by consent. This may be merely an error on the part of the clerk who was docketting the various exhibits. On the other hand it may be an indication that the objection to Ex. XI was not taken at the time when it was actually put into evidence. If so it is open to the trial Court to overrule the objection because of the lateness at which it was made.

In the result therefore I allow the appeal and remand the suit to the trial Court for disposal after giving the defendants an opportunity to prove the deposition of the plaintiff

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contained in Ex. XI by other records if available and admissible and after giving both parties an opportunity to adduce evidence on the questions whether Ex. XI was or was not marked by consent and whether the objection taken to that document was or was not belated. Should the trial Court come to the conclusion that Ex. XI is admissible either because plaintiff consented to its being exhibited or because objection to its admission was belated this appeal will stand dismissed with costs throughout. In the absence of such a result, the trial Court will dispose of the suit and costs will abide the result.

Leave to appeal is refused.

B. V. V. —— *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

L. Venkatakrishna Naidu, Receiver .. *Plaintiff**

*v.*

R. Narayanaswami Aiyar and five others .. *Defendants.*

T. S. Rajarama Sastri ... *Third Party.*

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*Original Side Rules, O. V-A, r. 5—Third party procedure—Sale deed in favour of defendant expressly mentioning covenant of title and indemnity—Sale questioned subsequently as in violation of terms of temple endowment—Defendant requiring his immediate vendor to be made a party—Propriety of third party procedure—Reasons for justification—Limit to and extent of.*

In a suit for recovery of properties said to have belonged to a temple the plaintiff sought to ignore the alienations made, in violation of the terms of the original endowment, in favour of the defendants. The first defendant said that he was a *bona fide* purchaser for value and that he was protected by express covenants of title and indemnity which he took from his several vendors and as he had got the right of indemnity against his vendors he wished to avail himself of the third party procedure by which he wanted to have his vendors also made parties so that the question of their liability to him might be determined in case of his own loss in the action by the plaintiff.

*Held,* that the right to indemnity was here given in terms by the sale deed in favour of the first defendant. *Prima facie* therefore there was a right to indemnity against the immediate vendor of the first defendant.

No doubt a covenant for title is not the same as a covenant for indemnity. The measure of damages for breach of covenant may not strictly be based upon a right to indemnity, but there is nothing to preclude a vendor agreeing to indemnify against all loss for defects of title and when such a covenant is expressly given there is no reason why effect should not be given to it.

In this case it cannot be doubted that whether the property belongs to the trust or not is a question which is common not only between the plaintiff and

* C. S. No. 48 of 1938. (Application No. 1196 of 1938). 21st September, 1938.

the first defendant but also between the first defendant and his immediate predecessor in title and in which all alike are interested and therefore the first defendant's immediate vendor will have to take part in the present litigation for the purpose of being bound in the action and preventing the possibility of any conflicting decisions in an independent action between him and his vendors. Apart from any question of third party procedure it would be open to the Court to make him a proper party under O. 1, r. 10, Civil Procedure Code, for the purpose of completely adjudicating upon the question of title to the property in suit.

At the same time it is the duty of the Court to see that by the addition of the third party the plaintiff is not embarrassed in the trial of questions in which he would have no concern. If the adjudication of the question between the defendant and the third party would embarrass the plaintiff in his trial, the Court generally exercises its discretion by ordering the trial of those issues subsequent to the trial of the action.

*Swansea Shipping Co.* v. *Duncan,* (1876) 1 Q.B. 644 at 649 and *Carshore* v. *North Eastern Railway Co.,* (1885) 29 Ch. D. 344 at 346, relied on.

*Marten* v. *Whale,* (1917) 1 K.B. 544 at 550, disapproved.

*C. A. Seshagiri Sastri* for *K. Narasimha Aiyar, K. Sankaranarayanan* and *R. Natesan* for 1st Defendant—Applicant.

*N. S. Srinivasan* for 2nd Defendant.

*T. Aravamuda Aiyangar* instructed by *N. T. Shamanna* for Plaintiff—Respondents.

*A. Suryanarayana* for the Third Party.

The Court delivered the following

JUDGMENT.—This is an application by the 1st defendant for directions under O. V-A, r. 5 of the Original Side Rules relating to third party procedure. The application is resisted by the plaintiff and by the respondents on whom notices under r. 1 have been served. The contention on behalf of the plaintiff is that the third party procedure is not applicable at all with reference to the persons who are now sought to be added as third parties or against whom notices have been served. The objection on behalf of third parties is also similar except that, in addition to the above common contention, each raises a contention peculiar to himself. Though the application has been taken for giving directions against three respondents, Mr. Seshagiri Sastri on behalf of the 1st defendant has confined his application to T. S. Rajarama Sastri alone and did not press it as against the others. No directions need therefore be given in regard to them and the application must be dismissed as against them.

Before appreciating the contentions, it is necessary to state a few facts. The plaint seeks to recover the suit property

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described in Sch. A to the plaint as trust property belonging to the Deity Sri Thulasingaperumal. The plaintiff's claim is that the property was endowed to the said Deity by one Narasimhalu Chetty who by his will appointed his widow and another as executors to the said property. But his adopted son one Venkataraghavalu Chetty after the death of the executors in violation of the terms of the endowment purporting to treat the said property as his private property made several alienations one of such being to one T. Raghavendra Rao. The sale in favour of Raghavendra Rao was effected in or about August 1915 of six grounds of vacant land which is part of the property comprised in Sch. A. The said Raghavendra Rao sold the said property by a deed of sale dated 31st March, 1920, to T. S. Rajarama Sastri who by a sale deed dated 14th March, 1923, sold the said property to the 1st defendant. The 1st defendant also purchased portions of the suit property from other persons who also claim to be either alienees under Venkataraghavalu Chetty or persons who claim to be alienees from him. Thus the 1st defendant became owner of over nine grounds and 2,123 square feet and on the entire plot of ground he has erected substantial buildings. The plaintiff seeks to ignore these alienations and sues for a declaration that they are null and void and not binding on the trust and to recover possession of the A schedule property from the 1st defendant and other persons who are in occupation of the same. The case of the 1st defendant is that he is a *bona fide* purchaser for value and that he is protected by covenants of indemnity which he took from his several vendors and as he has got rights of indemnity against his vendors, he seeks to avail himself of the third party procedure and wants to have his vendors also made parties so that the question of their liability to him may also be determined in case he loses in the action. So far as Rajarama Sastri is concerned, the sale deed dated 14th March, 1923, in favour of the 1st defendant contains the following covenant:—

"The said vendor (Rajarama Sastri) doth hereby covenant with the said vendee (the 1st defendant) that he has full right and title to convey the said land to the said vendee and also agrees to indemnify the said vendee against all loss or damage which the vendee may at any time sustain in consequence of any defect in the title of the said vendor to the said land or of the right of the said vendor to convey the said land."

O. V-A, r. 5 of the Original Side Rules runs thus:—

"If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court, for directions, and the Court

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upon the hearing of such application may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit as the Court may direct, and if not so satisfied, may pass such decree as the nature of the case may require in favour of the defendant giving the notice against the third party."

The third party notice is issued under r. 1 which provides that

"Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the suit, he may, by leave of the Court or a Judge, issue a notice (hereinafter called a third party notice) to that effect."

My learned brother Gentle, J., has issued such a notice. The question therefore is—and it is open to the third parties to raise the question—whether the 1st defendant is entitled to add them as third parties. The claim of the 1st defendant as against Rajarama Sastri is that not only the latter must pay the price the 1st defendant paid for the purchase of the land from him but also the value of the buildings which the 1st defendant has erected thereon. It is contended on behalf of the plaintiff and on behalf of Rajarama Sastri that the claim is only in the nature of a right to damages and not a right to indemnity and therefore the third party procedure is not applicable. The rules relating to the third party procedure are based on English procedure and the decisions in England which bear on the point may usefully be referred to in dealing with the contention of the parties. Construing a rule corresponding to r. 1 of O. V-A in England, Bowen, L.J., in *Birmingham and District Land Company* v. *London and North Western Railway Company*[1] observed thus:

"The rule, when it deals with claims to indemnity, means claims to indemnity as such either at law or in equity. In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract; by express contract if it is given in terms by the contract between the two parties."

The right to indemnity is here given in terms by the sale deed in favour of the 1st defendant. *Prima facie*, therefore, there is a right to indemnity against Rajarama Sastri. But it is contended that though the term 'indemnity' is used, what was intended to be expressed by the covenant was only a

1. (1886) 34 Ch. D. 261 at 274.

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liability to damages which would arise from the breach of covenant for title. No doubt, a covenant for title is not the same as a covenant for indemnity; the measure of damages for breach of covenant for title may not strictly be based upon a right to indemnity, but there is nothing to preclude a vendor agreeing to indemnify against all loss for defects of title and when such a covenant is expressly given, I do not see any reason why effect should not be given to it. In this case, in addition to the usual covenant for title, there is also a covenant for indemnity. Even in cases where damages are claimed on the ground of a covenant for title, there seems to be authority for permitting a defendant to avail himself of the third party procedure. In *Page* v. *Midland Railway Company*[1], a purchaser was given relief under a covenant for title upon a third party notice in connection with a sale of land. Referring to this case, Rowlatt, J., in *Marten* v. *Whale*[2] points out that the point that the third party procedure was not applicable was not raised and he seems to be of the opinion that a third party procedure would not be applicable to cases of this sort, that is, where damages are claimed for breach of covenant for title. In *Marten* v. *Whale*[2], the defendant Whale bought a motor car from one Thacker who had no title to it. The true owner brought an action against Whale for the detention of the car. The defence of Whale was that Thacker was in possession at the time and he passed good title to it but in the event of being held that he had acquired no title by the purchase, he claimed to be entitled to indemnity as against Thacker. Therefore Whale served upon Thacker a third party notice under the rules of the English Procedure (O. 16, r. 48). Rowlatt, J., dismissed the notice in the view that no right of indemnity within the meaning of the rule would exist unless the remedy of the defendant against the third party was the same as that of the plaintiff against himself. He observed thus:

"Even if the measure of the damages is the same, it does not follow that it is an indemnity; and where it is not the same it seems to me impossible that it can be an indemnity. Assume that the plaintiff here had succeeded, the defendant would have had to give up this chattel, the motor car. He would be entitled to recover against Thacker on his warranty of title the money he had thrown away by paying him. But the right to recover that money is not a right of indemnity, because the money he paid Thacker is not the same thing as the motor car, and it may not represent the motor car . . . . . It seems to me the third party rule is inapplicable to the case of a claim in

1. (1894) 1 Ch. 11.

2. (1917) 1 K.B. 544 at 550.

... pp. 891 and 892 for corresponding pages in part No. 19. ...UNDER





detinue for a specific chattel. Under those circumstances it seems to me that this third party notice was misconceived."

It may be that in a case of damages for detention of a specific chattel the right of the defendant to claim damages against his vendor may not be strictly viewed as a right to indemnity but merely as a right to damages for misrepresentation that he had authority to sell whereas in fact he had not. But I am unable to see, if there is a contract of indemnity either express or implied given by a vendor to his vendee, why such a right of indemnity would not fall within the terms of the rule. I am not able to find any reported decision where the test formulated by Rowlatt, J., was applied in construing r. 48 of O. 16 of the English Rules of Practice—the rule which is now replaced by O. 16-A, r. 1. On the other hand, I find that *Page* v. *Midland Railway Company*[1] is cited by the Editors of the Annual Practice, 1938 Edition, in their commentary on O. 16-A, r. 1 of the Rules of the Supreme Court for the following proposition:—

"Covenantors for title in the usual form could, even under the old r. 48 be brought in as third parties by their covenantees sued on the basis of a defect in title against which the latter had also covenanted, although the defect was known to such covenantees at the date of their covenant."

In a later case, *Baxter* v. *France and others*[2], where the claim was based on a right to indemnity conferred by the statute—the Conveyancing and Law of Property Act, 1881, S. 7 (1)-A—Lord Esher, M.R., was inclined to the view that if the covenantee was claiming the value of the land which he would lose in the action, and mesne profits which he may have to pay, the third party procedure would be applicable. This also seems to have been the view of Lopes, L.J. and Rigby, L.J. But in that case they dismissed the third party notice on the ground that the purchaser in that case claimed against his own vendor not only the price of the land and mesne profits but also the value of the buildings which he erected on the land. This claim according to the view of Lord Esher and the other Lord Justices would not be a claim for indemnity within the rules but an independent claim for damages, and it would be very doubtful whether the indemnity given by the statute would cover such a claim; and further Lord Esher observed that

"where an application to a Judge at Chambers for directions involves the trial of such a preliminary question as whether in a case like this, on the true

1. (1894) 1 Ch. 11.    2. (1895) 1 Q.B.D. 591.

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construction of such an enactment as S. 7 of the Conveyancing and Law of Property Act, 1881, a claim for indemnity arises, that alone is a sufficient ground for refusing to give directions."

But in a case where a vendor covenants to indemnify against all loss or damage which the vendor might at any time sustain, the question would not be whether there is an indemnity at all, but whether the loss in respect whereof the covenant is given would include the value for buildings and the question would be more a measure of damages. The object of the third party notice as observed by Jessel, M.R., in *Swansea Shipping Co.* v. *Duncan*[1] is this:

"The object of these enactments was to prevent the same question being tried twice over, where there is any substantial question common as between the plaintiff and the defendant in the action and as between the defendant and a third person;"

and in such a case, as Jessel, M.R., also observes:

"The third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question once for all."

To the similar effect Fry, L.J., in *Carshore* v. *North Eastern Railway Co.*[2], observed:

"It is suggested that the plaintiff ought not to be embarrassed by the introduction of questions between the defendants and a third party. Possibly some delay may be caused by the third party proceedings, but the object of the rule is to enable the Court to try once for all an issue of fact in which all parties are alike interested."

In this case it cannot be doubted that whether the property belongs to the trust or to Venkataraghavalu Chetti is a question which is common not only between the plaintiff and the 1st defendant but also between the 1st defendant and Rajarama Sastri and in which all alike are interested, and therefore Rajarama Sastri would be a person who will have to be cited to take part in the present litigation for the purpose of binding him by the decision on the question and preventing the possibility of any conflicting decisions in an independent action between the 1st defendant and Rajarama Sastri. It seems to me also that, apart from any question of third party procedure, it would be open to the Court to make him a proper party under O. 1, r. 10 for the purpose of completely adjudicating upon the question of title to the property in the suit. No doubt, the plaintiff is not interested in the question of damages or the extent of the liability of Rajarama Sastri to the 1st defendant but all the

1. (1876) 1 Q.B. 644 at 649.
2. (1885) 29 Ch.D. 344 at 346.

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1. (1876) 1 Q.B. 644 at 649.
2. (1885) 29 Ch.D. 344 at 346.

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questions between the defendant and Rajarama Sastri need not be identical with the questions to be tried between the plaintiff and the defendant. It is enough if there is a common question to be tried. At the same time it is the duty of the Court to see that by the addition of the third party the plaintiff is not embarrassed in the trial of questions in which he would have no concern. If the adjudication of the question between the defendant and the third party would embarrass the plaintiff in his trial, the Court generally exercises its discretion by ordering the trial of those issues subsequent to the trial of the action. If therefore Rajarama Sastri would, according to dictum of Jessel, M.R., in *Swansea Shipping Co.* v. *Duncan*[1], be a proper party to be cited to take part in the litigation between the plaintiff and the 1st defendant, and if the question of liability of Rajarama Sastri to the 1st defendant on the covenant for indemnity can be postponed till the trial of the action, I do not see any objection to allowing the third party notice so far as he is concerned.

I therefore direct that Rajarama Sastri be added as a third party to the action and the 1st defendant is given leave to serve a statement of his claim in two weeks from to-day on Rajarama Sastri, who will have leave to file an answer thereto in two weeks from the date of service of the said statement. The issues relating to the liability of Rajarama Sastri to the 1st defendant should only be adjudicated upon after the trial of the action and so far as the conduct of the defences in regard to the trial of the issues raised by the plaintiff in the action, as between the 1st defendant and Rajarama Sastri is concerned, it should be in the hands of the 1st defendant; but the 1st defendant will not be at liberty to enter into any compromise with the plaintiff without the consent of Rajarama Sastri. If Rajarama Sastri has reason to believe that the 1st defendant is conducting his defence in a manner adverse to his interest or is otherwise not properly conducting the defence, liberty is reserved to Rajarama Sastri to move the Court for directions to enable him to contest the plaintiff's claim without reference to the 1st defendant.

K. C. ——— *Application allowed.*

1. (1876) 1 Q.B. 644.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Tallapragada Achutharamayya .. *Appellant* (Plaintiff and Defendant)*

*v.*

Ayyagari Soorappayya and another .. *Respondents (Defendant —Plaintiff).*

Achutharamayya *v.* Soorappayya.

*Survey and Boundaries Act (IV of 1897), S. 11—Survey officer's decision —Extent and scope of his finding—Question as to adverse possession—Actual decision governing factor—Unsuccessful party when and how barred from instituting subsequent proceedings.*

Accepting the rule laid down by the Full Bench in *Muthirulandi Poosari* v. *Sethuram Aiyar*, (1919) 36 M.L.J. 356: I.L.R. 42 Mad. 425 (F.B.), that the survey officer's decision under S. 11 of the Madras Survey and Boundaries Act (IV of 1897) is conclusive as to the rights of parties none the less because the unsuccessful party is not ousted from possession, it is apparent that the survey officer's decision can only be final to the extent to which it purports to decide the rights of the parties. If it decides that the unsuccessful claimant is out of possession, then it would not be open to that party in the absence of a successful suit as contemplated by the Act to contend in subsequent proceedings that the survey officer was wrong and that he was actually in possession. The survey officer having decided that the unsuccessful claimant has no title, it would not be open to that party in subsequent proceedings to contend that he had on that date of the survey officer's order acquired title by adverse possession. But if the survey officer merely on a consideration of the documentary evidence of ownership gives an adverse finding regarding title, there is no reason why that finding should bar the unsuccessful claimant from contending in subsequent proceedings that at the time of survey officer's order he had trespassed successfully on the land in question and that his unlawful possession continued and was openly hostile to the real owner for the period necessary, taking into consideration possession anterior to and posterior to the survey officer's order for establishing title by adverse possession. Similarly if the survey officer goes into the facts, finds that the insufficient claimant is in possession but that his possession is unlawful and lays down the boundary in accordance with his findings as to title, there is nothing in the survey officer's order to debar the unsuccessful party from asserting in a subsequent proceeding that his unlawful and hostile possession recognised to exist in the survey officer's order continued for such a period as to justify the plea of title by adverse possession in a later suit. The governing factor must be what the survey officer actually decided. In the light of the Full Bench decision the unsuccessful claimant cannot go behind that decision but there is no reason why he should not in subsequent proceedings put forward any claim which is not inconsistent with that decision.

*Ramamurti* v. *Gajapatiraju*, (1932) 64 M.L.J. 361: I. L. R. 56 Mad. 366; *Azhagaperumal Pillai* v. *Rasa Pillai*, (1931) 62 M.L.J. 399 and *Seetharama Raju* v. *Narayanaraju*, A.I.R. 1934 Mad. 685, referred to.

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* S. A. Nos. 537 and 538 of 1934. 9th September, 1938.

Achutharamayya v. Soorappayya.

Appeals against the decrees of the Court of the Subordinate Judge of Amalapuram in A.S. Nos. 47 and 32 of 1932 in A.S. No. 31 of 1932 respectively preferred against the decrees of the Court of the District Munsiff of Razole in O.S. Nos. 66 of 1930 and 154 of 1931 respectively.

*Ch. Raghava Rao* and *S. Rajaraman* for Appellant.

*K. Kameswara Rao* for Respondents.

The Court delivered the following

JUDGMENT:—These appeals arise out of a decision of the survey officer under the Madras Survey and Boundaries Act. Second Appeal No. 537 relates to a suit in which the appellant was the plaintiff and sued for possession on the basis of a favourable decision of the survey officers; whereas S. A. No. 538 relates to O. S. No. 154 in which the respondent who was an unsuccessful claimant before the survey officer sued to set aside the survey officer's decision. The decision of the survey officer in appeal is contained in Ex. F, dated 31st October, 1924. According to the appellant the relevant survey notification is Ex. S, dated 22nd November, 1926. But the learned Subordinate Judge has accepted the respondent's contention that limitation began to run only from a subsequent survey notification, Ex. X, dated 21st April, 1931. If this contention is wrong, the respondent's suit O.S. No. 154 is clearly time barred with reference to the terms of S. 14 of the Madras Survey and Boundaries Act. The learned Subordinate Judge gives no reasons for holding that the notification with which we are concerned is Ex. X and not Ex. S. The appellant adduced in evidence his own application to the survey authorities for a copy of the final notification relating to the survey of the village with which we are concerned, in response to which application a copy of the notification (Ex. S) was issued to him. This notification clearly purports to be a notification under S. 13 of the Act that the survey of certain villages including the suit village is complete. Ex. X on which the respondent relies purports to be a notification that the "survey of sub-divisions consequent on the re-settlement miscellaneous inspection" of certain villages including the suit village is complete. The learned Munsif points out that there is no evidence whatever that the delimitation of the boundaries which formed the subject of the complaint to the survey officer was part of the post survey operations terminating with Ex. X

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and not part of the main survey terminating with Ex. S. The fact that the survey department itself regarded Ex. S as the final notification terminating the survey is shown by the copy application. I have myself no doubt that Ex. S is the final notification and that Ex. X relates to what is in effect a supplemental survey terminated by a supplemental final notification. Except in so far as it relates to boundaries changed in the course of the supplemental survey, I do not see how Ex. X can be taken to extend the time for filing a suit to contest the correctness of the boundaries laid down in the main survey which had been terminated by the statutory notification of 1926. It follows that the respondent's suit O. S. No. 154 of 1931 was barred by limitation and was rightly dismissed by the trial Court. S. A. No. 538 of 1934 must therefore be allowed with costs throughout.

The other appeal—the appeal from the decision in the appellant's suit—raises questions of greater difficulty. Granting that the decision of the survey officer finding title to the disputed land in favour of the plaintiff concludes the question of title as on that date, the question remains whether the respondent can or cannot resist the plaintiff's suit based on the survey officer's order by proving adverse possession. There is a definite plea of adverse possession in the respondent's written statement and though no specific issue has been raised, the question of possession has been gone into in detail by both the Courts and I think the respondent would be entitled to rely on his plea, if it could be established by good evidence. Now quite clearly no plea of adverse possession would be of any avail unless he could tack on to more recent possession his alleged hostile possession anterior to the survey officer's order. Whether this is legally permissible or not, is a question on which there has been a good deal of difference of opinion. The Full Bench, in the case of *Muthirulandi Poosari* v. *Sethuram Aiyar*[1], held that when there was a dispute about a boundary which had been the subject of an order by the survey officer under S. 11 of Act IV of 1897, that order, if not set aside in appeal or by a suit as contemplated in the Act, was conclusive as to the rights of the parties and none the less so because the unsuccessful party who was in possession at the date of the order

1. (1919) 36 M.L.J. 356: I.L.R. 42 Mad. 425 at 430 (F.B.).

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was not subsequently ousted from possession. Now in the face of this decision, it is clearly not open to the respondent who was found by the survey officer not to be entitled to the land in dispute, to urge in reply to the plaintiff's suit based on the survey officer's decision that that decision was wrong. Consequently he cannot contend that he had a title, whether documentary or by virtue of adverse possession, at the time when the adverse order of the survey officer was passed. I think that it would also follow from the Full Bench decision that if the survey officer's order gave a definite finding that the respondent was at the time of his order out of possession and that possession lay with the appellant, it would not be open to the respondent to urge that the finding is wrong and to base a claim on adverse possession continuing from a time anterior to the survey officer's order. But when the order of the survey officer is based on evidence of title and does not purport to give a finding regarding actual physical possession at the time of the order, or when it finds that the unsuccessful claimant was in physical possession but was in possession only as a trespasser, can the unsuccessful claimant in a subsequent proceeding urge by way of defence that he has acquired title by adverse possession tacking together hostile possession anterior to and subsequent to the survey officer's order? On this question there is a definite ruling of a Bench of this Court in *Azhagaperumal Pillai* v. *Rasa Pillai*[1] to the effect that the decision of the survey officer, not purporting to record any definite finding or actual possession, does not *ipso facto* dispossess any party nor make any legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at its date. I may point out that the head note of this decision leaves out the qualification regarding the absence from the survey officer's decision of any adverse finding regarding actual possession. This omission is unfortunate and possibly has tended to a misunderstanding of the decision itself. Now this decision has been considered in two subsequent rulings. The case of *Ramamurti* v. *Gajapatiraju*[2] is a decision by Wallace, J., in a Letters Patent Appeal on a difference of opinion between Waller, J. and Krishnan Pandalai, J., of whom the former took the view that

1. (1931) 62 M.L.J. 399.
2. (1932) 64 M.L.J. 361: I.L.R. 56 Mad. 366.

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the decision in *Azhagaperumal Pillai* v. *Rasa Pillai*[1] was wrong whereas the latter considered that it was right. Wallace, J., dissented from the Bench decision and held that it was contrary to the Full Bench ruling in *Muthirulandi Pujari* v. *Sethuramier*[2], the plain meaning of which was that the decision of the survey officer is conclusive on the question of possession. This decision has been followed by Butler, J., in *Seetharama Raju* v. *Narayana Raju*[3]. Now with the greatest respect to the learned Judges who decided these cases, it does seem to me that they have overlooked the qualification of the ruling of the Bench in *Azhagaperumal Pillai* v. *Rasa Pillai*[1], with reference to the absence from the survey officer's decision of any finding regarding actual possession. Accepting the rule laid down by the Full Bench that the survey officer's decision is conclusive as to the rights of parties none the less because the unsuccessful party is not ousted from possession, it seems to me apparent that the survey officer's decision can only be final to the extent to which it purports to decide the rights of the parties. If it decides that the unsuccessful claimant is out of possession, then in my opinion it would not be open to that party, in the absence of a successful suit, as contemplated by the Act, to contend in subsequent proceedings that the survey officer was wrong and that he was actually in possession. The survey officer having decided that the unsuccessful claimant had no title, it would not be open to that party in subsequent proceedings to contend that he had on the date of the survey officer's order acquired title by adverse possession. But if the survey officer, merely on a consideration of the documentary evidence of ownership, gives an adverse finding regarding title, I see no reason why that finding should bar the unsuccessful claimant from contending in subsequent proceedings that at the time of the survey officer's order he had trespassed successfully on the land in question and that his unlawful possession continued and was openly hostile to the real owner for the period necessary, taking into consideration possession anterior to and posterior to the survey officer's order, for establishing title by adverse possession. Similarly, if the survey officer goes into the facts, finds

1. (1931) 62 M.L.J. 399.
2. (1919) 36 M.L.J. 356: I.L.R. 42 Mad. 425 (F.B.).
3. A.I.R. 1934 Mad. 685.

that the unsuccessful claimant is in possession but that his possession is unlawful and lays down the boundary in accordance with his finding as to title, I see nothing in the survey officer's order to debar the unsuccessful party from asserting in a subsequent proceeding that his unlawful and hostile possession recognised to exist in the survey officer's order continued for such a period as to justify the plea of title by adverse possession in a later suit. In my mind, the governing factor must be what the survey officer actually decided. In the light of the Full Bench ruling the unsuccessful claimant cannot go behind that decision, but I see no reason why he should not in subsequent proceedings put forward any claim which is not inconsistent with that decision.

If this view of the law is correct, it follows that it is open to the respondent in the suit brought by the appellant to establish title by adverse possession if he can prove continuous possession both before and after the survey officer's order for the statutory period, always provided that the survey officer's order does not give a definite finding regarding the factum of possession at the time of his order which would bar the tacking of pre-survey possession which is necessary to complete the full period. The original order of the survey officer in this case is Ex. D. The finding regarding possession there is that the appellant and the respondent had originally a common tenant and that it was only after 1918 that it was possible for the respondent to assert possession adverse to the appellant. There is no clear finding one way or the other on the question of who was in physical possession at or about the time of the survey officer's order, which is based on documentary title. The order in appeal proceeds entirely on the documentary title together with evidence of payment of kist and does not refer to physical possession at the time of the order in question. I must hold that there is nothing in either of these orders to bar the respondent from contending that he was at that time in actual enjoyment of the land in a manner hostile to the appellant.

Now, the two courts below have differed in their views of the evidence of actual enjoyment of the land. Unfortunately the learned Subordinate Judge's finding which would ordinarily be binding on me as a finding of fact is vitiated by the totally unjustifiable procedure which he has adopted. In paragraph 9 of his judgment he states that he made a local

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inspection in the presence of vakils and parties. That is of course a quite unobjectionable procedure; in fact O. 18, r. 18, Civil Procedure Code, expressly provides for it. After making certain observations, about what he saw, he goes on to say:

"At the time of the local inspection a number of persons on both sides flocked there and when I asked them at the request of both sides vakils, every one of them including very old persons has stated that it is a joint well and that the 1st defendant Soorappayya and other sharers also have been using it. There is not a single individual who supported the theory of this plaintiff and that also completely probabilises what is contained in the old documents of 1852 Exs. I and II."

Then he goes on to make remarks on the inability of the plaintiff—apparently by the well-side still—to answer the learned Judge's questions about the land, the trees and the well. Then he sets forth the views of the respondents' vakil, who is described as a gentleman with a lot of experience as to the evidentiary value of certain trees and the age thereof and he comments on the absence of any explanation either by the appellant's vakil or by the appellant or by his people about this important piece of evidence on behalf of the respondent.

Now it is, I think, unnecessary to quote any authority for the view that this is emphatically not the way in which a case should be tried and that these are not the materials upon which a judgment should be based. When the Judge welcomes the presence of crowds of anonymous villagers and indulges in informal enquiries amongst the people in those crowds for the purpose of obtaining guidance in deciding the rights of the parties and treats the result of those enquiries as evidence in the case, there is an end of all judicial procedure. A judgment must be based on evidence which is admissible in law. There is no objection to a Judge viewing the place in dispute in order to enable him to visualise the locality and to appreciate the evidence before him. But there is absolutely no warrant for the procedure whereby the Judge converts himself into an unofficial investigator and inquiries of all and sundry regarding their views of the rights of the parties with the object of founding a judgment on what he has heard. It is of course argued for the respondent that the learned Judge has also considered the admissible evidence and that this irregular procedure should not be taken to vitiate his judgment. Unfortunately it is not possible to accept that contention. The

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learned Judge appears to have attached importance to this well-side inquiry, to have formed an opinion as a result of what he heard therein and to have considered the admissible evidence in the light of the opinion which he had already formed. One cannot too strongly deprecate this procedure; and clearly no finding of fact based on such materials and achieved by such a procedure can be supported in second appeal.

In the result therefore Second Appeal No. 537 is allowed and the appeal is remanded to the lower appellate Court for disposal after recording a definite finding on the question whether the defendants has established title by adverse possession, taking into consideration any evidence which may beavailable regarding pos session anterior to the survey officer's order. Appeals Nos. 47 and 32 (covered by S. A. No. 537) of 1932 will accordingly be re-heard by the lower appellate Court. The costs of this second appeal will abide by the result. The court-fee will be refunded.

It is pointed out that the plaintiff's title has been established under the survey order only to the extent of 45 cents and that as regards the balance, there is an adverse decision by the trial Court against which the appellant preferred an appeal to the lower appellate Court. I give no finding one way or other as to the rights of the parties in this excess over the 45 cents found to be within the appellant's holding by the survey officer. Obviously the legal position regarding this excess area is quite different from the position regarding that portion which has been included in the appellant's holding by the survey officer's decision. As to the excess area the plaintiff clearl y has to establish his title and the lower appellate Court must give a finding thereon.

Leave to appeal is refused.

K.C. —— *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner for the North-West Frontier Province.]

PRESENT:—LORD WRIGHT, LORD ROMER, LORD PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

The Peoples Bank of Northern India, Limited (in liquidation) .. *Appellants**

*v.*

Mian Ghulam Jan and another .. *Respondents.*

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Peoples Bank of Northern India, Ltd. *v.* Mian Ghulam Jan.

*Purdanashin lady—Deed executed by—Proof of knowledge of act on her part.*

The rule is firmly established that it is incumbent on the Court, when dealing with the disposition of her property by a purdanashin woman, to be satisfied that the transaction was explained to her and that she knew what she was doing.

Appeal from a judgment and decree of the Court of the Judicial Commissioner, North Western Frontier Province.

*A. M. Dunne, K.C.* and *J. M. Pringle* for Appellants.

*J. P. Eddy, K.C.* and *M. H. Rashid* for Respondents.

22nd July, 1938. Their Lordships' judgment was delivered by

Sir Shadi Lal.

SIR SHADI LAL.—The respondent, Mian Ghulam Jan, carried on the business of buying and selling carpets at Peshawar; and for the purpose of his business he borrowed money from the appellants, the Peoples Bank of India, Limited, on what is called "cash credit account." He got also another loan from the bank, for which he executed a promissory note on the 29th August, 1930, and pledged his carpets as security for the payment of the debt. At the end of April, 1931, his liability to the bank amounted to Rs. 3,110-7-9 on the cash credit account, and to Rs. 11,740-14-3 on the promissory note account. The total sum due by him was Rs. 14,851-6-0. He did not discharge his liability, with the result that the creditors threatened to bring an action against him to realise the debt by selling his carpets. The debtor, however, got a postponement of the time for payment, by executing a mortgage-deed in favour of the creditors. The mortgage-deed was written to secure the payment of the amount due by the debtor on the two accounts, and also of Rs. 148-10-0 which was paid to him at the time of the transaction in order to make up the round sum of Rs. 15,000. The security for the payment of this

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consolidated sum was a house, which was owned by him and his wife Musammat Mohamadi Begum in equal shares. In order to make her share of the house liable for the mortgage money, she affixed her thumb impression to the mortgage-deed, which contained various stipulations, including the promise to pay the mortgage money with interest at 9 per cent. per annum within one year. It was agreed that the creditors would not be entitled to recover the mortgage-debt before the expiry of one year, but that they could enforce their claim after the expiry of the stipulated period in the event of the mortgagors' failure to pay the debt.

The promise as to the payment within one year was not fulfilled by the mortgagors, and the bank consequently brought the present action against them to enforce their personal liability and also to recover the debt by the sale of the house, which was mortgaged as security for it. The Courts in India have concurred in granting a decree against the husband, but have exempted the wife and her share in the house from liability. The decision of the appellate Court has proceeded on the ground that there was no consideration for her promise to pay the debt of her husband.

There is no evidence to prove that Musammat Mohamadi Begum, who was admittedly a purdanashin lady unable to read or write, knew or understood the contents of the mortgage-deed which sought to make her share in the house liable for the payment of the debt. The endorsement made by the Sub-Registrar at the time of the registration of the deed is in ambiguous language, and does not show that either he or any other person explained the deed to her.

The rule is firmly established that it is incumbent on the Court, when dealing with the disposition of her property by a purdanashin woman, to be satisfied that the transaction was explained to her and that she knew what she was doing.

This plea was expressly raised by Musammat Mohamadi Begum, but no issue was framed on the subject, except the issue as to her executing the deed under the influence of her husband. Their Lordships, upon the record, as it stands, are unable to hold that her liability has been established.

On this view, the question of consideration need not be discussed, more particularly, as apart from the deed, there is no evidence to show that it was in response to Musammat

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Mohamadi Begum's request that the bank stipulated not to enforce the liability of her husband during the period of one year mentioned in the deed.

The appeal, therefore, fails, and must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellants: *Cardew, Smith and Ross.*

Solicitors for Respondents: *Nehra & Co.*

R. C. C. —— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

The Secretary of State for India in Council, represented by the Collector of South Arcot .. *Petitioner** (*Respondent*)

*v.*

Mask and Company, by Partners, M. Vedachala Mudaliar and another .. *Respondents* (*Appellants*).

Secretary of State for India in Council
v.
Mask & Co.

*Civil Procedure Code (V of 1908), S. 109, cls. (a) and (b)—Dismissal of suit on a preliminary point by first Court—Appeal to High Court—Reversal of judgment—Remand order—If a final order—Scope of cl. (c).*

Where in a suit the objection was taken that the Court had no jurisdiction to entertain the suit on the ground that the suit was barred by the provisions of the Sea Customs Act and the trial Court upheld the objection and dismissed the suit on that ground, and an appeal was filed to the High Court against that judgment and the High Court held that the Civil Court was not deprived of jurisdiction in the matter by the provisions of the Sea Customs Act and remanded the suit for trial on the merits,

*Held,* an order of the above kind is not a "final order" within the meaning of S. 109, cls. (*a*) and (*b*) and leave cannot be granted under them. But leave could be granted here under cl. (*c*) as a fit case for appeal as the question was pending decision in several other suits and the question of jurisdiction was a substantial question of law and one of general importance. The circumstance that the respondent will be inconvenienced is no ground for refusing leave nor can the High Court make any provisions therefor.

Petition under S. 109 (*c*) and O. 45, r. 2, Civil Procedure Code, praying that in the circumstances stated therein the High Court will be pleased to grant leave to the petitioner to appeal to His Majesty in Council against the decree of the High Court in A. S. No. 179 of 1937 preferred against the

* C.M.P. No. 2812 of 1938. 8th September, 1938.

decree of the Court of the Subordinate Judge of Cuddalore in O. S. No. 18 of 1934.

Secretary of State for India in Council *v.* Mask & Co.

*The Advocate-General* (*Sir A. Krishnaswami Aiyar*) for Petitioner.

*K. Bhashyam* for *T. R. Srinivasan* for Respondents.

The judgment of the Court was delivered by

Varadachariar,

*Varadachariar, J.*—This is an application made on behalf of the Secretary of State for India in Council, for leave to appeal to His Majesty in Council against the decision of this Court in A. S. No. 179 of 1937. That judgment did not decide the rights of the parties finally but only remanded the suit for trial on the merits. In the Court below, an objection had been taken to the jurisdiction of the Court to entertain the suit on the ground that the suit was barred by the provisions of the Sea Customs Act (*vide* issue 3). The lower Court tried this issue as a preliminary issue and upholding the objection dismissed the suit. On appeal by the plaintiff, this Court held that the Civil Court was not deprived of jurisdiction in the matter by the provisions of the Sea Customs Act and accordingly directed the case to be tried on the merits.

It has been held that an order of the above kind is not a "final order" within the meaning of cls. (*a*) and (*b*) of S. 109, Civil Procedure Code. The learned Advocate-General accordingly relied upon cl. (*c*) of that section and asked us to certify that this is a case fit to be taken in appeal to His Majesty's Privy Council. The amount claimed in the suit is more than Rs. 20,000 and the question of jurisdiction decided by this Court is a substantial question of law and one of general importance. It was however pressed on us by the learned Counsel for the respondents that it would be a hardship to his clients to take steps to appear before the Judicial Committee at this stage as the matter might as conveniently be carried in appeal to the Privy Council after a final decision of the case on the merits. If, for any reason, the lower Court should decide against the plaintiffs on the merits, an appeal to His Majesty in Council by the Secretary of State, might, it was pointed out, not be necessary at all. It was also contended that the respondents are being kept out of possession of a large sum of money and that any further delay in the disposal of the suit on the merits would cause great loss to them. We

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have carefully considered this aspect of the matter. Before coming to a final conclusion, we desired to know whether there was any urgency for obtaining an adjudication from the Judicial Committee on the question of jurisdiction; and on information obtained from the department, the learned Advocate-General informed us that this question of jurisdiction is awaiting decision in eight suits pending in this province and that if, in the ordinary course, the Courts in the moffussil should follow our decision, it would be necessary for the Secretary of State to bring them all in appeal to this Court. It was also represented that there were other claims of the same kind in which notice of suit had been given and that some litigations were pending in the Courts in other provinces. In view of these considerations and having regard to the general importance of the question, we have come to the conclusion that this is a fit case to be certified under cl. (*c*) of S. 109, Civil Procedure Code. The question whether any possible hardship to the respondents arising from this course can be remedied by an appropriate order as to costs must be left to be dealt with by their Lordships of the Judicial Committee; we have no power to impose any conditions in that behalf. A certificate will be granted under cl. (*c*) of S. 109, Civil Procedure Code.

K. C. —— *Petition allowed.*

## PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Sind.]

PRESENT:—LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Pestonjee Bhicajee (Firm) .. *Appellants**

*v.*

Patrick H. Anderson .. *Respondent.*

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Pestonjee Bhicajee *v.* Anderson.

*Civil Procedure Code (V of 1908), S. 60 (1) (m)—"Contingent or possible right or interest"—Will and codicil of testator—Income of property settled on named persons—Gift over of income and property to their children—Attachment of contingent interest—Validity.*

The testator by his will directed that the residue of his estate should be divided into sixteen shares and he bequeathed three of such shares to his nephew *A* and *W* his wife and their issue. By a codicil of later date the testator revoked his bequest and in lieu thereof directed as follows: "The income from these three-sixteenths shall so long as *A* and *W* his wife are

* P. C. Appeal No. 18 of 1938. 27th July, 1938.

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both alive be divided two-thirds to the wife and one-third to the husband. If one of them dies his or her share of the income shall belong to their four children or the survivor of them in equal proportions and when the remaining parent dies the capital and income shall belong to the children then living in equal proportions." After the death of the testator and while both *A* and *W* were alive a creditor attached the interest of *P* one of the sons of *A* and *K* in the three-sixteenth shares in the testator's residuary estate.

*Held*, that the interest of *P* under the codicil was, during the joint lives of *A* and *K*, unquestionably contingent both as to income and as to corpus and that it was exempt from attachment under S. 60 (1) (*m*) of the Civil Procedure Code.

Decision of the Sind Judicial Commissioner's Court affirmed.

Appeal from an order of the Court of the Judicial Commissioner, Sind, in its High Court Jurisdiction, dated 28th February, 1936 (*Rupchand Bilaram* and *Mehta, A.J.C.C.*) affirming an order of the same Court in its District Court Jurisdiction (*Aston, A.J.C.*) dated 19th April, 1933.

*L. M. Jopling* for Appellants.—The intention of S. 60(1)(*m*), Civil Procedure Code, is to protect from attachment the interest known as a *spes successionis*, and the scope of protection offered by the sub-section is not to be extended beyond that. It is submitted that there could have been no reason for excluding from attachment an interest like that of the respondent, and that grave injustice would result if such protection were indeed afforded. The language of the sub-section cannot have been intended to effect exclusion from attachment of all interests save vested interests, and a contingent interest under a will is not, within the purview of this enactment. Counsel referred to Halsbury's *Laws of England*, Vol. 15, p. 707 (2nd Edition) for a brief statement of the law, and to *Meek* v. *Kettlewell*[1] and In re *Parsons*[2]. It is a rule of construction that words cannot be read as extending the scope of preceding superior words. (*See* Craies *Statute Law*, 4th Edition, p. 167.) Applying that rule here, the words "mere contingent interest" must connote an interest similar in character to a *spes successionis*, but of inferior value. Counsel referred to *Ram Chandra Tantra Das* v. *Dharmo Narayan Chuckerbutty*[3], *Umes Chunder Sircar* v. *Mussummat Zahoor Fatima*[4] and *Ma Yait* v. *Official Assignee*[5].

(Sir George Rankin referred to *Rajendra Narain Singh* v. *Sunder Bibi*[6].)

The word "expectancy" is used in England to describe a *spes successionis*, and that cannot be attached. But the respondent's

1. (1843) 1 Phillips 342: 41 E.R. 662. 2. (1890) 45 C.D. 51 at 57.
3. (1871) 7 Beng.L.R. 341 (F.B.).
4. (1890) L.R. 17 I.A. 201 at 210: I.L.R. 18 Cal. 164 (P.C.).
5. (1929) 58 M.L.J. 83: L.R. 57 I.A. 10: I.L.R. 8 Rang. 8 (P.C.).
6. (1925) 49 M.L.J. 244: L.R. 52 I.A. 262: I.L.R. 47 All. 385 (P.C.).

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interest is not a "mere expectancy", and is one which may be attached. It is submitted that the distinction to be drawn between a *spes successionis* and a contingent interest is illustrated by S. 6 (1) (*a*) of the Transfer of Property Act, 1882, which provides that a *spes successionis* is not transferable at law, whereas a contingent interest is.

*F. H. L. Errington* for Respondent.—The respondent's interest in his parents' shares of the estate, both as to capital and income, is a contingent interest. That interest was and remains a mere contingent interest within the meaning of S. 60 (1) (*m*) of the Code. Counsel referred to S. 61 of the Code, to the position under the Code of 1859, and to S. 119 of the Indian Succession Act, 1925.

27th July, 1938. Their Lordships' judgment was delivered by

Lord Romer.

LORD ROMER.—By his will dated the 28th December, 1926, one, John Alexander Anderson, who died in October, 1928, directed that the residue of his estate should be divided into 16 shares, and he bequeathed three of such shares to his nephew C. S. Anderson and Winifred, his wife, and their issue as therein mentioned. By a codicil dated the 22nd July, 1927, the testator revoked that bequest, and in lieu thereof he directed as follows:—

"The income from these three-sixteenths shall as long as C. S. Anderson and Winifred his wife are both alive be divided, two-thirds to the wife and one-third to the husband. If one of them dies his or her share of the income shall belong to their four children or the survivors of them in equal proportions and when the remaining parent dies the capital and income shall belong to the children then living in equal proportions."

The respondent, Patrick H. Anderson, is one of the four children of C. S. Anderson and his wife, and the question to be determined upon this appeal is whether, while both C. S. Anderson and his wife were still living, the interest of the respondent in the income and capital of the three-sixteenth shares in the testator's residuary estate was liable to attachment and sale in view of paragraph (*m*) of the proviso to S. 60 of the Civil Procedure Code, 1908. That section so far as relevant is as follows:—

"60.—(1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds, or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable belonging to the judgment-debtor, or over which, or the profits of

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which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

"Provided that the following particulars shall not be liable to such attachment or sale, namely:—

"(*m*) an expectancy of succession by survivorship or other merely contingent or possible right or interest."

The circumstances that have given rise to the appeal are as follows. On the 14th January, 1932, the appellants instituted in the Court of the Judicial Commissioner of Sind (District Court Jurisdiction) a suit against the respondent and others claiming a sum of Rs. 1,20,900. On the same day they applied to that Court for attachment of (*inter alia*) the interest of the respondent in the income and capital of the three-sixteenth shares. This application was made under O. XXXVIII, r. 5 of the said Code which provides for conditional attachment before judgment of property of a defendant where the Court is satisfied that such defendant with intent to obstruct or delay the execution of any decree that may be passed against him:—(*a*) is about to dispose of the whole or any part of his property, or (*b*) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court.

The application in due course came before Additional Judicial Commissioner Aston. He was satisfied that the conditions upon which an attachment could be made under the rule had been fulfilled, but he held that the respondent's interest in the three-sixteenth shares was protected from attachment by virtue of the proviso to S. 60 (1) of the Code. It was, he held, a "merely contingent or possible right or interest" within the meaning of paragraph (*m*) of the proviso. The appellants thereupon appealed to the same Court (High Court Jurisdiction). The appeal was heard on the 28th February, 1936, by Additional Judicial Commissioners Rupchand Bilaram and Dadiba C. Mehta and was dismissed. From that dismissal the appellants, having obtained the necessary leave, now appeal to His Majesty in Council.

In their Lordships' opinion, the decision appealed from was plainly right. The interest of the respondent under the codicil was, during the joint lives of his father and mother, unquestionably contingent, both as to income and as to corpus. It was therefore expressly protected from attachment by the plain terms of the proviso unless there be given to the words

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"contingent or possible right or interest" something other than their usual meaning. Various reasons were advanced by Counsel on behalf of the appellants why this should be done. It is not, he argued, all contingent interests that are protected but only such interests as are "merely" contingent. Their Lordships, however, are unable to distinguish an interest that is contingent from one that is merely contingent. Rupchand Bilaram and Dadiba C. Mehta, A.J.C.C., said that it was a distinction without a difference, and their Lordships agree with them. It was then urged that the words "or other merely contingent or possible right or interest" should be construed as applying only to such rights or interests as are *ejusden generis* with an expectancy of succession by survivorship, that is, with a *spes successionis*. But in the first place a *spes successionis* is not in strictness a right or interest at all; and though their Lordships realize that a *spes successionis* may not inaptly be described as a "possible" right or interest, that is to say, as being something that will possibly result in a right or interest being acquired (and the words "or other" in the present case seem to suggest that this was the view of the framers of the Code), their Lordships are unable to conceive of any genus of "right or interest" that will include the species "*spes successionis*" but exclude the species "contingent right or interest". For the *ejusden generis* argument is based upon the hypothesis that a "*spes successionis*" is not a genus by itself but is a species of some larger genus. Reliance was also placed by the appellants upon the principle enunciated in "Craies Statute Law" at p. 167 in these words:

> "It has always been held that general words following particular words will not include anything of a class superior to that to which the particular words belong."

Their Lordships do not desire to throw any doubt upon this principle. They fail, however, to see how it is applicable to the present case, for they see no way of determining the respective claims to superiority or precendency of a *spes successionis* and a contingent interest. If value is to be the criterion, the hope of the only child of a millionaire of succeeding to his father's fortune may properly be ranked before his prospect of attaining a vested interest in a contingent legacy of £50. If on the other hand precedence is to be awarded according to theory of probabilities his chance of getting something in the former case may be greater than his

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chance in the latter. It would depend upon the nature of the contingency. Their Lordships are unable to get any assistance from the principle in question.

It was further urged on behalf of the appellants that there can be no intelligible reason for protecting contingent interests from attachment, when, as is admittedly the case, vested interests that are liable to be divested get no such protection. But, even assuming this to be true, it affords no justification for refusing to give effect to the plainly expressed intention of the legislature. Finally, the appellants sought to get some support for their contention from the fact that a contingent interest is transferable at law, whereas in view of the provisions of S. 6 (1) (*a*) of the Transfer of Property Act, 1882, a *spes successionis* is not. This fact, they contended, afforded a reason for construing the words of S. 60 (1) (*m*) of the Code of Civil Procedure as including nothing beyond what is described in S. 6 (*a*) of the Transfer of Property Act, namely: "the chance of an heir-apparent succeeding to an estate, the chance of a relative obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature." In their Lordships' opinion this contention is wholly untenable. The fact that a contingent interest can be made the subject of a voluntary transfer affords no reason whatever for supposing that the Legislature must have intended such an interest to be made the subject of a forced sale in attachment proceedings. Additional Judicial Commissioners Rupchand Bilaram and Dadiba C. Mehta in course of their judgment in the present case said this:

> S. 6 (*a*) of the Transfer of Property Act and S. 60, cl. (*m*) of the Civil Procedure Code are differently worded and perhaps for very good reasons . . . .
>
> It appears that from the earliest times forced sales of interests in properties which are not vested in the debtors or which are indefinite have not been countenanced.

And later on they referred to the mischief that was intended to be checked by preventing attachment of indefinite rights although such rights were assignable by acts of parties.

With these observations their Lordships find themselves in complete agreement.

In the result their Lordships are unable to find any good reason for declining to give effect to the plain words of S. 60

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(1) (*m*). They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondent: *Rose, Johnson & Hicks.*

R. C. C. —— *Appeal dismissed.*
B. V. V.

## PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh at Lucknow.]

PRESENT:—LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Rani Huzur Ara Begam and another .. *Appellants**

*v*

The Deputy Commissioner, Gonda, in charge of the Court of Wards, Utraula Estate and others .. *Respondents.*

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Rani Huzur Ara Begam *v.* Deputy Commissioner, Gonda.

*Custom—Succession—Taluqdari estate—Customary devolution of estate upon single heir—Non-taluqdari property belonging to same family—Presumption as to general rule of succession being applicable.*

If immovable property forming part of a taluqa is governed by the custom of single heir succession, there is no *prima facie* reason why immovable property not comprised in the taluqa should follow a different rule. It must indeed be taken as a settled rule that, whereas the entry of a taluqdar in list 2 prepared under S. 8 of the Oudh Estates Act, 1869, of the taluqdars whose estate according to the custom of the family ordinarily descends upon a single heir, is conclusive evidence that his taluqa is governed by the rule of devolution upon a single heir, it raises also a presumption, which may be rebutted by evidence proving a different rule, that the family custom applying to a taluqa governs also the succession to non-taluqdari immovable property. The above principle is applicable also to movable non-taluqdari property.

The object of S. 7 of the Oudh Estates Act of 1869 is to enable the taluqdar to ensure that heirlooms mentioned in the inventory made by him under the section shall pass along with the estate in all circumstances; but it does not warrant the inference that the legislature intended that the descent of movable property, for which no inventory was made, should be governed by the ordinary law.

Consolidated appeals from a judgment and decrees dated 21st April, 1936, of the Chief Court of Oudh at Lucknow (*King* and *Zia-ul-Hasan, JJ.*) reversing a decision of the same Court in its original civil jurisdiction.

*J. P. Eddy, K.C.* and *M. H. Rashid* for Appellants.—This case depends on the interpretation put on *Murtaza Husain Khan*

* P. C. Appeal No. 61 of 1937. 22nd July, 1938.
Oudh Appeals Nos. 13, 14, 15 and 16 of 1936.

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v. *Mahomed Yasin Ali Khan*[1], as to which it was pointed out in *Rani Jagadamba Kumari* v. *Wazir Narain Singh*[2] that it dealt with immovable property. It is submitted that the Chief Court misunderstood the effect of *Murtaza's case*[1]. S. 2 of the Act of 1869, in defining an estate, is dealing with immovable property. S. 7 is important as showing that, if an estate consists also of movable property, for example, money, certain specified procedure has to be followed if that money is to devolve with the rest of the estate. Counsel referred to the circumstances in which the Act of 1869 was passed, and submitted that it was only intended to deal with immovable property.

(*Sir Shadi Lal.*—The provisions of S. 7 operate in the case of persons whose estate is not subject to succession by a single heir. Do they also operate in the case of persons in Lists I and II under the Act?)

The section applies in the case of all taluqdars.

(*Lord Romer.*—Assuming that the Act does not deal with movable property, is there not a presumption, the judgment-creditor being in List II, that his movable property devolves in the same way as his immovable?)

The Act abrogates the ordinary law, so that there is, it is submitted, no such presumption.

(*Lord Romer.*—It may be a case not of abrogating law but of recognising a custom.)

It is submitted that the terms of S. 7 are inconsistent with the suggested presumption. Counsel referred to *Maharajah Pertab Narain Singh* v. *Maharanee Subhao Kooer*[3]. The ordinary law is that a custom must be proved, which has not happened here. Counsel referred to *Murtaza's case*[1], *Rani Jagadamba Kumari* v. *Wazir Narain Singh*[2], *Shiba Prasad Singh* v. *Rani Prayag Kumari Debi*[4], *Mohammad Sadiq Ali Khan* v. *Fakhr Jahan Begam*[5] and *Zarif-un-nisa* v. *Shafiq-uz-zaman Khan*[6].

(*Sir George Rankin* referred to the special custom, for example, of excluding females—*Musammat Parbati Kunwar* v. *Rani Chandarpal Kunwar*[7]).

The custom relied on must be proved. See *Zarif-un-nisa's case*[6].

1. (1916) 31 M.L.J. 804: L.R. 43 I.A. 269: I.L.R. 38 All. 552 (P.C.).
2. (1922) 44 M.L.J. 503: L.R. 50 I.A. 1 at 9: I.L.R. 2 Pat. 319 (P.C.).
3. (1877) L.R. 4 I.A. 228 at 246: I.L.R. 3 Cal. 626 (P.C.).
4. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331 at 345, 347, 352 and 353: I.L.R. 59 Cal. 1399 (P.C.).
5. (1931) 62 M.L.J. 320: L.R. 59 I.A. 1: I.L.R. 6 Luck. 556 (P.C.).
6. (1928) L.R. 55 I.A. 303: I.L.R. 3 Luck. 372 (P.C.).
7. (1909) 19 M.L.J. 605: L.R. 36 I.A. 125: I.L.R. 31 All. 457 (P.C.).

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(*Sir George Rankin.*—The entry in List II means that there is a single heir custom dating from earlier than 1856. That is the custom to be considered here.)

In the absence of express language to that effect, Parliament must not be taken as intending to abrogate the ordinary law; refers to Halsbury's Laws of England, Vol. 27, p. 148, para. 278. The present Act would have said so if it had been contemplated that movables should follow the special rule of descent prescribed under List II.

*Cyril Radcliffe, K.C., W. Wallach* and *Charles Russel* for 1st Respondent.—It is submitted that *Murtaza's case*[1] is conclusive of the present. It is indisputable that the taluqdari estate devolved by custom on a single heir, and Mahomedan Law makes no distinction between movables and immovables except in certain cases. There is a presumption that movables follow the rule of succession governing immovables. If there is no distinction between the two kinds of property, *Murtaza's case*[1] covers both movable and immovable property. In its application to movables, that case covers this. Admittedly *Murtaza's case*[1] has since been referred to as dealing with immovable property. But reference to the record in that case shows that it referred also to movables. *Shiba Prasad Singh's case*[2] has nothing to do with custom, which was neither alleged nor proved. It merely says that a man may by his own act incorporate immovable property with his impartible estate, and the question there was whether that had been done. It is always a question of evidence what the custom is. Here List II is the necessary evidence, and from that arises the presumption.

(*Sir Shadi Lal* referred to S. 32-A of the Act of 1869, which deals with other non-taluqdari property, as throwing possible doubt on the presumption.)

Counsel referred to *Raja Mohan* v. *Nisar Ahmad Khan*[3]. The power given by S. 7 of the Act to regulate the devolution of certain property has nothing to do with what is the custom. It makes the property so dealt with inalienable, but does not deal with all movable property.

*L. P. E. Pugh, K.C., S. Hyam* and *Siraj Husain* for 2nd Respondent.—Counsel referred to *Thakur Ishri Singh* v. *Baldeo Singh*[4]. It is important to note whether the taluqdar is a Hindu or a Mahomedan. Decisions on Hindu impartible estates are not applicable here. For example, in *Shiba Prasad Singh's case*[2],

1. (1916) 31 M.L.J. 804: L.R. 43 I.A. 269: I.L.R. 38 All. 552 (P.C.).
2. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331 at 345, 347, 352 and 353: I.L.R. 59 Cal. 1399 (P.C.).
3. (1933) 64 M.L.J. 455: L.R. 60 I.A. 103 at 115: I.L.R. 8 Luck. 65 (P.C.).
4. (1884) L.R. 11 I.A. 135: I.L.R. 10 Cal. 792 (P.C.).

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there was a Hindu impartible estate in respect of which the rule of primogeniture obtained. A claim that all the property passed in the same way failed. Counsel referred to *Nawab Ibrahim Ali Khan* v. *Nawab Muhammad Ahsan Ullah Khan*[1]. Once the rule of single heir devolution is established with regard to taluqdari property, it applies to all the property in the estate, whether Hindu or not. The effect of the decisions is that once a property is included in List II under the Act the presumption contended for arises. Counsel referred to *Narindar Bahadur Singh* v. *Achal Ram*[2].

*C. Sidney Smith* for 3rd Respondent.—Counsel referred to *Hakim Khan* v. *Gool Khan*[3], *Zarif-un-nisa's case*[4], *Janki Pershad Singh* v. *Dwarka Pershad Singh*[5] and *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar*[6].

*Eddy, K.C.,* replied.

22nd July, 1938. Their Lordships' judgment was delivered by

Sir Shadi Lal.

SIR SHADI LAL.—Raja Mohammad Mumtaz Ali Khan, taluqdar of the Utraula Estate in the district of Gonda of the Oudh Province, obtained, on the 22nd April, 1930, against Raja Saadat Ali Khan, taluqdar of the Nanpara Estate, two decrees for the recovery of certain sums of money. These decrees were based upon an award made by the Commissioner of Lucknow Division on the 8th April, 1930. The award, after finding the amounts of money due to the taluqdar of Utraula, concluded as follows:—

"The payment of the annuity to the Raja of Utraula will cease on his death. But should his death occur before the liquidation of the arrears amounting to Rs. 2,09,919, payment of these arrears will be completed to his heirs."

Raja Mohammad Mumtaz Ali Khan died on the 4th March, 1934, leaving him surviving four persons who were his heirs under the Mohammadan law;—namely, his widow, Rani Huzur Ara Begam, his minor daughter, Rajkumari Fatma Begam, and two minor sons, Raja Mohammad Mustafa Ali Khan and Iqbal Ali Khan.

On the 18th September, 1934, the widow, Rani Huzur Ara Begam, on behalf of herself and as guardian of her daughter, filed in the Chief Court of Oudh two applications

1. (1911) 22 M.L.J. 478: L.R. 39 I.A. 85: I.L.R. 39 Cal. 711 (P.C.).
2. (1893) L.R. 20 I.A. 77: I.L.R. 20 Cal. 649 (P.C.).
3. (1882) I.L.R. 8 Cal. 826 at 830.
4. (1928) L.R. 55 I.A. 303: I.L.R. 3 Luck. 372 (P.C.).
5. (1913) 25 M.L.J. 34: L.R. 40 I.A. 170: I.L.R. 35 All. 391 (P.C.).
6. (1918) L.R. 45 I.A. 134: I.L.R. 40 All. 470 (P.C.).

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for execution of the two decrees. The total amount for which execution was sought was Rs. 1,85,925-2-8 with reference to one decree, and Rs. 11,43,227-5-4 with reference to the other decree. The applications expressly stated that they were made by the widow in her personal capacity and as guardian of her minor daughter, and also for the benefit of the two minor sons.

The judgment-debtor challenged the right of the widow to execute the decrees obtained by her husband. Her right was disputed also by the Deputy Commissioner of Gonda who, as the representative of the Court of Wards, was in charge of the persons and properties of the two minor sons. He asserted that, under the law and the family custom of single heir succession, the estate of Raja Mohammad Mumtaz Ali Khan, including his rights under the decrees, devolved on his elder son Raja Mohammad Mustafa Ali Khan alone; and that neither the widow nor his other children were entitled to succeed to any portion of his estate. He accordingly denied the right of the applicant to execute the decrees.

Now, the taluqdar of the Utraula Estate is named in list 2 of the taluqdars prepared under S. 8 of the Oudh Estates Act, I of 1869, whose estate, according to the custom of the family on or before the 13th day of February, 1856, ordinarily devolved upon a single heir; S. 10 of the statute provides that the Court shall take judicial notice of the list and regard as conclusive the fact that the person named therein is such taluqdar. In other words, there was a pre-existing custom attaching to the estate on which its inclusion in list 2 was based. There is, therefore, an irrebuttable presumption in favour of the existence of the custom of the family by which the estate devolves on a single heir, but the provision as to the conclusiveness of the custom is confined to the estate coming within the ambit of the statute. It does not apply to any property which is not comprised in the estate or taluqa. What is the rule which governs succession to non-taluqdari property? If immovable property forming part of the taluqa is governed by the custom of single heir succession, there is no *prima facie* reason why immovable property, which is not comprised in the taluqa, should follow a different rule.

Indeed, it has been decided by this Board that there is a presumption that the rule as to succession to a taluqa governs

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also the succession to non-taluqdari immovable property; *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*[1]. It must, therefore, be taken as a settled rule that, whereas the entry of a taluqdar in list 2 is conclusive evidence that his taluqa is governed by the rule of devolution on a single heir, it raises also a presumption that the family custom applying to a taluqa governs also the succession to non-taluqdari immovable property. The only difference is that, while in the case of taluqdari estate there is an irrebuttable presumption in favour of the rule of devolution on a single heir, the presumption in the case of non-taluqdari immovable property may be rebutted by evidence proving a different rule.

The question then arises whether there is any other rule in the matter of succession to the non-taluqdari movable property left by the taluqdar. As observed in *Thakur Ishri Singh* v. *Baldeo Singh*[2]:

"their Lordships consider that the District Judge in this case is quite right when he argues from the law relating to the taluka to the law relating to all other family property, and says there is a presumption from the actual decisions relating to the taluka that the family property followed the same law, or rather, as he puts it accurately, there is no evidence to show that the other family property followed a line of devolution different from that of the taluka."

Their Lordships' attention has been invited to S. 7 of the Act, which provides that if a taluqdar or grantee desires that any elephants, jewels, arms or other articles of movable property belonging to him should devolve along with his estate, he should make an inventory thereof and deposit it in the office of the Deputy Commissioner of the district wherein his estate is situated. Thereupon the articles mentioned in the inventory shall be enjoyed and used by the person who under, or by virtue of, the Act may be in actual possession of the estate.

It is argued that the necessity for making this special provision for the devolution of heirlooms mentioned in the inventory arose because the legislature contemplated that movable property of a taluqdar would devolve, not on a single heir along with the estate, but upon the persons who might be his heirs under the ordinary law. Their Lordships think that the object of the section was to enable the taluqdar

1. (1916) 31 M.L.J. 804: L.R. 43 I.A. 269: I.L.R. 38 All. 552 (P.C.).
2. (1884) L.R. 11 I.A. 135 at 148: I.L.R. 10 Cal. 792 (P.C.).

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to ensure that the heirlooms mentioned in the inventory should pass along with the estate in all circumstances, but it does not warrant the inference that the legislature intended that the descent of movable property, for which no inventory was made, should be governed by the ordinary law.

The result is that the non-taluqdari property, immovable as well as movable, is governed by the custom applicable to the taluqa, as there is no evidence to prove a custom to the contrary. The judgment of the Court of Appeal, dissenting from that of the single Judge, of the Chief Court of Oudh, must, therefore, be affirmed. Their Lordships will accordingly humbly advise His Majesty that these consolidated appeals should be dismissed with costs to be paid to the respondent the Deputy Commissioner as representing the elder son, Raja Mustapha Ali Khan, the owner of the Utraula estate.

Solicitors for Appellants: *Nehra & Co.*

Solicitors for Respondents: *Solicitor, India Office, Barrow, Rogers, Nevill and Hy. S. L. Polak & Co.*

R. C. C. —— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE STODART.

P. R. Govindaswami Naicker .. *Petitioner* (Appellant in C. M. A. No. 261 of 1938 on the file of the High Court)*

*v.*

C. Javanmull Sowcar and another .. *Respondents (Respondent in do.).*

Govindaswami Naicker *v.* Javanmull Sowcar.

*Madras Agriculturists Relief Act (IV of 1938), S. 7—Scaling down of debt—Mortgage-debt—Exercise of power of sale under S. 69, Transfer of Property Act, 1882—Failure of creditor to scale down debt—Suit for injunction to prevent sale—Maintainability.*

Where the creditor in exercise of his power of sale under S. 69 of the Transfer of Property Act, 1882, was about to recover by sale of the debtor's property mortgaged to him the full amount of the debt, that is to say, without deducting the amount by which it had become reduced by the operation of the Madras Agriculturists Relief Act, 1938, and the debtor thereupon sued for an injunction to prevent the creditor from proceeding with the sale,

*Held*, that the suit was competent and that as the sale was imminent the Court might properly grant an interim injunction. It is no answer in such a case to say that under S. 69 of the Transfer of Property Act the debtor will

* C. M. P. No. 2464 of 1938. 21st May, 1938.

be entitled to recover damages if the mortgagee exercised his power of sale in an improper or irregular manner.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a temporary injunction restraining the respondents herein their auctioneers or other agents from selling the suit houses, namely, superstructures Nos. 6/78, 27/78 and 28/78, Pedariar Koil Street, George Town, Madras, under the power of sale pending appeal against Order No. 261 of 1938 preferred to the High Court against the order of the Additional City Civil Judge of the City Civil Court, Madras, dated the 12th day of May, 1938 and made in C. M. P. No. 1488 of 1938 in Original Suit No. 815 of 1938.

*K. Subba Rao* for Petitioner.

*V. S. Arunachalam* for Respondents.

The Court made the following

ORDER.—The petition in my opinion must be allowed.

The first two grounds have been, I think, properly rejected by the learned Judge.

But the third ground has in my opinion been wrongly rejected.

I assume that the debtor is an agriculturist though in his plaint barring the simple statement that he is one, there are no averments in support of that statement.

On this assumption however the Madras Agriculturists Relief Act applies to this debt and the debt, by the operation of that Act, becomes reduced.

Under S. 7 of the Act no sum in excess of the reduced amount is recoverable from any land belonging to the debtor.

Under S. 69 of the Transfer of Property Act the creditor is now about to recover by sale of the debtor's property mortgaged to him the full amount of the debt, that is to say, without deducting the amount by which it has become reduced by the operation of the Agriculturists Relief Act.

The suit is for an injunction to prevent him from doing so. I think such a suit lies and that since the sale is imminent an interim injunction might appropriately be granted. I do not think it is any answer to say that under the provision of S. 69 of the Transfer of Property Act the petitioner will be entitled to recover damages if the mortgagee exercises his

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power of sale in an improper or irregular manner. The suit simply is to prevent the mortgagee from doing what he is not entitled to do, namely, to bring the property to sale for more than is due on the mortgage. That is an act which will cause loss to the mortgagor for it deprives him of the opportunity to redeem on payment of the amount properly due. It is an act therefore which can be prohibited by injunction.

In the result the Civil Miscellaneous Appeal is admitted. Meanwhile the sale must not be held.

Civil Miscellaneous Petition is allowed with costs.

B. V. V. ——— *Petition allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

P. R. Govindaswami Naicker .. *Appellant** (*Plaintiff*)

*v.*

C. Javanmull Sowcar and another .. *Respondents* (*Respondents 1 and 2*).

Govindaswami Naicker v. Javanmull Sowcar.

*Madras Agriculturists Relief Act* (*IV of 1938*), *S. 7—Scaling down of debt—Duty of creditor—Power of sale under S. 69, Transfer of Property Act, 1882—Failure to scale down debt of agriculturist—Injunction to restrain sale.*

There is nothing in S. 7 of the Madras Agriculturists Relief Act, 1938, that indicates that the scaling down must necessarily be the act of a Court. It appears to be implied that after the passing of the Act it is the duty of the creditor to scale down the amounts due to him by his debtors. And it will only be in cases in which the creditor does not scale down the amounts due to him that the intervention of the Court will be necessary.

Where the plaintiff who claimed to be an "agriculturist" within the meaning of Madras Act IV of 1938 sued for an injunction restraining the defendant-mortgagee from exercising his power of sale under S. 69 of the Transfer of Property Act and it appeared that the mortgagee had not scaled down the debt,

*Held*, that it was a proper case for granting an injunction as the debt would have to be scaled down if he was an "agriculturist" and it was no answer to the plaintiff's claim that under S. 69 of the Transfer of Property Act he could recover damages if the mortgagee exercised his power of sale in an improper or irregular manner.

Appeal against the order of the Additional City Civil Judge of the City Civil Court, Madras, dated 12th May, 1938 and made in C. M. P. No. 1488 of 1938 in O. S. No. 815 of 1938.

*S. Krishnamachariar* and *K. Subba Rao* for Appellant.

*V. S. Arunachalam* for Respondents.

* A. A. O. No. 261 of 1938. 16th August, 1938.

Govindaswami Naicker v. Javanmull Sowcar.

The Court delivered the following

JUDGMENT.—This is an appeal from the order of the learned Additional Judge of the City Civil Court, Madras, in C. M. P. No. 1488 of 1938, dated the 12th May, 1938, in which he refused to issue a temporary injunction under O. 39, r. 1 of the Civil Procedure Code.

The plaintiff in the suit O. S. No. 815 of 1938 prayed for a permanent injunction restraining the first defendant from exercising his power of selling out of Court three houses situated in the City of Madras. The three houses together with an oil engine, it is alleged, had been mortgaged in the first instance to the second defendant in 1934. The first defendant is a subsequent mortgagee whose deed was executed by the plaintiff on 28th January, 1935. It is not disputed that the deed gives first defendant power of sale without the intervention of Court and therefore under S. 69 (*i*) (*c*) of the Transfer of Property Act, the first defendant has power to sell the mortgage property out of Court. The plaintiff's case is that he is an "agriculturist" and that under S. 7 of the Madras Act IV of 1938, he is entitled to have his debt to the first defendant scaled down in accordance with the provision of the Act. His contention is that a sale out of Court for an amount in excess of what would be due from him to the first defendant after such scaling down is an injury which the first defendant should be prevented from inflicting upon him by means of a permanent injunction. The learned Judge of the City Civil Court considers that this point does not arise at the present stage. He thinks it will only arise after the property has been sold and that the plaintiff will have a remedy in damages under S. 69 (3) of the Transfer of Property Act. I agree with my learned brother Stodart, J., who expressed the opinion in his order on C.M.P. No. 2464 of 1938* that it is no answer to say that under S. 69 of the Transfer of Property Act, the petitioner will be entitled to recover damages if the mortgagee exercises his power of sale in an improper or irregular manner. S. 7 of the Madras Act IV of 1938 expressly says:

> "Notwithstanding any law, custom, contract or decree of Court to the contrary all debts payable by an agriculturist at the commencement of this Act shall be scaled down in accordance with the provisions of this Chapter."

It goes on to say:

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* The case is reported in *Govindaswami Naicker* v. *Javanmull Sowcar*, (1938) 2 M.L.J. 918.

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"No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him."

There is nothing in this section that indicates that the scaling down must necessarily be the act of a Court. It appears to me to be implied that after the passing of this Act, it is the duty of the creditor to scale down the amounts due to him by his debtors. It will only be in case in which the creditor does not scale down his claim in accordance with the provisions of the Act that the intervention of the Court will be necessary. It is not alleged on behalf of the respondent that he has made any scaling down. I understand that he does not admit that the plaintiff is an "agriculturist" and so entitled to the benefit of Madras Act IV of 1938. It is clear however that if the plaintiff is an "agriculturist" the amount due from him to the first defendant will have to be scaled down in accordance with Chapter 2 of the Madras Act IV of 1938. And it is obvious as my learned brother has already held in the order referred to that the action of the creditor in bringing the debtor's property to sale for a sum in excess of the amount so scaled down is *prima facie* an injury. I am told by learned Counsel for the respondent that the respondent offered to postpone the auction if the plaintiff deposited in Court the amount of principal due under the mortgage bond. The plaintiff, it is said, refused to accept this offer. On the other hand I am informed by learned Counsel for the appellant that the amount of the principal is one of the main questions in dispute between these two parties. The plaintiff allege that though the bond recites a principal amount as Rs. 800, he actually received only Rs. 400, less a considerable sum deducted as advance interest. The learned Counsel for the appellant says that he offered to deposit Rs. 400 which according to him was the real amount of principal advanced by the respondent.

It is clear to me there is a case to be tried and therefore I think this is a case in which an injunction should issue. But it should be on condition that the plaintiff deposits the amount of Rs. 400 in the lower Court within a reasonable time. Learned Counsel on both sides are not agreed as to what is reasonable time and I shall therefore fix four weeks. This appeal is accordingly allowed and the order of the Court will be that an injunction do issue restraining the first defendant from exercising his power of bringing the hypotheca to sale out of Court pending disposal of O.S. No. 815 of 1938 on the

file of the City Civil Court. It is further ordered that if the plaintiff fails to deposit in the City Civil Court the sum of Rs. 400 towards the amount due to the first defendant the temporary injunction will be cancelled forthwith. The appellant will be entitled to his costs of this appeal from the respondent and the respondent will be permitted to withdraw the money from the City Civil Court, if deposited, on furnishing security to the satisfaction of that Court.

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B. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE WADSWORTH.

Gangamma *alias* Chinnakempammal .. *Plaintiff**

*v.*

Cuddapah Kuppammal and others .. *Defendants.*

Gangamma *v.* Kuppammal.

*Custom—Dancing girl—Adoption of girl—Legal consequences—Coparcenary if constituted—Right of adopted daughter to claim partition—Formalities for adoption—Adoption of two persons—Validity—Adoption effected for purposes of prostitution—Effect.*

The practice of adoption among devadasis in Madras has nothing to do with religious benefit but is purely a custom arising out of the natural desire of the women of that class to have a daughter. In such cases the adopted daughter inherits to her adoptive mother but it cannot be said that a coparcenary such as that recognised by the Hindu Law exists between the mother and the daughter, and the daughter cannot claim a share by partition of the property possessed by the adoptive mother on the ground that it is joint family property.

*Chalakonda Alasani* v. *Chalakonda Ratnachalam,* (1864) 2 M.H.C.R. 56; *Kamakshi* v. *Nagarathnam,* (1870) 5 M.H.C.R. 161; *Boologam* v. *Swornam,* (1881) I.L.R. 4 Mad. 330; *Mathura Naikin* v. *Esu Naikin,* (1880) I.L.R. 4 Bom. 545; *Guddati Reddi* v. *Ganapathi,* (1912) 23 M.L.J. 493 and *Kokilambal* v. *Sundarammal,* (1924) 21 L.W. 259, considered.

No particular ceremony is necessary for an adoption by a devadasi and there is no legal objection to the adoption of two daughters by a dancing girl provided that such a practice is sanctioned by the custom of the community.

The adoption of a minor by a dancing girl for purposes of prostitution is not really an adoption at all, it is a mere use of certain forms and will confer no status on the person adopted.

*Kandaiya Pillai* v. *Chokkammal,* (1920) 12 L.W. 7, relied on.

*K. K. Sridharan* for Plaintiff.

*T. G. Raghavachari, P. Srinivasa Aiyangar, N. K. Kumaraswami, S. P. Duraiswami, S. Ramanujachari* and *K. C. Duraiswami* for Defendants.

* C. S. No. 407 of 1934. 21st October, 1937.

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The Court delivered the following

JUDGMENT.—The plaintiff sues as the adopted daughter of the first defendant, who is a dancing girl by caste and profession, claiming a share in immovable property, jewels and cash on the basis that she and her adoptive mother constituted a joint family possessed of property in which she is entitled to claim a share by partition. The plaint is drafted just as if it were an ordinary partition suit under the Hindu Law, and there is even an allegation that the sale of one item of property to defendants 4 and 5 is not for family necessity, but for immoral purposes and not binding on the plaintiff. Throughout the plaint it is assumed that the adopted daughter of a devadasi living jointly with her mother has a right to claim partition, the suit not being expressly based on any plea of special custom or contract to that effect. Defendants 2 and 3 are impleaded on the ground that they have joined in the sale deed in favour of the fourth defendant and because the first defendant alleged that the second defendant was a member of the joint family. The third defendant is the daughter of the second defendant. The fourth defendant is the wife of the fifth defendant and they are stranger-purchasers of one item of property. The questions arising in this suit relate to the fact and validity of the plaintiff's adoption, the existence of a joint family, the right of the plaintiff by virtue of the adoption or by virtue of the existence of a joint family to claim partition, the contribution by the plaintiff of her earnings to the family funds, and the legality of a claim based on the contribution of moneys, presumably the result of immoral earnings. There are also the usual contentions regarding the alienation of a house to defendants 4 and 5. I will deal firstly with the question of fact.

The first defendant is an elderly woman who admittedly has practised the calling of a dancing girl in her youth. It is well established that she adopted the second defendant many years ago. The documents relating to the dedication of the second defendant are not available, but there is no doubt that she was dedicated to the temple by her adoptive mother. The first defendant in 1917 (Ex. IV) applied to a Fund for a mortgage, giving a genealogical tree in which she shows the second defendant as her daughter. There was also a similar application in 1924 (Ex. V), after the plaintiff had come to live with the first defendant, to which also she appended another genealogical tree show-

ing the second defendant as a daughter and the third defendant as a grand-daughter and ignoring the plaintiff. The plaintiff herself was born a Vanniya. Her parents died in her infancy and she was in the custody of her brother-in-law, P. W. 3, Rangaswami Naicker. There is considerable diversity of evidence as to how she came to live with the first defendant. It is common ground that she did join the first defendant when she was six or seven years old. She herself has no recollection of the alleged adoption. Her brother-in-law, P. W. 3, states that he was a poor man and found difficulty in maintaining the plaintiff after her mother died, that Rajammal (D. W. 2) the wife of the first defendant's brother, and a native of Tirupporur where P. W. 3 lives approached him on behalf of the first defendant and he agreed to give the plaintiff in adoption to the first defendant, that there was a feast to which the members of his community were invited and that on that occasion the first defendant and D. W. 2 came and took the plaintiff. He also states that the first defendant had previously approached the plaintiff's mother during her lifetime with a view to the adoption and that the latter had agreed to it.

I have no hesitation in finding that this story of the circumstances in which the plaintiff went to live with the first defendant is not the whole truth. The most significant fact is the existence of a document (Ex. VIII), dated the 29th December, 1922, admittedly executed by P. W. 3 and his wife, which recites that the plaintiff has been given by them to one Chinnappa Naicker, who is authorised to maintain the plaintiff and to arrange for her marriage after she attained puberty or dedicate her to a temple in accordance with custom. This Chinnappa Naicker is dead. He is alleged to have been a relative of P. W. 3 and also a relative of D. W. 2. This is difficult to believe, for P. W. 3 is a Vanniya while D. W. 2, though she married into the dancing girl caste, is by birth Balija. The D. W. 2 herself says that she first saw the plaintiff in the house of this Chinnappa Naicker, who told her that the child had been left with him by P. W. 3 owing to his poverty. According to D. W. 2, the child wanted to go to Madras and she took her without any formal transfer of guardianship and the child lived for a while with D. W. 2 in the ground floor of the house, the upper storey of which was occupied by the first defendant. There, she made friends with

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the first defendant's grand-daughter, the third defendant, a child of the same age, and gradually she came to live upstairs with the first defendant instead of downstairs with D. W. 2. It seems to me that this evidence is much more probably true than the story of P. W. 3 that he himself, in pursuance of the wishes of the plaintiff's mother, formally gave the child in adoption to the first defendant.

It is of course well settled that no particular ceremony is necessary for an adoption by a devadasi. There is therefore not the legal necessity for a giving and taking such as is required to constitute a valid adoption of a boy under the ordinary Hindu Law. When dealing with the adoption of a girl by a devadasi all that need be proved is the fact of adoption by the adoptive mother, which may be by a unilateral act. We have good evidence that the plaintiff was taken into the family of the first defendant in her childhood and brought up along with the first defendant's grand-daughter. The genealogical tree in Ex. V appears to indicate that up to 1924, at any rate, no formal decision had been made by the first defendant to adopt the plaintiff. The first defendant did, however, give to the plaintiff the sort of education which a woman of the dancing girl community ordinarily gives to a daughter. She was taught to dance and at a comparatively early age she gave performances in public. The only documentary evidence indicating an actual adoption is comprised in two documents connected with the dedication of the plaintiff to the temple as a dancing girl. This dedication took place in 1931, and the documents concerned are a doctor's certificate dated 27th May, 1931, in which the plaintiff is described as the daughter of the first defendant, aged 17, and a Magistrate's certificate dated the 16th June, 1931, in which the plaintiff is described as the daughter of the first defendant and is alleged to have stated that she is hereditarily connected with the devadasi community. According to the plaintiff these statements are based on information supplied by the first defendant to the officials concerned. According to the first defendant, the statements are based on information supplied by the plaintiff herself. It is admitted that the first defendant accompanied the plaintiff when these certificates were obtained and that she did dedicate the plaintiff to the temple of which P. W. 2, Raghava Bhattachari, is the Archaka and it is he who produces these documents. These

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facts, if they stood alone, would raise a strong presumption that the first defendant had actually adopted the plaintiff as her daughter; but there are other circumstances tending to rebut this presumption and to confirm the inference which arises from the genealogical trees appended to Exs. IV and V. The plaintiff after her dedication was taken by the first defendant to Karaikudi. According to the first defendant and D.W. 2 this was merely a short visit connected with the illness of a relation but according to the plaintiff she was taken there in order that she might earn large sums by dancing and prostitution and she would say that she was there for nearly two years. Probably the truth lies between the two stories. The situation of Karaikudi in close proximity to the Chettinad provides great facilities for the profitable exercise of the plaintiff's profession and it seems to me probable that she did practice her trade there, though I am quite unable to believe her evidence that she earned Rs. 10,000 during this visit. She is probably exaggerating the duration of her visit and almost certainly she has grossly exaggerated the amount of her earnings.

[His Lordship proceeded to discuss the evidence and continued:]

Every other circumstance in the case points to the conclusion that the plaintiff was an orphan girl not adopted but fostered and trained merely that she might be exploited as a prostitute and, in view of the palpably false nature of the evidence of P. W. 3, which is the positive evidence of adoption, I must hold that the story of adoption is untrue.

This finding is of itself sufficient to conclude the case, for it seems to me apparent that, unless the case is somehow based on a family relationship, it can be nothing more than a claim for an account of the profits of organised prostitution, which the Courts would not entertain. But it is desirable, in view of the possibility that the case may be taken further, that I should discuss the legal aspects of this case which have been argued very fully before me. For the purpose of this discussion I will assume that my finding regarding the adoption is erroneous and that the plaintiff was in fact the adopted daughter of the first defendant. Assuming so much, can the plaintiff claim a share in her mother's property merely on the

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ground that she and her mother were living jointly and that her earnings were handed over to her mother? There is in my opinion no reliable evidence that the plaintiff's earnings contributed substantially to the acquisition of the immovable properties in which a share is claimed; and, seeing that the plaintiff was allowed to remove all the jewels which she claimed as her own, it is not very likely that anything in which she has an interest was left in the possession of the first defendant, unless it can be said that the plaintiff has, whether by status, custom or contract, a right to claim a partition of the joint family property.

It is well established in Madras at any rate that the adopted daughter of a dancing girl of the devadasi community inherits to her adoptive mother, the property passing from mother to daughter. The plaintiff's claim, however, is based either on the existence of a coparcenary similar to that which the Hindu Law recognises amongst men of ordinary castes, or at least on the existence of some custom or contract whereby the property of the family of these women is treated as if it were joint family property divisible amongst the members thereof. I may say at once that there is no specific pleading of any custom or contract. The plaint appears to proceed on the basis of the acquisition by the plaintiff of a status as an adopted daughter which gives her a right automatically to claim partition. There is, it is true, an averment that the plaintiff has contributed substantially to the acquisition of the properties which she claims, but the plaint does not proceed on the basis of a claim for either a return of her contributions or a share proportionate to those contributions. Essentially the claim is one based on the existence of a joint family in which the plaintiff has a share by her status as a member of that family.

It seems to me doubtful whether such a thing as a coparcenary strictly speaking can be said to exist between mother and daughter in the devadasi community. The essence of the coparcenary consists in the acquisition of rights in property by birth, rights which are a creature of the law, based on the theory of religious benefit and incapable of being created by act of parties otherwise than by adoption (vide *Sudarsanam Maistri* v. *Narasimhulu Maistri*[1]). Can it be said that the law

1. (1901) 11 M.L.J. 353: I.L.R. 25 Mad. 149 at 154.

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has created a coparcenary between a mother and a daughter in the devadasi community? I do not think it can. Nor do I think it can be said that there is any custom having the force of law which has ever been recognised by the Courts as establishing the existence of a true coparcenary amongst the female members of this community. There are three reported cases which come near to the recognition of such a coparcenary. The first is a very old case, *Chalakonda Alasani* v. *Chalakonda Ratnachalam*[1]. That was a case in which the plaintiff claimed the jewels, etc., in the possession of her daughter and granddaughter on the ground that they were the result of joint earnings and that she, as the senior member of the joint family, had the right to hold those properties. The defence was that they were the self-acquisitions of the daughter and the granddaughter. No other objection was raised and no claim for partition was considered. The lower Court held that these properties represented the gains of learning and were the self-acquisitions of the defendants, and on appeal, it was held that they were joint properties and that the plaintiff, the senior member of the joint family, had the right to their custody. In this case it was assumed that the rules applicable in a Hindu coparcenary to the custody of the properties and the separate ownership of self-acquisitions, applied in the case of the female members of the devadasi caste living jointly. But there was no real consideration of the question whether such a female member acquires a right by birth or can claim during the lifetime of her mother a partition as against her. In *Kamakshi* v. *Nagarathnam*[2], the plaintiff sued to establish her right as a coparcener with her deceased mother's sister to a share in a hereditary dancing girl office. It was held that in this community a daughter must be regarded as a son and must take an estate of inheritance from her mother and that the first defendant did not as a coparcener acquire the right of succession to her deceased sister to the exclusion of the latter's daughter. Here again, there appears to have been no consideration of the question whether any true coparcenary exists in which a daughter acquires rights by birth. All that is decided is that, as between two sisters, the joint right of one does not pass on her death to the other but to the daughter of the deceased. Besides these two old cases there is a modern

1. (1864) 2 M.H.C.R. 56. 2. (1870) 5 M.H.C.R. 161.

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case which appears to recognise the existence of a coparcenary between the female members of a dancing girl's family, namely, the decision of Kumaraswami Sastri, J., in *Kokilambal* v. *Sundarammal*[1]. That was really a case in which the mother and daughters joined together in an attempt to defeat an alienee by asserting that the property alienated formed part of the joint family property, that the alienation was not binding on the joint family and that the property was liable to be partitioned. The learned Judge recognised the existence of joint family property as between the mother and daughters, held that the alienation was binding only in part and directed a partition. Referring to the old cases which I have just quoted, he holds it established that there can be a coparcenary of dancing girls with rights of survivorship but remarks that there is no case which goes to the length of saying that daughters of dancing girls acquire by birth an interest in the ancestral property. He leaves this question open and decides the case on the basis that the mother and daughter and grand-daughter were in fact living together as members of a joint family, pooling their earnings and meeting their expenses out of the joint funds and treating the property as coparcenary property, so that it became coparcenary property by conduct. With very great respect to this distinguished and learned Judge it seems to me that in this decision the term "coparcenary" is used in a somewhat unprecise manner. If we restrict the term to its ordinary connotation of the relationship created by law, the basis of which is religious and the essence of which is the acquisition of an interest by a coparcener by birth or by adoption, I do not see how it can be said that any such thing as a coparcenary exists amongst the females of the dancing girl community. As has been observed by Sadasiva Aiyar, J., in *Guddati Reddi* v. *Ganapathi Kandanna*[2], no spiritual benefit can accrue to a prostitute mother by the spiritual ministrations of her prostitute adopted daughter. It seems to me quite clear that the practice of adoption amongst devadasis has nothing to do with religious benefit but is purely a custom arising out of the natural desire of the women of this class to have a daughter to look after them in their old age and receive their property on their death. There is, so far as I am aware, no text of Hindu Law which

1. (1924) 21 L.W. 259.

2. (1912) 23 M.L.J. 493.

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recognises the acquisition by birth by the daughter of a dancing girl of a right in the ancestral property of her mother and it seems to me apparent that, if the joint ownership of the family property is to be spelt out of the conduct of the members of the family, no question of the acquisition of a right by birth, can arise and that the right to a share must really be the creature of a contract, express or implied, and not the result of status. It might of course be argued that there is a universal and legally binding custom in the community that daughters should have a right to claim partition against their mother. But such a custom would have to be asserted and proved and certainly cannot be inferred by a mere analogy with the special rules of Hindu Law based, on religion and on the texts, regarding coparcenary relationships amongst men. Actually, however, the decision of Kumaraswami Sastri, J., in the case referred to is not based on the assumption of any true coparcenary relationship between the mother and the daughters. It is expressly based on conduct from which can be implied a family arrangement that the property should be treated as if it were ordinary Hindu joint family property; that is, the decision is based on an implied contract, and I do not think it can be treated as an authority for the contention that any dancing girl living jointly with her mother can claim as against her mother a partition in the family property merely on the basis of their joint living and the absence of any indication of separation in food or status. I am fortified in this view by indications in other decisions. One of the cases quoted by Kumaraswami Sastri, J., himself is *Boologam* v. *Swornam*[1], in which it was held that property acquired by two dancing girls, sisters, from the earnings of the prostitution was the self-acquired property of the two sisters which they held as co-owners and in which the other members of their family had no rights. I have examined the original judgment from which this appellate decision arises and I find that the trial Judge held that the property in question was in fact acquired out of the joint assets of the family but that there was no law or custom by which a dancing girl could compel partition of a family property. The reported appellate decision proceeds on a different finding of fact and it has not considered the question whether a right to demand partition exists. There is a Bombay case, *Mathura Naikin* v.

1. (1881) I.L.R. 4 Mad. 330.

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*Esu Naikin*[1], in which it was held that the Madras view recognising the validity of an adoption by a prostitute could not be accepted in Bombay and it is remarked at page 572, that, even if a right of inheritance were recognised, that is distinct from a right to call for partition and that such a right could not be based on the analogy of the position of an ordinary daughter-heir, nor could it be based on the analogy of the position of an adopted son whose right accrues by the fact of adoption just as the right of a natural born son accrues by birth. It seems to me that this reasoning is sound. The right to claim partition may be based on contract, on law, or on custom having the force of law. If it is based on contract, the contract must be asserted and proved, as it certainly has not been in the present case. If the right is a creature of the law, authority must be found for it either in the ancient texts or in the statutes or in the body of law expounded and affirmed in the reported decisions of the Indian Courts. I can find no such basis for the right as claimed by the plaintiff. If it is based on custom, here again there must be a specific plea of such a custom and evidence in support of it. The evidence must satisfy the usual requirements for the proof of a customary right; it must be ancient, certain, notorious and continuous. There is no such averment and no such evidence in the present case. I find therefore that, even assuming that the plaintiff's adoption be good, no basis has been established for a right to claim partition as a member of the joint family.

I have already indicated that, in my opinion, no suit would lie for an account or a share in the profits of an immoral and illegal partnership. It seems to me unnecessary to go in detail into the further question whether the adoption of the plaintiff by the first defendant is itself an illegal adoption by virtue of which no claim could be preferred. There is no legal objection to the adoption of two daughters by a dancing girl provided that such a practice is sanctioned by the custom of the community as it appears to be in this case. On my findings of fact it must be taken as established that the plaintiff was taken when a minor into the first defendant's household in circumstances which justify the inference that she was taken with a view to being trained as a prostitute, that is, the first defendant obtained possession of her in such circumstances as would constitute an

1. (1880) I.L.R. 4 Bom. 545.

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offence under S. 373 of the Indian Penal Code. Such an adoption, being prohibited by law, cannot give rise to a status which would form the basis of legal rights. As was observed by a Bench of this Court in *Kandaiya Pillai* v. *Chokkammal*[1], such an adoption is prohibited by law though the law recognises the possibility of adoption by a dancing girl when the purpose is not prostitution. But, as the learned Judges say, the adoption of a minor for the purpose of prostitution is not really an adoption at all; it is a mere use of certain forms which, when gone through by persons with an untainted purpose, would result in an adoption; as actually gone through, they result in nothing, and affect the status of no one. On the basis of this reasoning, it would follow that, even if the first defendant had intended to adopt the plaintiff, it being shown that the adoption is one which offends against the law as laid down in S. 373 of the Indian Penal Code, that adoption is invalid and confers no status upon the plaintiff, nor can there be any question of an estoppel against the provisions of a statute.

Turning to the issues in the case, I must hold on the first issue that the adoption set out in the plaint is not true and, even if true, would not be valid; on the second issue that there is no joint family properly speaking and that the plaintiff has no claim to partition; on the third issue that there is no proof that any of the properties in which the plaintiff claims a share were acquired out of her earnings; and on the fourth issue, even if it were proved that the plaintiff's immoral earnings contributed to the acquisition of the properties claimed, that a suit based on such an immoral association would not lie. No decision seems necessary on the fifth issue. On issues 6, 7 and 8, I find that the plaintiff cannot question the alienation in favour of defendants 4 and 5. In the result, the suit is dismissed with costs, one set for defendants 1 and 2 and one set for defendants 4 and 5. The plaintiff will pay the court-fee due to Government.

B. V. V. *Suit dismissed.*

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1. (1920) 12 L.W. 7.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sri Maharani Adilakshmi Devamma Garu by her authorised agent Kancherla Ramakrishniah .. *Appellant** (*Plaintiff*)

*v.*

Rao Kumara Raya Appa Rao Garu .. *Respondent* (*Defendant*).

**Adilakshmi Devamma Garu *v.* Appa Rao Garu.**

*Madras Estates Land Act (I of 1908), Ss. 3 (15) and 26 (3)—Claim for rent—Adverse decision—Subsequent suit for rent—Plea of* res judicata—*Adverse possession—Rent-free tenure—Occupant of land if a ryot—Applicability of S. 26 (3).*

Where a claim to levy rent on certain land was negatived in a suit filed in 1903 on the ground that the land had been granted rent free, and a subsequent suit was filed in 1933 for rent against the occupant of land,

*Held*, that the previous decision operated as *res judicata*. Even otherwise the occupant must be deemed to have held the land rent free for a sufficient period to establish his rent-free tenure by adverse possession. The person holding the land free of rent cannot be a ryot within the definition of S. 3 (15) of the Madras Estates Land Act.

*Semble*: S. 26 (3) of the Act has no application to land held free of rent.

*Palaniappa Mudaliar* v. *Abdul Subhan Sahib*, (1938) 2 M.L.J. 977, followed.

Appeal against the decree of the District Court of Chittoor in A. S. No. 97 of 1933 (Suit No. 1902 of 1932, Special Deputy Collector's Court, Chandragiri).

*B. C. Seshachala Aiyar* and *P. Srikantam* for Appellant.

*P. V. Rajamannar* for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff who is the appellant in this appeal purchased a zamindari in Court auction and he filed a suit to recover rent from the defendant on the suit land which admittedly has never paid any rent within living memory, though it is shown in the zamindari records as a land in respect of which a rate of rent has been fixed. It would appear that the defendant belongs to the family of a former zamindar and it is conjectured that his immunity from rent is due to this fact. In 1903 when the Court of Wards was in charge of the estate, a similar claim was put forward to levy rent on this same land and the then occupant of the land contended that the land had been granted rent free. This contention was upheld and there is a specific finding that the lands are rent-free lands. It appears to me that this decision bars the present suit.

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* S. A. No. 602 of 1934. 19th September, 1938.

Adilakshmi Devamma Garu v. Appa Rao Garu.

In the first place I am of opinion that it operates as *res judicata*, for if there was a pre-existing rent-paying relationship to which the landholder had a right to revert the existence of that relationship could have been put forward as a ground for reverting to the previous rates of rent under the Rent Recovery Act which prevailed at the time of the 1903 suit (*vide* S. 11, sub-S. 4) just as under S. 26 of the Estates Land Act which substantially re-enacts the same provision. Moreover quite apart from *res judicata* this judgment is certainly the starting point for adverse possession in favour of the defendant. From the date of this judgment it must be recognised that the defendant was claiming successfully to hold this land free of all liability to rent present or future; and in my opinion even if the judgment did not operate as *res judicata* from the date of the judgment, the defendant must be deemed to have held the land rent free for a sufficient period to establish his rent-free tenure by adverse possession. Further more, I am extremely doubtful whether S. 26, sub-S. 3 of the Madras Estates Land Act has any application to lands held free of rent. When there is no rent at all, it cannot to my mind be held that the land has been granted on a rate of rent lower than the lawful rate payable. Moreover, when land is held free of rent it is very difficult to see how the person who holds that land could be a ryot within the definition of S. 3 (15) which defines a ryot as a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying to the landholder the rent which is legally due upon it. This case is almost precisely similar to that with which I had to deal in *Palaniappa Mudaliar* v. *Abdul Subhan Sahib*[1] in which I came to a similar conclusion. This appeal is dismissed with costs.

Leave to appeal is refused.

K. C. *Appeal dismissed.*

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1. (1938) 2 M.L.J. 977.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR.

Kailasa Padayachi .. *Petitioner* (Defendant)*

*v.*

Duraiappa Kachirayar and another .. *Respondents (Plaintiff and attaching decree-holder).*

Kailasa Padayachi *v.* Duraiappa Kachirayar.

*Civil Procedure Code (V of 1908), O. 21, r. 2 and Limitation Act (IX of 1908), Art. 174—Payment of decree amount—Decree-holder applying to record satisfaction of decree—Absence at the time of enquiry—Dismissal of application—Subsequent application by judgment-debtor to enter satisfaction—Dismissal of it as being time barred—If sustainable—Proper procedure.*

A decree-holder was alleged to have received the decree amount. Within 30 days of the alleged payment he himself applied to record satisfaction of the decree. A third party who had attached the decree raised objection and an enquiry was held in that connection. Then the decree-holder denied the payment but was absent from the enquiry and his vakil reported no instructions. The Court struck off the decree-holder's petition but reserved the judgment-debtor's right to claim full satisfaction in proper proceedings. The judgment-debtor accordingly applied for satisfaction of the decree being recorded. The lower Court dismissed the application as being time barred.

*Held*, on revision, that the application if treated as an independent application was not saved by S. 5 or S. 14 of the Limitation Act; but the lower Court was not justified in striking off the application of the decree-holder. At any rate at the later stage, the Court ought to have proceeded with the original application of the decree-holder, treating the application of the judgment-debtor only as an application to continue the former proceeding.

*Somu Pattar* v. *Rangaswami Reddiar*, (1918) 35 M.L.J. 253, followed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order dated 10th September, 1936 and made in E. A. No. 152 of 1936 in S. C. No. 355 of 1936 on the file of the Court of the District Munsiff of Mayavaram.

*K. Desikachari* for Petitioner.

*N. R. Govindachari* for Respondents.

The Court delivered the following

JUDGMENT.—The Court below has written a long order in this matter but I have found it very difficult to understand its reasoning; it seems to me waste of time to criticize the judgment. Far from a desire to decide the substance of the dispute between the parties, the order of the Court below only exhibits an anxiety to discuss points of law and an equal anxiety to go wrong on them.

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* R. P. No. 1469 of 1936. 5th August, 1938.

Kailasa Padayachi v. Duraiappa Kachirayar.

The Revision Petition has been filed against an order of the learned District Munsiff passed in the following circumstances.

A decree-holder was alleged to have received the decree-amount, but it returned out that even before the date of this alleged payment a third party had obtained an order for attachment of that decree. So far as one can gather from the dates available in the record, the payment is said to have been made before the original judgment-debtor was served with a prohibitory order. It was contended by the attaching decree-holder that there had in fact been no payment and at one stage of the proceeding the decree-holder also swore that the payment was not true, though a receipt purporting to have been given by him was produced by the judgment-debtor and its genuineness was admitted by the decree-holder. As the merits of the case have not been gone into, I do not wish to say more on this aspect of the matter at this stage.

Within 30 days of the alleged payment, the decree-holder himself applied to record satisfaction. But as it appeared from the record that the decree had been attached by a third party, notice of the application was given to the attaching decree-holder. In the ordinary course when the decree-holder applied to enter up satisfaction, no notice or enquiry would have been necessary and it is meaningless to insist that notwithstanding the application by the decree-holder to enter up satisfaction, the judgment-debtor must have taken the precaution of filing another petition for the same purpose within the period allowed by the law. It was only when the attaching decree-holder raised objection and an enquiry was held in that connection that the decree-holder thought fit to deny the payment. Till then the judgment-debtor was certainly not called upon to file any application to enter up satisfaction because the decree-holder had already applied to do so. What happened during the course of this enquiry does not seem to do much credit to any of the parties concerned. Having denied the payment, though he had given a receipt, the decree-holder absented himself and his vakil reported no instructions. The District Munsiff accordingly purported to strike off the decree-holder's petition—a course which is certainly opposed to the judgment of this Court in *Somu Pathar* v. *Rangaswami*

Kailasa Padayachi v. Duraiappa Kachirayar.

*Reddiar*[1]. The then District Munsiff seems to have thought that this would not prejudice the judgment-debtor and he contented himself with adding a reservation at the end of his order to the following effect:—

"The defendants' right to claim full satisfaction in proper proceedings is reserved."

I do not for a moment suggest that if otherwise the defendants' right had been lost, a mere reservation in the above terms would save it or preserve it. But it undoubtedly furnishes an answer to an argument relied on in one of the orders now complained of, that the defendants' vakil who was present in Court when this order was passed should have got up and insisted on going on with the enquiry. It was not the privilege of the Munsiff alone to make a mistake ; the vakil also was entitled to assume that the defendants' rights would not be prejudiced. And what is more curious in this case is that for one purpose the District Munsiff proceeds on the footing that the judgment-debtor was not a party to this order but nevertheless in another connection he lays hold of the fact that the gentleman who was supposed to be his vakil in some other proceeding happened to be sitting in Court when this order was passed.

Acting on the strength of the reservation above referred to, the judgment-debtor applied for satisfaction being recorded. He was then met with the plea that his application was too late and that plea was upheld. It is against this order that this Civil Revision Petition has been filed.

*Prima facie* the second application is out of time and I agree with the lower Court that it is not saved either by S. 5 or S. 14 of the Limitation Act. The lower Court was therefore right in dismissing it if it is to be treated as an independent application. But I do not think it was really necessary or proper to treat it as an independent application. It has so often been laid down that an order which merely strikes off a particular application cannot always be regarded as finally disposing of that matter. The judgment-debtor is interested more than the decree-holder in an applica-

1. (1918) 35 M.L.J. 253.

Kailasa Padayachi *v.* Duraiappa Kachirayar.

tion to enter up satisfaction. The mere fact that the decree-holder who has filed the application absents himself is certainly no justification for striking off the application. The proper thing therefore for the District Munsiff to have done was to have proceeded with the original application itself, treating the later application of the judgment-debtor only as an application to continue the former proceeding. At any rate when the judgment-debtor took the precaution of filing a second application inviting the District Munsiff to do so, the least that the lower Court should have done was to have adopted that course. The grounds on which these applications have been dismissed are wholly untenable. I accordingly set aside both the orders of the lower Court and direct it to proceed with the application dated 27th November, 1935, treating the order of 23rd April, 1936, passed on that application as not amounting to a valid or final disposal of that petition. Notice will now be given by the lower Court to the attaching decree-holder as well as the judgment-debtor and all parties will be given the opportunity of leading evidence and putting forward their contentions on the merits.

It is only the attaching decree-holder that is represented before me by Counsel. If the mistake had merely been that of the lower Court in dealing with the application dated 27th November, 1935, I should not have thought fit to saddle the attaching decree-holder with the costs of this revision petition. But I find that he has taken up and persisted in the untenable position which the lower Court has upheld in the orders now set aside. The petitioner will be entitled to recover his costs of this petition from both the respondents.

K.C. *Orders set aside and case remanded.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE STODART.

Ry. Rajaram Raja Saheb and others .. *Appellants** (*Petitioners*)

*v.*

T. R. Bhawani Sanker Joshi and others .. *Respondents* (*Respondents*).

Rajaram Raja Saheb *v.* Bhawani Sanker Joshi.

*Civil Procedure Code (V of 1908), O. 21, r. 90—Suit on mortgage—Decree—Sale in execution—Judgment-debtor's application to set aside sale—Later mortgages by judgment-debtor over some properties—If possibility of no surplus to judgment-debtor a ground to hold judgment-debtor is not affected by the sale.*

In a suit on a mortgage the decree-holders purchased properties in execution of the mortgage decree. The judgment-debtors applied under O. 21, r. 90 to set aside the execution sale. Their petitions were dismissed by the District Judge as not maintainable as he held that they could not come under cls. 1 and 2, nor even under cl. 3 of O. 21, r. 90 because they were not persons "affected by the sale" inasmuch as the judgment-debtors had executed three other later mortgages for very large amounts and could not therefore get any surplus available to them even if a fresh sale should be held. He did not make any enquiry into the facts. Certain attaching decree-holders of the equity of redemption also applied to set aside the sales. These petitions were also dismissed.

*Held*, that the petitions by the judgment-debtor and the attaching decree-holder were maintainable as they are persons whose interests are *prima facie* affected by the sale and that the question whether the judgment-debtor or attaching decree-holders would get any surplus may be relevant only in an enquiry as to whether they sustained substantial injury.

Appeals against the orders of the District Court of West Tanjore at Tanjore dated 13th December, 1935, and made respectively in E. As. Nos. 473, 474, 488, 528, 510, 609, 511 and 610 of 1933 and 503, 504, 505, 512, 513, 527, 641 and 642 of 1933 all in E. P. Nos. 74 of 1930 and 24 of 1931.

*T. M. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar, K. Swaminathan, A. Swaminatha Aiyar* and *S. Tyagaraja Aiyar* for Appellants.

*S. Panchapakesa Sastriar, V. K. Srinivasa Aiyangar* for *K. R. Rangaswami Aiyangar* and *V. V. Ramadurai* for Respondents.

The judgment of the Court was delivered by

King, J.

*King, J.*—This is a large batch of appeals concerned with the execution of the decree against defendants 3 to 6 in C. S.

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*A. A. O. Nos. 31 to 38 and 160 to 167 of 1936. 27th July, 1938.

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King, J.

No. 10 of 1926, the sons of the senior prince of Tanjore. There were eight sales of property in execution of this decree and 16 petitions to set aside those sales under O. 21, r. 90. The judgment-debtors themselves filed eight of these petitions and the others were filed by an attaching decree-holder. The learned District Judge of Tanjore has dismissed all these petitions and these are appeals against his order.

When the petitions came on for hearing, no evidence was taken as it was represented on behalf of the auction purchasers that the petitions ought to be dismissed on the allegations contained in the pleadings and on the admitted facts in the case. The learned District Judge appears to have accepted that point of view and therefore heard the petition upon arguments only and without taking any evidence. He has however dismissed the petitions on various grounds, the first of which was that neither the judgment-debtors, nor the attaching decree-holders were entitled to file the applications under O. 21, r. 90 at all. The learned Judge refers to the words of that rule, that it is only the decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale who can apply to the Court to set it aside, and he went on to find that the judgment-debtors and the attaching decree-holder were not persons interested in the result of the sale because in addition to the mortgage upon which the suit was brought in which this execution has taken place, there were further mortgages amounting to seven or eight lakhs of rupees. It was therefore in the view of the learned District Judge impossible that any money would be available for any other person than those mortgagees. Therefore even if a higher amount might be fetched by the resale, none of that amount could possibly reach the pockets of the present appellants and therefore their interests could not be said to be affected by the sale. We are unable to accept this reasoning. It appears to us too obvious to require any discussion that a judgment-debtor and an attaching decree-holder are persons whose interests are affected by the sale and it is clear further that it is only after evidence has been taken and any thorough investigation made by the Court into the position of the judgment-debtors' estate that the Court can ever come to the conclusion that the judgment-debtors or any attaching decree-holder can receive no financial

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benefit whatever from the result of their applications. We think that if the learned District Judge had been able to establish on the evidence that there could be no substantial injury afforded to the petitioners by the low amount fetched at the sale on the ground that even if a proper amount had been fetched no money would have been available for them, then his order might have been justified under the terms of O. 21, r. 90. But it is quite clear that the present appellants were persons whose interests *prima facie* were affected by the sale. We therefore disagree with the learned District Judge in regard to that particular reason for dismissing the applications.

The learned Judge then goes on to discuss the other questions raised by the petitioners and has come to the conclusion in his judgment that none of those contentions are valid. It has been strenuously argued before us that the learned Judge ought to have confined his order to the maintainability of the petitions alone and that in the absence of evidence he would not be justified in giving any findings upon the other points raised by the petitioners. This as an academical argument is one against which we say nothing, but upon examination of the contentions themselves we feel bound to say that we consider the learned District Judge was perfectly justified in dismissing the applications. There are three main contentions raised. The first is that the upset price, owing to the fraud practiced upon the Court by the decree-holder, was fixed at a ridiculously low figure in regard to all the items that were put up for sale. We are unable to see how this matter is a material irregularity which can cause any substantial injury to the appellants. It seems to us obvious that the lower the upset price on valuable land is put, the greater is the inducement for intending bidders to come and bid. The real injury suffered by the appellants if they ever suffered any injury, is obviously due to the failure of any bidders to come and bid against the decree-holder or auction purchasers, and as we have said we are unable to see how the fixing of an upset price can have possibly affected the intention of such bidders.

It is then argued that the learned District Judge in settling the proclamation of sale has adopted a method which has resulted in a substantial loss to the appellants. He should, it

is contended, have ordered the sale to be held in much smaller lots than he actually ordered, and that if he had done so, many smaller bidders who were unable to make any bid for large items of property would have attended the auction and increased the price realised by the sale. This is no doubt a very plausible argument, but we find from the records that this was raised only in these petitions and at no time during the conduct of the execution petition. The proper time for raising this contention before the Court was in the proceedings that took place before the terms of proclamation were settled. There is nothing to show that at that time or indeed at any time before the sale was held any such contentions were raised, and in the absence of any such contention it is impossible to say that the decisions of the lower Court to sell the property in the manner in which it has sold it can possibly amount to any material irregularity.

There is finally the assertion that there has been no proclamation or publication of the sale in the villages concerned and no opportunity whatever for the land owners in these villages to be aware of the fact, that the sale was going to be held or of the date on which it was to be held. This is an assertion very easily made, and contrary of course to the actual entries appearing in the records of the case. We are of opinion that it would have been advisable to have remanded this case for the taking of evidence if there had been any assertion by the appellants of any specific omission on the part of the Court to carry out its duties in the matter of the publication of the proclamation. But we are unable to find any such assertion. The assertion that there has been no publication, no proclamation and no means for bidders to become aware of the sale is a mere matter of form which is commonly resorted to by persons in the position of the appellants and it would, we think, serve no useful purpose to allow the appellants any opportunity, after five years have elapsed since the sales took place, of bringing in oral evidence to contradict the facts which appear from the records. In this case particularly we see no reason to distrust the accuracy of the official records regarding the publication of the sale as the existence of this litigation and the imminence of the sale in execution must have been a matter with which nearly everyone in the Tanjore District was familiar.

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The result is that although the learned District Judge has put forward one reason which we cannot support for dismissing these applications he has given other reasons with which we are in agreement. These appeals accordingly must fail and are dismissed. The appellants in each of these appeals must pay costs. In all of the appeals except C.M.A. Nos. 32, 33 and 161, the appellants must pay costs to the first respondent, and we fix vakil's fee at Rs. 40 in each appeal. In Appeals Nos. 33 and 161 the appellants must pay the costs of the second respondent in each appeal. In Appeal No. 32 the appellants must pay the costs of the second and third respondents. One set.

K. C. —— *Appeals dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

CT. AL. VR. Alagappa Chettiar and another .. *Appellants* (Defendants 2 and 7)*

*v.*

The Bank of Chettinad, Ltd., Kanadukathan through its Director and General Manager Pr. Al. Kasi Chettiar and others .. *Respondents (Plaintiff and Defendants 1, 3, 4, 5 and 6).*

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*Hindu Law—Joint family—Family business—Participation by junior coparcener—Effect—If liability for pre-existing debts and debts incurred by manager arises—Affairs of family business referred to arbitration—Award directing two members to wind up business—If makes them partners.*

Where a junior adult coparcener of a Hindu joint family, having a family business takes an active part in the conduct of the business he does not become personally liable for pre-existing debts of the business or debts incurred by the manager, except by reason of the applicability of the doctrine of "holding out". By such conduct he does not make himself a partner in a firm.

The view of Spencer, J., in *The Official Assignee of Madras* v. *Palaniappa Chetty*, (1918) 35 M.L.J. 473: I.L.R. 41 Mad. 824 (F.B.), relied on.

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*Chelamayya* v. *Varadayya*, (1898) 9 M.L.J. 3: I.L.R. 22 Mad. 166 followed.

*Gokal Kastur* v. *Amarchand*, (1907) 9 Bom. L.R. 1289 and the view of Sadasiva Aiyar, J., in *The Official Assignee of Madras* v. *Palaniappa Chetti*, (1918) 35 M.L.J. 473: I.L.R. 41 Mad. 824, dissented from.

*Benares Bank* v. *Krishna Das*, A.I.R. 1932 Pat. 206, referred to.

Where in a joint family business, the liabilities exceeded the outstandings and the members of the family referred the question of partition to certain arbitrators and they passed an award directing that two of the members should take over its assets and liabilities, and wind up the whole business within three years and that one of them should collect the assets of the business and they were given the option to do new business under a different *vilasam*.

*Held*, that the award did not make them partners.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai dated 3rd February, 1934, and made in O. S. No. 136 of 1932.

*B. Sitarama Rao, S. Parthasarathy, V. K. Tiruvenkatachari* and *P. P. Ramabadra Aiyar* for Appellants.

*The Advocate-General (Sir A. Krishnaswami Aiyar)* and *K. Umamaheswaran* for 1st Respondent.

The judgment of the Court was delivered by

Varadachariar, J.

*Varadachariar, J.*—This appeal arises out of a suit for the recovery of money due under a promissory note (Ex. J), executed by the first defendant in favour of the plaintiff on 4th May, 1932. The first defendant is the eldest son of one CT. AL. VR. Veerappa Chettiar who died in October, 1927. The fifth and sixth defendants are the minor sons of the first defendant; the second defendant is the younger brother of the first defendant and the seventh defendant is the minor son of the second defendant. Defendants 3 and 4 are the step-brothers of defendants 1 and 2. The plaint asked for a personal decree against defendants 1, 2 and 3 and for a decree against all the defendants to the extent of the family assets in their hands. The learned Subordinate Judge dismissed the suit as against defendants 3 and 4 and gave the plaintiff a personal decree as against defendants 1 and 2 and a decree against the family assets in the hands of defendants 1, 2 and 5 to 7. Against this decree this appeal has been preferred by defendants 2 and 7.

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In the lower Court defendants 2 and 7 contended that the suit should be dismissed as against them. Before us, this extreme contention has not been pressed on behalf of the appellants. Their learned counsel admitted that the plaintiff was entitled to a decree even as against the appellants to the extent of the joint family assets in their hands. The only question for decision in this appeal therefore is whether the second defendant was personally liable for the suit claim, so as to entitle the plaintiff to proceed against properties in his hands not forming part of the joint family assets.

The following is the history of the events that led up to the execution of the suit promissory note. In September, 1922, Veerappa opened a money-lending business in Mandalay with the *vilasam* of CT. AL. VR. and for the conduct thereof appointed one Somasundara, agent. After Somasundara's term, one Ramasami Chetti was appointed agent. For the financing of that business, Veerappa entered into an arrangement with D.W. 1 for moneys being lent to the Mandalay firm from D.W. 1's firm at Rangoon. The Rangoon firm was known by the *vilasam* of S.R.M.M.A. We however find that moneys have also been borrowed under this arrangement from the S.R.M.M.R.M. firm at Rangoon. The result of the transactions between the CT. AL. VR. firm at Mandalay and the two lending firms at Rangoon was that on 14th January, 1927, a promissory note for Rs. 10,000 was executed by Ramasami Chetti, the Mandalay agent, in favour of the S.R.M.M.A. firm and another note for Rs. 10,000 was executed in favour of the S.R.M.M.R.M. firm on 28th January, 1927, by the same agent. Veerappa died during the term of Ramasami's agency, but before Somasundara's accounts had been finally settled. At that time, the first defendant was at Penang serving as the agent of some other Chetti firm there. The correspondence that passed between the first and second defendants about this period will be referred to later on; it shows that the third defendant who had then attained majority was anxious to have a partition effected soon but that the second defendant preferred its being postponed till after the first anniversary of Veerappa's death. The first defendant returned to his native village in India in October, 1928, and soon after the celebration of the first anniversary of their father's death, the parties referred the question of partition to certain

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arbitrators—*vide* Ex. D dated 3rd December, 1928. There was an award (Ex. E) on the 8th of January, 1929, the substance of which was that shares were separately allotted to the four brothers in the house and in certain movable properties, as regards the business in Mandalay, the award directed that defendants 1 and 2 should take over its assets and liabilities. It appears from the award itself that the liabilities exceeded the outstandings; a more detailed reference to the terms of the award will be made in due course, when dealing with the arguments advanced by the parties on these terms. One provision may however be mentioned here; the award directed the assets of the Mandalay firm to be collected by the first defendant as theretofore and it also directed defendants 1 and 2 to wind up the whole shop within three years and gave them the option to do *new* business at Mandalay under a different *vilasam*. In December, 1929, an additional sum of Rs. 5,000 was borrowed from the S.R.M.M.A. firm by the first defendant. Beyond a statement in the evidence of the first defendant that this was borrowed to pay off a creditor, the wife of Vakil Mukerjee who was pressing for payment, we have little or no information on the record as to the necessity for this loan or its utilisation. On the 9th of January, 1930, a promissory note Ex. H was executed by the first defendant in respect of this sum of Rs. 5,000 and two promissory notes Exs. G and F were also executed by the first defendant renewing the Rs. 10,000 loans of 14th January, 1927 and 28th January, 1927. These three notes were signed by him as "managing partner" of the CT. AL. VR. firm. These notes were endorsed by the payees in favour of the plaintiff bank; and the suit promissory note was executed by the first defendant directly in favour of the plaintiff bank, for the amounts due under the endorsed notes Exs. H, G and F.

The plaint sought to make defendants 2 and 3 personally liable on the following ground; that when Veerappa Chettiar started the Mandalay business in 1922, it was open not merely by Veerappa but by his sons who were majors at that time, namely, defendants 1, 2 and 3—*see* paragraph 4 of the plaint. It was added that

"After the death of Veerappa Chettiar, the defendants have been conducting the said firm jointly and in partnership."

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The several promissory notes above referred to were alleged to have been executed by the first defendant as "managing partner" and in paragraph 14 of the plaint, it was stated that defendants 1 to 3 were personally bound in the capacity of partners with the first defendant. The learned Subordinate Judge held that at the time the Mandalay firm was started by Veerappa, it could not be regarded as a "partnership" between the father and his major sons but was only a joint family business in which the father and his sons were interested as members of a joint family. The sons, though they were adults, were not in his opinion partners in the firm (*see* end of paragraph 6 of the judgment). He however held that after the death of Veerappa in October, 1927, defendants 1, 2 and 3 became partners of the firm, apart from their being members of a joint family (*see* end of paragraph 11 of the judgment). He also held that by virtue of the award, Ex. E, in which defendants 1 and 2 acquiesced, they became partners in the firm and had been so till the date of suit. As the third defendant became severed from the partnership and from the family, in consequence of the award, the learned Judge dismissed the suit as against him. As the fourth defendant had all along been a minor, there was no possibility of his having become a partner at any time; and on the footing that he too had become divided from the first defendant in consequence of the award, the suit was dismissed as against him also.

The finding that during Veerappa's lifetime, the relation of defendants 1, 2 and 3 to the Mandalay business was only that of members of a joint Hindu family to a family business and not that of partners has not been challenged before us. The second defendant at one stage attempted to suggest that the Mandalay business was not even a joint family business but was started by Veerappa only for the benefit of the third defendant; but this contention has not been pressed and it is obvious from Exs. D and E that the parties have proceeded on the footing that the Mandalay business was a family business, though started for the first time by the father. The learned Counsel for the appellants has attacked the correctness of the lower Court's conclusion that after Veerappa's death, the relation between defendants 1, 2 and 3 in respect of that business became changed into that of partners from that of members of

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a joint Hindu family. He has contended that the course of conduct relied on by the learned Subordinate Judge as leading up to this conclusion does not warrant that conclusion. He has also challenged the correctness of the finding that defendants 1 and 2 became partners by reason of the award Ex. E. This last question would be material if it should be held that the learned Judge was not right in his conclusion that even prior to the date of the award defendants 1, 2 and 3 had become partners. It will be convenient first to dispose of the argument found by the lower Court upon the award.

As stated already, it appears from the recitals in the award that the liabilities of the Mandalay shop exceeded the outstandings and that accordingly early arrangements had to be made for the collection of the outstandings and the discharge of the liabilities. The fourth defendant was still a minor and on this and on other grounds set out in the award, the arbitrators thought it better that the duty of winding up the Mandalay shop should be left to defendants 1 and 2. They accordingly provided in paragraph 9 of Ex. E, that defendants 1 and 2 should take charge of the Mandalay shop, that the first defendant should manage *as heretofore,* collect the outstandings and wind up and close the shop and that if for the purpose of enabling him to do so, any papers had to be signed or documents executed by the other parties, the same should be done by them without any objection. Then follows the provision, already referred to, that if defendants 1 and 2 should agree to continue to conduct the said shop, they should within three years discharge the existing liabilities; wind up the whole shop, change the present *vilasam* of CT. AL. VR. by substituting another *vilasam* and conduct the shop as they liked. This provision makes it clear that all that was contemplated by the award was that the CT. AL. VR. business should be wound up and it was expected that it might be done within three years from that date. No new business was contemplated to be done under the old *vilasam.* It is admitted by the first defendant in his evidence as P.W. 7 that after the award, no new account was opened and no new business was done. On the terms of the award, it is difficult to interpret it as changing the pre-existing legal relationship between defendants 1 and 2 in so far as the old business was concerned. We shall presently consider whether prior to the date of the award, the relationship between defen-

dants 1 and 2 had become that of partners or not. But it seems to us clear that if they had not already become partners, there is nothing in the terms of the award to make them partners and nothing in their subsequent conduct to create that relationship between them. It is therefore impossible to base on the terms of the award or the conduct subsequent thereto any conclusion to the effect that on 9th January, 1930, when Exs. H, G and F were executed or on 4th May, 1932, when Ex. J was executed, defendants 1 and 2 stood towards each other in the relationship of partners.

The evidence relating to the manner in which the parties conducted the Mandalay business between the date of Veerappa's death and the date of Ex. D (the reference to arbitration) is furnished by a few documents. We may point out at the outset that in respect of this period, no evidence has been placed before us as to the nature or the volume of business done at Mandalay. The tenor of the few letters that have been exhibited in the case suggests that even during Veerappa's lifetime, the business had not been profitable and that all that was done after his death was only in the way of winding up the business by collecting the outstandings and discharging the liabilities. A few account books have been produced but no attempt has been made to show either from these accounts or by any question put to the witnesses whether any and if so how much new business was done by the Mandalay firm after Veerappa's death. The management of a firm like this in foreign parts is carried on by a course of voluminous correspondence between the agent on the spot and the principals at home. Very few letters have been produced relating to the conduct of any business at Mandalay during this period. The first defendant is supporting the plaintiff's claim as it will benefit him by diminishing the extent of his liability. It is he who has produced some of the letters which have been exhibited in this case and there is no reason to think that he would have had any difficulty in producing other letters, if any, throwing light on this aspect of the matter were in existence. He admits that the account books of the firm are in Mandalay; we are therefore entitled to assume that beyond what have been produced in this case, there is nothing which contains any useful information.

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The period commencing with Veerappa's death opens with the letter Ex. W written by the second defendant to the Mandalay agent Ramasami Chetti on the 15th November, 1927. It acknowledges receipt of a sum of Rs. 1,000 sent from Mandalay by insured post. It refers to the fact that a letter said to have been sent from Mandalay on the 10th Arpisi, that is, about 20 days before the date of Ex. W has not been received here and asks for a copy of that letter. The last sentence of that letter is significant; it is to the following effect:—

"Please be sending copy of day book and balance sheet to C.T. to Penang."

"CT" refers to the first defendant who was then employed in Penang as agent in another shop there. This last sentence relates to the practice of Chetti agents in foreign parts sending every month or every fortnight to their principals here copies of their day book and also sending now and then something in the nature of a balance sheet (called *Ainthugai* in Tamil). There is a reference in Ex. Y-2 which is the missing letter referred to in Ex. W to a suggestion that had been made by the first defendant that day book copies and balance sheets might be sent to him to Penang. But when it is remembered that at the time of writing Ex. W, the second defendant had not seen the letter Ex. Y-2 the reasonable inference seems to us to be that the course of practice must have already come into existence of these copies being sent from Mandalay to Penang and that the second defendant was probably aware of it. The continuance of that practice is more consistent with the hypothesis that the second defendant did not wish to bring about any change in his relation to the business. The receipt of the sum of Rs. 1,000 by insured post is explained as being connected with the expenses of Veerappa's funerals. The practice in the community is that its members keep very little cash in India and on occasions when they require cash, they generally get it down from their firms abroad. Nothing contained in Ex. W suggests any change in the relationship of the second defendant to the family business at Mandalay. If, therefore, his connection with that business was that of a junior member of a family having a family business, Ex. W is consistent with that position being continued even after Veerappa's death.

Ex. Y-2 is the copy of the missing letter which was apparently written by the Mandalay agent in ignorance of

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Veerappa's death. It is not possible to say whether it was addressed to Veerappa or to the second defendant. The description of it in the printed record as a letter addressed to the second defendant is obviously unwarranted. The third paragraph of this letter refers to a suggestion that had been made by the first defendant to the effect that after he received the day book, etc., copies at Penang he would send the same "to you after perusal." We see nothing to justify the contention that the word "you" in this paragraph refers to the second defendant; in all probability it was intended to refer to the father as the agent was not then aware of the father's death. No other letter has been produced which will show that either before this date or after this date any kurippu copy of *Ainthugai* has been sent to the second defendant either in the ordinary course from Mandalay or by the first defendant from Penang. Ex. Y the letter written by the Mandalay agent to the second defendant on 23rd November, 1927, merely enclosed the copy of Ex. Y-2 and carries the matter no further than Ex. Y-2 itself. Ex. Q dated 18th January, 1928, throws very little light upon the matter now under consideration. It is a communication from the second defendant to the first defendant; it refers to the insistence of the third defendant on an early partition but advises its postponement on grounds of decency till after the first anniversary of the father's death. There are two other sets of documents relating to this period and it is on them that great stress has been laid both by the lower Court and by the learned Counsel for the respondents before us, in support of the argument that during this period, the second defendant was so conducting himself in relation to the Mandalay business as to incur a personal liability for its debts. Before dealing with these documents, it is necessary to ascertain with some precision the legal basis on which the second defendant's liability is sought to be sustained. Several decisions relevant to this question have been brought to our notice in the course of the argument; it does not however appear to us necessary to refer to every one of them in detail. They may be conveniently grouped under certain heads. There are observations in some judgments in support of the extreme view that all adult coparceners in a joint Hindu family carrying on a family business are in the position of partners and are personally liable for debts contracted by the manager for the conduct of

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the business (*see* for instance *Debi Dayal* v. *Baldeo Prasad*[1] and the observations of Sadasiva Aiyar, J., in *The Official Assignee of Madras* v. *Palaniappa Chetti*[2]). This extreme view has not been sought to be supported before us by the learned Advocate-General who appeared for the respondents. Indeed, it cannot be reconciled with the positive insistence made by the Legislature in S. 5 of the Indian Partnership Act of 1932 that the relationship of partners arises from contract and not from status. The next paragraph of that section, which is merely a declaration of the pre-existing law, provides in express terms that the members of a Hindu undivided family carrying on a family business as such are not partners in the business. There is another line of authority holding that such of the adult members as take an active part in the conduct of the business must be regarded as incurring a personal liability for the debts contracted by the managing member (*cf.* for instance *The Official Assignee of Madras* v. *Palaniappa Chetti*[2], *Joharmal Ladhooram* v. *Chetram Harisingh*[3], *Shiv Charan Das* v. *Hari Ram*[4], *Sheo Ram* v. *Luta Ram*[5], *Nachiappa* v. *Raman*[6], *Bishambhar Nath* v. *Fateh Lal*[7] and *Ramaswami Chettiar* v. *Srinivasa Aiyar*[8]). It is not clear whether in these cases the personal liability of the participating members was based only on the doctrine of "holding out" or on the view that by such participation they changed their relationship from that of coparceners in the joint family to that of "partners" in the business. For instance, the observations of Spencer, J., in *The Official Assignee of Madras* v. *Palaniappa Chetti*[2] seem to proceed on the theory of "holding out"; but the observations of many other learned Judges merely postulate the liability without precisely defining its basis. It cannot be denied that the language sometimes used by them suggestes that the participating members were regarded by them as "partners". If active participation in the business is to be accepted as affording a new basis of liability it will be obvious that the basis of the liability thus arising must be

1. (1928) I.L.R. 50 All. 982.
2. (1918) 35 M.L.J. 473: I.L.R. 41 Mad. 824 at 837 and 838.
3. (1914) I.L.R. 39 Bom. 715.
4. (1935) I.L.R. 17 Lah. 395.
5. A.I.R. 1937 Lah. 6.
6. A.I.R. 1935 Rang. 227.
7. (1906) I.L.R. 29 All. 176.
8. (1935) 70 M.L.J. 214.

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more precisely defined; because the extent of the liability incurred by the participating member will be different according as it is based upon the one ground or the other. For instance, if it is based on the theory of "holding out" it is only persons who have acted on such representation or on the faith of the "holding out" that can claim to hold the participating member liable, whereas if such participation is to be regarded as giving the participating member the status of a partner, he will become liable to all persons dealing in the ordinary course with the business independently of any question whether or not they were aware of the participation by the particular member. Another aspect of this question which has also been left vague in the decisions is as to whether the participating member becomes personally liable only for obligations incurred subsequently to his participation or even for debts existing at the time that he begins to take part in the business. If his liability is to be based on the doctrine of "holding out", it is obvious that such liability can arise only in respect of transactions subsequently entered into and on the faith of his conduct. Even if it should be held that by such participation the coparcener becomes a partner in the business, it seems to us unreasonable to hold that he thereby incurs a personal liability in respect of the pre-existing debts of the business. So far as we have been able to examine the cases cited to us, none of them has held the participating member liable for pre-existing debts (*see* for instance the judgment for Sir John Wallis, C. J. and Spencer, J., in *The Official Assignee of Madras* v. *Palaniappa Chetti*[1]). But in many of these cases the position was complicated by the fact that prior to the participation the member in question was a minor. The learned Advocate-General relied upon a decision of the Patna High Court reported in *Benares Bank* v. *Krishna Das*[2], as holding the participating member liable even for pre-existing debts. The facts are not clear from the report and though the language used is wide, we do not feel sure whether the learned Judges meant to lay down this proposition in that case. We are unable to carry the doctrine of these cases to the extent of postulating personal liability for pre-existing debts for one reason, namely, that even the analogy of a partner formally admitted into a going concern will not

1. (1918) 35 M.L.J. 473: I.L.R. 41 Mad. 824.
2. A.I.R. 1932 Pat. 206.

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support this extreme contention; as laid down in S. 31 of the Indian Partnership Act the person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner (*see also* Lindley on Partnership, 10th Edn., p. 266).

We must add that the decisions which infer a partnership from mere participation of the junior coparcener in the business have not gone unchallenged. In *V.R. C.T. V.R. Chettiar* v. *C.A.P.C. Chettiar*[1], Page, C. J., critised this line of authority in forcible language and in *Sitharama Chettiar* v. *Sivagurunatha Chettiar*[2], a Division Bench of this Court refused to hold that active participation in the family business by a junior member would suffice to make him a partner in the business—see also *Murari Lal* v. *Ghudhumal*[3]. This last line of cases lays stress on the fact that the relationship of partners can arise only from a consensual act and that the participation by a junior coparcener in the family business is sufficiently explained by his interest therein as a member of the family and cannot justifiably be attributed to an intention to take upon himself a greater liability than would exist if the business was regarded only as a family business. We cannot help thinking that there is a great deal to be said in favour of this last mentioned view. But for the purpose of this case we do not find it necessary to choose definitely between these two lines of authorities. No case of 'holding out' has been put forward in the present suit; D.W. 1 who was the original lender and (later) also chairman of the Board of Directors of the plaintiff-Bank only speaks of the CT. AL. VR. firm as having belonged to Veerappa and his sons 'as members of a joint family.' The two promissory notes for Rs. 10,000 each came into existence during Veerappa's life-time, that is, long before there was any scope for the argument based upon the second defendant's conduct. In this connection, we may also refer to the observations in *Chalamayya* v. *Varadayya*[4], with reference to the circumstances in which one member of a joint Hindu family can be made personally liable for debts incurred by the manager. Though some doubt has been cast on the correctness of these observations by Chandavarkar, J.,

1. (1936) I.L.R. 14 Rang. 122.
2. (1930) M.W.N. 437.
3. A.I.R. 1933 Lah. 1018
4. (1898) 9 M.L.J. 3: I.L.R. 22 Mad. 166.

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in *Gokal Kastur* v. *Amarchand*[1], and by Sadasiva Aiyar, J., in *The Official Assignee of Madras* v. *Palaniappa Chetti*[2], the correctness of the principles there laid down has been accepted in nearly all other reported decisions and with all respect we venture to think that the observations in *Chalamayya* v. *Varadáyya*[3], enunciate the true principle. We have come to the conclusion that judged by the test there laid down, it is not possible to hold the second defendant personally liable for the suit debt or for the debts which were consolidated by the suit promissory note.

The second defendant's conduct relied on in this connection is evidenced by Ex. P, dated 19th December, 1927 and by the set of documents (Exs. A, B and R) relating to the settlement of the accounts of the first agent Somasundara. Exs. Z and Z-1 also bear upon this last topic. Ex. P is a hundi admittedly drawn by the second defendant on the Mandalay firm. It was for a sum of Rs. 301 payable to the sister Seetha for the value of presents usually made in the community on festive occasions during the first three years after a girl's marriage. It is important in judging of the value of this document to remember that this document was in fact never presented at Mandalay for payment; it is often the practice in the community that hundis drawn for such purposes are not presented for payment but are generally paid for in cash in the native village itself. The hundi is drawn more as a matter of honour and is a kind of evidence of the gift of the presents; in due course, the cash is paid in the village itself. Even assuming that this hundi is to be given greater weight than the circumstances above adverted to allow, it does not justify the conclusion that the second defendant was drawing it as *partner* in the firm. It has not been disputed that the amount was payable as a matter of custom and as we have already stated, it is the practice in the community to draw from the firm abroad for all important cash requirements here. The first defendant who was the managing member of the family was away in Penang at the time and it fell to the second defendant who was the next senior member of the family to draw the hundi as per the

1. (1907) 9 Bom.L.R. 1289.
2. (1918) 35 M.L.J. 473: I.L.R. 41 Mad. 824.
3. (1898) 9 M.L.J. 3: I.L.R. 22 Mad. 166.

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custom. The calling up of money from the family firm on an occasion like this in no way differs from the calling up of money for the funeral expenses of Veerappa. As the terms of the hundi itself indicate, the amount had to be merely debited to the headquarters account and not to any personal account of the drawer. It only remains to add that the *vilasam* in which the second defendant has signed the hundi is the family *vilasam* and has no particular relation to the *vilasam* of the business, except for the fact that the business also was being carried on in the family *vilasam*.

The documents relating to the settlement of Somasundara's account have to be understood in the light of the fact disclosed by the letters themselves that the conduct of the agency by Somasundara had apparently not been very profitable to the family and the family even suspected that Somasundara had misconducted himself in the course of his agency. In the ordinary course, his account would have been settled as soon as he returned to India on the completion of his term, but the settlement seems to have been delayed apparently because the family wanted to have fuller information as to the details of his management before deciding whether to release him from all liability or to hold him liable for any particular amount in respect of losses incurred during his agency. After Veerappa's death the settlement must in due course have been brought about by the first defendant who was the eldest member; but as the first defendant was away at Penang or at Kualalumpur about this time, he seems to have left it to the second defendant to do the needful in the matter. This is made clear by his querry in Ex. Z-1 as to what had been done with Somasundara in respect of the amounts due from him. As often happens in these disputes between the principal and the agent, the parties sought the help of mediators and the documents show that they availed themselves of the services of Dewan Bahadur K. M. Murugappa Chettiar in settling the disputes, with the result that Somasundara executed the promissory note Ex. A in favour of the first defendant for a sum of Rs. 5,250 as representing his consolidated liability on the result of the accounts. On the execution of Ex. A the receipt (Ex. B) was passed, signed by the second and third defendants first and signed by the first defendant later on. This settlement was reported by the second defendant to the first defendant in Ex. R.

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Ex. Z is a letter which preceded the settlement and shows the kind of enquiries that the second defendant was making before settling the question of Somasundara's liability. Taking this group of documents as a whole, we fail to see how they carry the matter farther than what the second defendant might reasonably be expected to do as a member of the family interested in the family business at Mandalay.

It seems to us unreasonable to insist that the adult members of a joint Hindu family should take no interest whatever in the family business except on pain of becoming personally liable for all the transactions of the managing member. Under the Hindu Law, their share in the family property is undoubtedly liable for the liabilities incurred by the manager and they certainly stand to gain, even as joint family members, by the successful conduct of the business. Where the family property consists of other kinds of assets as, for instance, landed property or outstandings, it is not uncommon for junior members to take an active part in the supervision of such property, whether it consists in cultivation or in the collection of outstandings. No one has gone the length of saying that the participation by an adult member in business of the last mentioned kind involves him in personal liability for family debts borrowed by the manager. A distinction may arise so far as participation in trade is concerned, by reason of the applicability of the principle of 'holding out' in this line of cases, but except to the extent resulting from that doctrine, it does not seem to us fair or useful to insist that no junior member of a joint Hindu family has any right to take any interest in the affairs of the family trade. The present case itself illustrates the necessity and propriety of the junior member concerning himself in the affairs of the business. The last agent had made a mess of the bnsiness; the father was dead and the first defendant was away at Penang. The second defendant as the next eldest member of the family was the only person fit to take steps for settling the accounts of the previous agent if heavy loss to the family was to be averted; and, for the purpose of settling his account, he had necessarily to get adequate information as to the way he had conducted the business.

Undue stress cannot be laid on the fact that the receipt (Ex. B) is signed by all the three adult members. That is only to be expected for the protection of the agent. On the other

hand, it is significant that the promissory note taken is taken only in the name of the first defendant; and the evidence of the first defendant and of Somasundara shows that the promissory note account was settled wholly between Somasundara and the first defendant himself, a large remission having been made by the first defendant, without any reference to the second defendant.



The above remarks also apply to the direction in the opening part of Ex. Z a letter written by the second defendant to the agent Ramasami Chetti on the 4th of April, 1928. He advised him to collect such items as could be collected, without delay and pay up the liabilities. Certainly if the family property was liable for the business debts, the second defendant as a member of the family was justified in advising the agent to do his best to pay up the liabilities from out of the outstandings without adding to the liability of the other properties of the family. It has also to be borne in mind in appreciating the significance of these letters that, as we have already observed, there is no evidence to show that any new business was carried on subsequent to Veerappa's death. What then was the partnership in which the second defendant is to be held to have become a member, *ex hypothesi* he was liable only to the extent of the family assets in respect of the transactions entered into during the father's lifetime. All that he is shown to have done by the letters above referred to is that he took steps to reduce the liability of the family as far as possible, by insisting that the accounts of the former agent should be properly settled and that the debts of the business should as far as possible be paid off by the collection of its own outstandings. It seems to us impossible to suggest that for this purpose he must have changed or must be deemed to have changed his relationship from that of a junior coparcener in a joint Hindu family to that of a partner. We must accordingly express our dissent from the conclusion of the learned Subordinate Judge that by his conduct the second defendant had made himself a partner in the Mandalay firm or had incurred a personal liability for the debts of that firm.

Relying upon the observations in *Chalamayya* v. *Varadayya*[1], the learned Advocate-General contended that by the conduct

1. (1898) 9 M.L.J .3: I.L.R. 22 Mad. 166.

above referred to, the second defendant must at least be held to have become personally liable on the ground of acquiescence or adoption or ratification. We are unable to hold that there is any basis for this contention. There is no scope here for the application of the doctrine of "ratification" in the true sense. The agent who executed the original promissory notes for the two sums of Rs. 10,000 never purported to act as the agent of the second defendant. It is impossible to think of it, when it is remembered that these notes were executed during the father's lifetime and as we have already stated, at that stage the business was only an ordinary joint family business. The utmost that could be inferred from any alleged acquiescence or adoption of the same by the second defendant is that he could no longer be heard to say that it was not binding on the family; there is no reason to read more into the second defendant's conduct and imply therefrom that he intended to convert his limited liability as a coparcener into an unlimited liability as a partner or a contracting party to the transaction.

As regards the item of Rs. 5,000 borrowed in December, 1929 and referred to in Ex. H, the plaintiffs' case stands on an even less firm ground than in respect of the two earlier loans of 10,000 each. The award (Ex. E) had been passed in January, 1929 and according to its terms the Mandalay business had only to be wound up; this sum of Rs. 5,000 was borrowed only at the end of 1929, that is, more than 11 months after the award. It has not been shown that this borrowing was necessary for the purposes of the winding up; it is very doubtful whether even in a regular partnership, one partner can in the course of winding up incur a debt so as to throw upon the other partners a personal liability therefor.

Before us, the learned Advocate-General urged a different line of argument on the strength of certain provisions in the award. Referring to the provision in the award throwing the liability for the debts of the family including those of the Mandalay business on defendants 1 and 2, he contended that there was an implied indemnity in favour of defendants 3 and 4 in respect of the same and he argued that for the purpose of discharging his obligations under that covenant, the first defendant was entitled to enter into transactions like those evidenced by Exs. H, G, F and J even to the extent of throwing an unlimited or personal liability on the second

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defendant. We are unable to follow this argument. It is true that as between defendants 1 and 2 on the one hand and defendants 3 and 4 on the other the arbitrators directed defendants 1 and 2 to discharge the debts; but that did not of itself involve any change in the nature of the pre-existing liability of defendants 1 and 2 for these debts, either as between themselves or between them and the creditors. The mere fact that an indemnity could be claimed by defendants 3 and 4 if occasion should arise for it will not admittedly avail the creditor who was no party to this arrangement. Assuming that if such division of liability took place by a contract between the parties, there can be any justification for the argument now urged before us, we see even less justification for it when the arrangement is brought about by an award. It was not by his choice that the second defendant agreed to indemnify defendants 3 and 4, but he had to submit to the award made by the arbitrators. He denied that he acquiesced in it but we are not prepared on the evidence to hold that he ever objected to it. But we see no justification for reading into the award the further provision that even as between defendants 1 and 2 the second defendant's liability for the existing debts should become different or that the first defendant should in carrying out the duties imposed upon him by the award be empowered to throw a personal liability on the second defendant. If one is to rely on the terms of the award in this connection, the second defendant is entitled to urge that the power of management given to the first defendant by cl. 9 was only to the effect that the first defendant should manage as *heretofore*. Even if the personal liability of the first defendant existed already, we see no basis for the argument that the first defendant was empowered to shift that liability on to the second defendant as well.

The only document subsequent to the award that remains to be noticed is Ex. AA, dated 4th April, 1929. In that letter the second defendant refers to one Kuttayan Chetti who was for some time working in the Mandalay firm. It was produced to contradict a statement foolishly made by the second defendant from the witness-box that he was not aware of this Kuttayan Chetti at all. The letter undoubtedly shows that the second defendant knew of Kuttayan Chetti and was annoyed at his removal by the first defendant from service in the Mandalay firm. But we do not see that that circumstance carries the

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plaintiff's case any further than what the other documents help to do. As we have already mentioned, after the award there was no question of any new business. The letter is written to a stranger and the second defendant there complains of the conduct of the first defendant in getting rid of Kuttayan Chetti after a service of about two months. We may note in this connection that there is nothing to warrant the first defendant's statement that Kuttayan Chetti was sent by the first and second defendants; but even if it had been so done, we see no particular significance in that circumstance because he must obviously have been sent only to wind up the concern as per the directions in the award. On the other hand, there is more significance in the fact admitted by the first defendant in his cross-examination that when after Veerappa's death occasion arose for giving a power-of-attorney to Ramasami Chetti, the agent, the second defendant refused to execute a power-of-attorney. If anything, this clearly suggests that the second defendant declined to undertake the role of a partner even at that stage.

For the above reasons, we hold that the learned Judge was not justified in holding that by reason of his conduct the second defendant had made himself personally liable for the suit debt. The decree of the lower Court must accordingly be varied by deleting the reference to the second defendant in the earlier part which contains the declaration of personal liability. The second defendant must also be exonerated from personal liability so far as the payment of costs in the lower Court is concerned. Having regard to the extreme contention put forward by the second defendant in the lower Court, we do not propose to interfere further with that Court's order as to costs. The appellants will be entitled to the costs of this appeal, to be paid by the first respondent.

S. V. V. ——— *Decree modified.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.].

PRESENT:—LORD WRIGHT, LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

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Partap Singh v. Sant Kaur.

Partap Singh and another .. *Appellants**

*v.*

Sant Kaur and another .. *Respondents.*

*Minor—Contract by—Void nature—Person unauthorisedly entering into contract for minor—Same whether can be upheld as family settlement.*

* P. C. Appeal Nos. 1 and 2 of 1937. 1st April, 1938.

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It is true that if a compromise has been entered into in good faith by the manager of a Hindu joint family, or by a father in such family, a minor member of the family cannot be allowed to disturb it on the ground of inequality of benefit, unless there was fraud or some other ground which in law vitiates it. This rule proceeds upon the principle that the minor was properly represented by the father or the manager of the family; and he was therefore a party to the compromise. The rule does not offend against any law governing a contract. Consequently a party cannot by describing a contract unauthorisedly entered into on behalf of a minor as a family settlement claim for it an exemption from the law governing the capacity of the minor to make a valid contract.

Decision of the Lahore High Court affirmed.

Appeal from a judgment and decree of the High Court of Judicature at Lahore reversing a judgment of the trial Judge.

*Robert Ritson* for Appellants.

*J. M. Parikh* for Respondents.

1st April, 1938. Their Lordships' judgment was delivered by

Sir Shadi Lal.

Sir Shadi Lal.—On the 17th August, 1920, Mussammat Jiwani, the widow of one Sham Singh died, leaving her surviving two illegitimate daughters, Sant Kaur and Basant Kaur. Mussammat Jiwani was the proprietor of four squares of land in the district of Lyallpur in the province of the Punjab. This land was originally in the occupation of her husband as a tenant of Government, but he died in October, 1901, without acquiring the proprietary rights by paying the price thereof in compliance with the rules applicable to the acquisition of ownership by a tenant of Government. It was only after his death that Mussammat Jiwani paid the price and became the owner of the land in August, 1910.

The question of succession to the land arose shortly after her death. In the course of the proceedings taken by the Revenue Officer for the mutation of names in respect of the estate, the right of the daughters to inherit it on the death of their mother was denied by Sham Singh's collaterals, who laid claim to the whole of the property as his heirs. There were three collaterals, namely, Gujar Singh, the son of Sham Singh's paternal uncle, and Partap Singh and Kartar Singh, the sons of Gujar Singh's brother, Sarmukh Singh. They claimed to exclude the daughters from the inheritance, but the dispute was settled between them and the daughters by a compromise, the terms of which were embodied in a deed executed on the 22nd April, 1921. The estate was divided among all the claimants, one square was allotted to each of the daughters, and the remaining two squares

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were awarded to the collaterals. It was, however, provided that the girls would have only a life interest in the land assigned to them, without any right of alienation; and that on the death of each, her square would devolve upon the collaterals.

It is common ground that the younger girl, Basant Kaur, was a minor at that time and was represented by Gujar Singh who purported to act as her guardian in consenting to the distribution of the land. The Revenue Officer, who was dealing with the mutation proceedings, directed that the land should be entered in the revenue record in favour of the various parties in accordance with the settlement arrived at by them.

On the 15th August, 1927, Gujar Singh made a gift of his square to the two girls and executed a deed of gift in their favour. This deed was followed by another document, which he executed on the 16th August, 1927, by which he relinquished in their favour his right to succeed to their land on their deaths. Thereupon, Partap Singh and Kartar Singh brought, on the 8th October, 1927, an action against the girls and Gujar Singh for a declaration that neither the deed of gift nor the deed of relinquishment should affect their reversionary interest in the property.

On the 31st October, 1927, the girls instituted a suit for possession of the square which had been allotted to Partap Singh and Kartar Singh, and claimed that they (the girls) were entitled to succeed to the whole of the estate belonging to their mother, and that they were not bound by the deed of settlement which was entered into during their minority.

The Trial Judge held the deed of settlement to be binding upon the parties, and while dismissing the girls' suit for possession of one square, granted a declaratory decree in favour of Partap Singh and Kartar Singh with respect only to the deed of gift impeached by them. The girls appealed to the High Court against both the decrees in so far as they were against them, and their appeals were accepted, with the result that their suit for possession of one square was decreed against the collaterals, and the suit brought by the latter for declaration was dismissed *in toto*.

From the judgment and the decrees of the High Court Partap Singh and Kartar Singh have brought to His Majesty in Council two appeals, which have been consolidated. The vital question, which requires determination, is whether the deed

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of settlement is binding upon the girls. As stated already, it was their mother, Mussammat Jiwani, who paid the price for the land to Government, and it was not disputed in the Trial Court that she had thereby acquired the rights of ownership in the property. Indeed, it is stated by the High Court in their judgment that the learned Counsel for Partap Singh and Kartar Singh conceded before them that "but for the deed of 1921, the daughters were the only rightful heirs of Mussammat Jiwani." Does that deed create an obstacle in the way of their right to succeed to the whole of the estate left by their mother?

*Ex concesso*, the younger girl, Basant Kaur, was a minor on the date of the deed of settlement, but Gujar Singh adopted the role of her guardian for entering into the contract on her behalf. It is, however, clear that he was neither appointed her guardian by any Court, nor could claim that status under the law applicable to her. He himself wanted a share in the estate, and this claim was adverse to her right to succeed, with her sister, to the whole of the estate. The rule of law is firmly established that a minor is not competent to make a contract, and as Gujar Singh had no authority to enter into a contract on her behalf, the deed of settlement must be held to be a void transaction as against her.

Whether her elder sister, Sant Kaur, also was a minor at that time is a matter in controversy between the parties. The date of her birth cannot be ascertained with any reasonable certainty, but the circumstances mentioned by the High Court justify the inference that she had not attained the age of majority on the date in question. In any case however, the elder sister would not be bound if the transaction was unenforceable as against the younger. Their Lordships, after examining the relevant material on the record, see no reason to dissent from the conclusion reached by the learned Judges of the High Court. It is not suggested that Gujar Singh or any other person even purported to act on her behalf as her guardian.

It is, however, argued that the transaction should be upheld, because it was family settlement. Their Lordships cannot assent to the proposition that a party can, by describing a contract as a family settlement, claim for it an exemption from the law governing the capacity of a person to make a valid contract. It is true that if a compromise has been entered into in good

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faith by the manager of a joint Hindu family, or by a father in such family, a minor member of the family cannot be allowed to disturb it on the ground of inequality of the benefit, unless there was fraud or some other ground which in law vitiates it. This rule proceeds upon the principle that the minor was properly represented by the father or the manager of the family; and he was, therefore, a party to the compromise. The rule does not offend against any law governing a contract.

As regards the transaction for the distribution of squares in the present case, it is not proved that there was any person who had authority, either under the law of contract or under the personal law applicable to the minors, to make the compromise on their behalf, surrendering a moiety of their inheritance to persons who were not entitled to it.

Their Lordships have no hesitation in holding that the compromise invoked by the appellants cannot bind the daughters of Mussammat Jiwani. They will, therefore, humbly advise His Majesty that the appeals should be dismissed with costs.

Solicitors for Appellants: *Nehra & Co.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

R. C. C. —— *Appeal dismissed.*

B. V. V.

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD WRIGHT, LORD ROMER, SIR SHADI LAL AND SIR GEORGE RANKIN.

Sir Hukumchand Sarupchand, *Kt.* .. *Appellant**

*v.*

Hansraj Harji and another .. *Respondents.*

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Hukumchand Sarupchand *v.* Hansraj Harji.

*Practice—Appeal—Appellate Court as Court of rehearing—Finding of trial judge—How far binding.*

The appellate Court is a Court of Appeal on facts as well as of law and the appeal is a rehearing, and consequently the appellate Court may have to consider whether there are not such surrounding facts as make it impossible to accept the finding of the trial judge even though the latter had the advantage of seeing and hearing the witnesses.

Decision of the Bombay High Court affirmed.

Appeal from a judgment and decree of the High Court of Judicature at Bombay reversing a decision of the same Court on its original jurisdiction.

* P. C. Appeal No. 21 of 1937. 7th April, 1938.

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Hukumchand Sarupchand *v.* Hansraj Harji.

Lord Wright.

*Lionel L. Cohen, K.C.* and *J. M. Parikh* for Appellant.

*L. P. E. Pugh, K.C.* and *S. Hyam* for Respondents.

7th April, 1938. Their Lordships' judgment was delivered by

LORD WRIGHT.—The question in this appeal is whether a firm called Hukmichand Rambhagat and Company (hereafter for convenience described as H.R. & Co.) consisted at the material times of two partners, namely, Hansraj Harji the first respondent and a firm of Hukmichand Rambaghat (hereinafter described as H.R.) or of three partners, namely, the first respondent and two other persons, the appellant and the second respondent Mamraj Rambaghat, who were the partners in H.R. In other words were there three separate partners, or only two? The importance of the question is that H.R. & Co. sustained heavy losses and has been wound up, and the second respondent is also insolvent. Hence if H.R. were as a firm partners in H.R. & Co., H.R., in which the appellant is now the solvent partner, will have to make good the loss in respect of H.R. & Co. in the proportion of 12 annas in the rupee to 4 annas, which is the share of the first respondent, whereas if the appellant and the second respondent were separate partners in H.R. & Co. in equal proportions of 6 annas each, the liability of the appellant will be proportionately reduced.

The facts may be thus summarised. The appellant, who is a business man on a large scale, having his principal place of business at Indore, was concerned in many subsidiary partnerships in other parts of India. Among these was the firm of H.R., which had its principal office at Bombay. In 1916, he decided to embark on business operations in Japan and for that purpose the firm of H.R. & Co. was formed, its partners being the firm H.R., the first respondent and one Vali Mahomed, who was in charge of the Kobe or Japan branch. The shares were at first Vali and the first respondent $2\frac{1}{2}$ annas each, H.R. 11 annas. The partnership agreement was in writing and was originally for three years. H.R. provided the capital. At the end of 1919, the agreement was extended for a further period of three years and the partners' shares were varied, Vali's share being increased to 3 annas and the share of H.R. being decreased to

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$10\frac{1}{2}$ annas. This was indorsed on the agreement. About the end of 1921, it was discovered that Vali had been guilty of irregularities in Japan. It was decided to dissolve the partnership. Vali was to go out and his share of 3 annas was to be divided into two parts, $1\frac{1}{2}$ annas share going to the first respondent, the other $1\frac{1}{2}$ annas share going to the other partner or partners, so as to make a 12 annas share. The dispute is whether at the same time, what had been beyond question up to that time the undivided interest of H.R. was split up into two separate and equal shares of 6 annas each, one share being that of the appellant and the other that of the second respondent. Wadia, J., accepted the appellant's evidence that this had been agreed at an interview in December, 1921, at which the two respondents were present or represented, though Vali was neither present nor represented. The High Court in appeal found it impossible to take that view, as the onus to establish this change in the constitution of H.R. & Co. rested on the appellant and in their opinion he had failed to satisfy that onus. The High Court in appeal accordingly allowed the appeal from Wadia, J., and declared that the shares in H.R. & Co. were 12 annas in the rupee for the appellant and second respondent as partners in H.R. and 4 annas in the rupee for the first respondent. The appellant now appeals.

The question is purely one of fact, partly depending on the voluminous oral evidence, partly on a number of documents, partly on the probable inferences from proved facts. Wadia, J., really decided the case on the oral evidence of the appellant, as to what passed at the interview referred to above. He said he regarded the appellant as a generally reliable witness, though on certain not unimportant matters he could not accept his evidence. On the other hand, he rejected the evidence of the other side denying that any such arrangement changing the constitution of H.R. & Co. had been arrived at. There was no corroboration of the appellant's testimony as to the material allegation, unless some corroboration is to be found in the accounts of H.R. & Co. kept at Bombay for the years 1926 to 1928 inclusive, which show the profits of H.R. & Co. as credited in equal 6 annas shares to the appellant and to the second respondent. The same position appears in statements sent to the appellant at Indore from Bombay and in the appellant's books kept at

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Indore. The Bombay books were kept at Bombay by the first respondent, in the same office as that of the appellant. There were no profits after 1928, and before 1926 the books are not forthcoming, so that it is impossible to say if any change was made after 1921. There is no evidence which explains satisfactorily why these books were not produced and there is no ground to justify holding that one party or the other was guilty of deliberately keeping them back.

These accounts undoubtedly form some evidence of a division of the profits of H. R. & Co. in 6 annas shares to the appellant and the second respondent as separate partners, but on the other hand they may do no more than show the distribution of the profits which was actually followed, splitting up what was *quoad* H.R. & Co. the 12 annas share of H.R. into the equal shares of the two partners in H.R. It is impossible in any event to infer from these accounts the agreement which the appellant alleges. It is therefore necessary to decide whether his evidence can be accepted on this matter. It is true that the appellant has been believed on this part of his evidence by Wadia, J., and that the learned Judge had the advantage of seeing and hearing him. But even so, in this, as in other cases, an Appellate Court, which is a Court of Appeal on facts as well as law, so that the appeal is a rehearing, may have to consider whether there are not such surrounding facts as make it impossible to accept the finding of the Judge. And in the present case it must also be remembered that the onus is on the appellant to establish the change in the firm which he alleges.

The High Court have come to the conclusion, which is carefully explained in the judgments of Beaumont, C.J., and Rangnekar, J., that the appellant's case cannot be accepted. Their Lordships agree with that conclusion. As they also agree in substance with the reasons of the Judges of the High Court, they can state their own reasons briefly.

It was not till 1930 that H.R. & Co.'s financial difficulties had to be dealt with, and the position created by the insolvency of the second respondents had to be arranged. There came into existence one document which in their Lordships' judgment cannot be regarded as other than conclusive against the case made by the appellant. It was necessary to wind up the affairs in Japan of H.R. & Co. and for that purpose a power of attorney

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was prepared appointing a firm of Gokaldas Dossa & Co. of Japan to act for the winding up in Japan of H. R. & Co.'s business and affairs. It is obvious that if the power were to be effective it was necessary that it should be executed by and in the name of the partners of H.R. & Co. The document which was prepared in Bombay by the appellant's solicitors was sent to the appellant's Indore office for execution from the appellant's Bombay office on the 23rd August, 1930, and was not returned to Bombay until the 18th September, 1930. It was expressly sent to obtain the signature of the appellant in the name of H.R. in the presence of a Government official. It was in fact on the 16th September, 1930, executed by the appellant personally in the name of H.R. in the presence of the Resident Magistrate at Indore, and was then returned to Bombay, where it was executed by the first respondent. The document recites that H.R. and the first respondent were carrying on business at Kobe and Osaka under the firm style of H.R. & Co. It seems clear that the execution of this document could not have taken place if the appellant's story was true. The appellant at the trial volunteered an explanation which Wadia, J., rejected. He was not prepared to accept the appellant's elaborate description of a conversation between him and the first respondent, in which the first respondent was said to have requested the appellant to sign the power of attorney. Wadia, J., suggests that the appellant may have signed the document inadvertently. But that seems incredible for many reasons. It is clear that not only was the document carefully prepared, but must have been examined by the appellant's standing legal adviser, Mr. Jal, at Indore and by his munim at Bombay, Mr. Ramgopal. The only possible inference is that it was not until after the date of this document that the case was advanced that the appellant's liability in respect of H.R. & Co. was limited to a 6 annas share. The action was not commenced until the 13th October, 1931, and even then, though it was alleged in the plaint that the appellant held a 6 annas share in H.R. & Co., the first respondent a 4 annas share, and the second respondent a 6 annas share, no particulars of any interview or conversations were given until the appellant gave his evidence at the trial in 1935. There is no written record of it. It is a curious story. No explanation is given why this change in constitution of the firm H.R. & Co. should have been made. The date stated by the

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appellant about the middle of December, 1921, appears impossible, because Vali did not arrive from Japan until about the end of December, 1921. He was a necessary party to the dissolution and the reconstitution of H.R. & Co., but the appellant does not say he was present at any discussion. There were many matters to be canvassed, such as the readjustment of the 3 annas share which had been that of Vali. Yet no evidence is forthcoming of any interview or discussion on these matters.

There were three other documents brought into existence in 1930 which have been relied on by the first respondent as inconsistent with the appellant's story. One was a written assignment by the appellant dated the 17th April, 1930, of all monies due on taking the accounts to the appellant from the second respondent in respect of the various businesses carried on by him in partnership with the second respondent, and in some cases with other partners as well. This document in one of its recitals states that the appellant was carrying on business in partnership with the second respondent and the first respondent in the name of H.R. & Co. in Japan, and in the firm of H.R. & Co. the share of the first respondent was 4 annas and the remaining share of 12 annas belonged in equal shares to the appellant and the second respondent. This recital is clearly inconclusive. The composition deed entered into between the second respondent as debtors and trustees for their various creditors, including H.R. & Co., contains in a schedule among the firms in which the second respondents were partners, the firm H.R. & Co., and gives the names of the partners as H.R. 12 annas, Hansraj Harji 4 annas. This document was signed by Ramgopal, the appellant's munim in Bombay in his capacity as one of the trustees for the creditors. No doubt in a sense Ramgopal in doing so represented the interests of the appellant, but their Lordships do not regard this as an admission binding the appellant. At the same time it was a matter of serious comment that Ramgopal, though present throughout the trial, was not called by the appellant, and indeed at a later stage when the first respondent sought to call him the appellant's counsel successfully placed difficulties, so that in the result he was not called.

There is also a notice of dissolution of H.R. & Co. dated the 3rd April, 1930, which describes H.R. & Co. as composed of the first respondent and H.R., but that again was not a

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document signed or issued by the appellant, and may be disregarded for this purpose.

On the whole case, their Lordships are of opinion, in agreement with Beaumont, C.J., and Rangnekar, J., that the appellant has failed to discharge the onus which rests upon him to establish that the single share held by him and the second respondent in H.R. & Co. was split up into two separate shares. They are accordingly of opinion that the appeal should be dismissed with costs.

They will humbly so advise His Majesty.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondents: *Barrow Rogers & Nevill.*

R. C. C. ——— *Appeal dismissed.*

B.V.V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

Nalam Lakshmikantham and others .. *Appellants** (*Plaintiffs 1 to 4*)

*v.*

Nalam Ramalingayya and others .. *Respondents* (*Defendants and Plaintiffs*).

Lakshmikantham *v.* Ramalingayya.

*Civil Procedure Code (V of 1908), S. 92—Public charitable trust—Family in management—Disputes between members of family—Reference to arbitration—Arbitrator framing a scheme therefor—Application to pass a decree in terms thereof—Court, if competent to pass such a decree.*

Though it may be open to parties entitled to the management of a public, charitable or religious institution to settle a scheme of management among themselves, and a suit for carrying out the scheme may lie as in *Ramanathan Chetty* v. *Murugappa Chetty*, (1903) 13 M.L.J. 341: I.L.R. 27 Mad. 192 and *Ramanathan Chetty* v. *Murugappa Chetty*, (1906) 16 M.L.J. 265: L.R. 33 I.A. 139: I.L.R. 29 Mad. 283 (P.C.), it is not open to the Court to pass a decree in terms of a scheme passed by an arbitrator on a reference by the parties, as by embodying the award in a decree of Court, the Court will be practically framing a scheme for the management of the institutions in question and it will be an evasion of the provisions of S. 92 to allow it to be done under the guise of an award when the procedure prescribed by S. 92 has not been complied with.

Question whether and under what conditions questions relating to a public trust can be referred to arbitration left open.

*Ramanathan Chetty* v. *Murugappa Chetty*, (1906) 16 M.L.J. 265: L.R. 33 I.A. 139: I.L.R. 29 Mad. 283 (P.C.), distinguished.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in O.S. No. 24 of 1932.

* Appeal No. 154 of 1934. 20th September, 1938.

Lakshmikantham *v.* Ramalingayya.

*V. Govindarajachari* and *Y. Venkatasubramaniam* for Appellants.

*M. S. Ramachandra Rao* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

*Varadachariar, J.*—Some of the plaintiffs in the suit have preferred this appeal against a decree which declined to file an award and embody it in a decree of Court. The parties are descendants of different branches of what may be referred to as the Nalam family which had founded various public charities in the circars. During the period of the first defendant's management, disputes arose between them and as a result, a muchilika referring the disputes to arbitration was executed by the parties on 8th June, 1931. Reference was made in the muchilika itself to the questions which the arbitrator was to decide. We may refer in particular to questions 4 and 5, namely, (4) How is the management of the choultry at Rajahmundry by the first defendant from 1919 up to date? How is the management of the Dharmakarthas of the other charitable institutions for the past 12 years? (5) What is the nature of the scheme to be framed regarding the future administration of the said institutions? The arbitrator passed an award on 10th January, 1932 and stated it as his conclusion that the first defendant's management of the choultry had not been blameworthy. As regards future management, he drew up an elaborate scheme consisting of about 35 clauses. As the parties were not prepared to accept this award, the plaintiffs filed this suit on 4th July, 1932.

The defendants raised various objections, out of which it is sufficient for the purpose of this appeal to refer to one, which formed the subject-matter of the 8th issue. Though this issue has not been very clearly worded, the contention was made clear in the course of the argument in the lower Court and it was understood as raising the question, whether the award was illegal and cannot be made a decree of Court as it related to matters which should be made the subject-matter of a suit under S. 92, Civil Procedure Code. The learned Subordinate Judge upheld this contention and dismissed the suit on this ground. He also found against the plaintiffs on certain other contentions; but in the view that we take on the objection based on S. 92 of the Civil Procedure Code, it is unnecessary to deal with the other objections.

Lakshmi-kantham v. Rama-lingayya.

Varada-chariar, J.

Before us, the learned Counsel for the appellants has mainly rested his argument in support of the appeal on the principle laid down by a Full Bench of this Court in *Appanna Poricha* v. *Narasinga Poricha*[1] and recently reaffirmed by a Division Bench in *Shanmukham Chetty* v. *Govinda Chetty*[2]. We do not think that the principle of those decisions helps the appellants in the present case. All that was there laid down was that where a person is seeking to assert or vindicate his individual or personal right in respect of the management of a charity, the mere fact that a relief asked for may happen to be one of the kinds specified in S. 92 will not preclude the maintainability of the suit without conforming to the provisions of S. 92 of the Civil Procedure Code. But what the plaintiffs are now attempting to do and what the award has purported to do is really not merely to protect the individual or personal right of a party. The arbitrator was required to investigate the nature of the management of the various charitable trusts by the parties in management thereof and was also asked to lay down a scheme for the future management of the institutions. These cannot reasonably be regarded as matters arising out of the private right of any particular individual. As pointed out in *Sundara Aiyar* v. *Varada Aiyar*[3], the fact that the disputing parties belong to the family or families in which the management of the institution is vested, will not of itself take the case out of the purview of S. 92 of the Civil Procedure Code if the object of the proceedings is to safeguard the interests of the institution or obtain directions for its proper management. See also *Krishna Aiyangar* v. *Alwarappa Aiyangar*[4].

The learned Counsel for the appellants next relied upon the decision in *Ramanathan Chetty* v. *Murugappa Chetty*[5], confirmed by the Judicial Committee in *Ramanathan Chetty* v. *Murugappa Chetty*[6], and contended that if as there held it is open to the parties entitled to the management of a public, charitable or religious institution to settle a scheme of management among themselves, there was no reason why such a scheme should not be settled by a reference to arbitration; be

1. (1921) 41 M.L.J. 608: I.L.R. 45 Mad. 113 (F.B.).
2. (1937) 46 L.W. 426.
3. (1935) 69 M.L.J. 300.
4. (1932) 63 M.L.J. 703.
5. (1903) 13 M.L.J. 341: I.L.R. 27 Mad. 192.
6. (1906) 16 M.L.J. 265: L.R. 33 I.A. 139: I.L.R. 29 Mad. 283 (P.C.).

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insisted that the Court must in both cases give effect to the scheme, when one of the parties sought to disturb it. But as explained in *Krishna Aiyangar* v. *Alwarappa Aiyangar*[1], *Ramanathan Chetty* v. *Murugappa Chetty*[2] and *Ramanathan Chetty* v. *Murugappa Chetty*[3], did not deal with the power of the Court to decree a scheme agreed on between the parties or settled by an arbitrator; the Court was only called upon to protect private rights which had accrued to certain parties under a scheme of management which had been accepted and acted upon for a long time. It is true that in *Ramanathan Chetty* v. *Murugappa Chetty*[3], their Lordships of the Judicial Committee observed that the arrangement which had been agreed to by the parties in that case was one which would have been sanctioned by the Court if its authority had been invoked. It is not clear what kind of sanction their Lordships had in view in making that observation. It cannot be a sanction under S. 92, Civil Procedure Code, because they go on to add that the arrangement was one which the parties interested were competent to make without applying to the Court. All that their Lordships seem to have had in mind was the consideration that the arrangement was not prejudicial to the interests of the institution. The suit itself was one for possession by the member who was entitled to a particular turn of management according to the existing scheme and there was no occasion for any objection under S. 92 of the Civil Procedure Code in that case.

*Ramlal Hargopal* v. *Kishanchand*[4], to which Mr. Govindarajachari drew our attention does not help him because the Privy Council in that case left open the question: Whether the management of a public religious trust could or could not be referred to arbitration. In *Muhammad Ibrahim Khan* v. *Ahmad Said Khan*[5], a Division Bench went the length of holding that a question of disputed succession to the trusteeship of a public religious trust could not be made the subject of a reference to arbitration. It may be a matter for argument whether in *Venkatachalam Chettiar* v. *Ramanathan Chettiar*[6], this Court has not adopted a different view; it is

1. (1932) 63 M.L.J. 703.
2. (1903) 13 M.L.J. 341: I.L.R. 27 Mad. 192.
3. (1906) 16 M.L.J. 265: L.R. 33 I.A. 139: I.L.R. 29 Mad. 283 at 288 (P.C.).
4. (1923) 46 M.L.J. 628: L.R. 51 I.A. 72: I.L.R. 51 Cal. 361 (P.C.).
5. (1910) I.L.R. 32 All. 503.
6. (1921) 15 L.W. 111.

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sufficient to say that the latter decision is much more limited in scope than the point now under consideration. As observed by Napier, J., in p. 117, the disputes in that case was "one between two branches of a family as to their respective trustee to act as trustee". Sadasiva Aiyar, J., who was a party to that decision clearly indicated in *Yegnarama Dikshadar* v. *Gopala Pattar*[1], that in the case of a public religious institution, a decree settling a scheme as per an award passed on a private reference would be a nullity.

It is not necessary for the purpose of this appeal to express any opinion on the wider question, whether and under what conditions questions relating to a public trust can be referred to arbitration (as to the English Practice, *see* Russell on Award, 13th Edition, p. 3, Tudor on Charities, 5th Edition, p. 349). We restrict ourselves to the question of the effect of S. 92, Civil Procedure Code, on proceedings of the kind now before us. The language of cl. (2) of that section is so wide that it is difficult to hold that the present suit is not precluded by its terms. By embodying the award in a decree of Court, the Court will be practically framing a scheme for the management of the institutions in question and it will be an evasion of the provisions of the section to allow it to be done under the guise of an award when the procedure prescribed by S. 92, Civil Procedure Code, has not been complied with.

It was finally contended by the learned Counsel for the appellants that we may omit such portions of the award as relate to reliefs of the kind contemplated by S. 92 and embody the rest of it in a decree; and he relied on the analogy of cases where plaints which combined other reliefs with those falling under S. 92 had been allowed to be limited to the other reliefs. Here the suit prays for a decree in terms of an award passed on a private reference and there is no suggestion that the award has dealt with matters not covered by the reference; in such a case it is not open to the Court to separate one portion of the award from another and limit the decree to portions thereof.

The appeal accordingly fails and must be dismissed with costs.

S. V. V. — *Appeal dismissed.*

1. (1918) 47 I.C. 548 at 549.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

K. M. Palaniappa Mudaliar and others .. *Appellants** (*Plaintiffs*)

*v.*

Abdul Subhan Sahib .. *Respondent* (*Defendant*).

Palaniappa Mudaliar v. Abdul Subhan Sahib.

*Madras Estates Land Act (IX of 1908), Ss. 3 (15), 26 (3)—Grant of both warams to defendant's predecessor—Conditions for the application of S. 26 to the case.*

S. 26 of the Madras Estates Land Act has no application to any case in which the relations of landholder and ryot do not subsist. Not only the third clause but the earlier clauses contemplate a rent-paying relationship between the landholder and the tenant.

Where there was no evidence, in a case, that the defendant ever held his land on condition of paying rent and that in fact the gift of both warams to his predecessor by the plaintiff's predecessor converted the tenant himself into a landholder,

*Held,* that it should be taken to have been established that the defendant was not a ryot within the meaning of S. 3 (15) of the Act.

*Duraiswami Pillai* v. *Venkatarama Pillai,* (1935) 42 L.W. 626, referred to.

Appeal against the decree of the District Court of Salem in A. S. No. 87 of 1934 preferred against the decree of the Court of the Deputy Collector of Salem in S. S. No. 43 of 1933.

*C. S. Venkatachariar* and *D. Ramaswami Aiyangar* for Appellants.

*B. Sitarama Rao* for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiffs, landholders under the Madras Estates Land Act, brought a suit under S. 77 of that Act for rent relying upon Ss. 25 and 26 of the Madras Estates Land Act and claiming the right to demand rent at the faisal rate though in fact that no rent has been paid on the suit land so far as there is any record. It is common ground that the suit land has been held free of rent by virtue of a maintenance gift made before 1858 by one of the plaintiffs' predecessors. Both the lower Courts have held that S. 26 has no application to the circumstances of this case. The plaintiffs therefore appeal.

So far as I am aware, there is no specific authority to support the appellant's case that S. 26, sub-S. (3) will apply to a case in which there has been a gift of land free of rent

* S. A. No. 548 of 1936. 24th August, 1938.

and not merely a grant subject to favourable terms with reference to rent. Mr. Venkatachari argues that if a landholder is not bound by the remissions of his predecessor when these remissions consist of the major portion of the land revenue, still less will he be bound by the remissions of his predecessor when these remissions consist of the whole of the land revenue and he argues that the wording of S. 26 (3) would justify the view that the landholder for the time being has the right even when no rent has ever been paid to revert to the faisal rate which is the rate lawfully payable on the land in the estate in the absence of evidence to the contrary. The nearest thing to an authority for the view for which Mr. Venkatachari contends, is found in the case of *Duraiswami Pillai* v. *Venkatarama Pillai*[1], wherein Madhavan Nair, J., had to deal with the case of a rent-free grant of land within the ambit of a Zamindari, and held that from the evidence of long standing enjoyment of the land free of rent, the Court would presume a legal origin for the right enjoyed and that a claim to apply S. 26, cl. (3) involves the establishment of certain facts by the landholder and could only be entertained on an express plea by the person who has to prove the applicability of that clause. Thus Madhavan Nair, J., had to deal with a contention similar to that which is now put forward, and negatived it on the ground that it was not pleaded at the original trial. There is, however, no decision that such a plea would be good in law on such facts if taken at the right time.

For the respondent, it is contended that S. 26 (3) has no application unless it is first shown that the relationship of landlord and ryot subsists with reference to the land in suit and that there cannot be any such relationship unless the defendant is a ryot within the definition in S. 3 (15), that is to say, it must be shown that the defendant is a person who holds, for the purpose of agriculture, ryoti land in an estate on condition of paying to the landholder a rent which is legally due upon it. The argument is that in the present case there is no evidence that the defendant ever held this land on condition of paying any rent and that in fact the gift of both warams to the defendant's predecessor by the plaintiffs' predecessor converted the tenant himself into a landholder.

1. (1935) 42 L.W. 626.

It does not seem to me to be necessary for the purpose of this case to go so far as to say that the defendant is a landholder in respect of this land; but it does seem to me to be clear that no relationship of landholder and ryot has been established between the plaintiffs and the defendant. It is true that there has been an exchange of pattas and muchilikas with reference to the cases payable on the suit land, but that is the result of a liability under the Local Boards Act, which has no relevancy in establishing the status of the defendant under the Estates Land Act. There is no evidence that the defendant or his predecessors ever held land under the plaintiffs or their predecessors on condition of paying any rent at all. It must, therefore, I think, be taken not to have been established that the defendant is a ryot. As I read S. 26, it has no application to any case in which the relations of landholder and ryot do not subsist. Not only the third clause but the earlier clauses contemplate a rent-paying relationship between the landholder and the tenant and the section lays down the terms on which the rent may or may not be augmented. The section, to my mind, has no application when there has been a complete surrender by the landholder of the right to collect any rent whatever on the suit land. In fact, though it does not appear that the grant to the defendant's predecessor has ever been expressly described as an inam, I am unable to see any legal difference between the tenure on which defendant holds and the ordinary tenure of a post-settlement inamdar. The grant was certainly not for service so that even applying the criteria which govern the resumption of post-settlement inams, it could not be presumed that the grant is resumable. But if it is an out-and-out grant of both the warams as it appears to be, there are no grounds, to my mind, for applying S. 26 of the Estates Land Act at all, for there is no longer any relationship of landlord and tenant subsisting between the parties.

In this view, I dismiss the appeal with costs.

Leave to appeal is refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Hejmady Co-operative Society by the present Official Liquidator Mr. K. Sarvothama Rao (*vide* endorsement dated 28th September, 1938, of the Advocate for the Appellant on the Vakalat filed by him on 29th September, 1938) ... *Appellant** (*Petitioner*)

*v.*

H. Veeraiya Naika .. *Respondent* (*Respondent*).

Hejmady Co-operative Society *v.* Veeraiya Naika.

*Madras Co-operative Societies Act (VI of 1932), S. 47 (3) (b) and (6)—Power of liquidator to decide questions as regards membership—Application to Court under S. 47 (6)—Jurisdiction of Court to decide the question of membership.*

The liquidator of a Co-operative Society passed an order determining what contribution should be made by the members under S. 47 (3) (*b*) of the Madras Co-operative Societies Act and applied to the Court under S. 47 (6) to enforce the order against the respondent. It was contended by the respondent that he was not a member of the Society and therefore was not bound by the liquidator's order.

*Held*, that the liquidator has jurisdiction to decide who are members and who are not. There is no bar therefore to the executing Court deciding whether the respondent is or is not a member bound by the order of the liquidator.

*Vaikunta Bhat* v. *Sarvothama Rao*, (1936) 70 M.L.J. 604: I.L.R. 59 Mad. 895, relied on.

Appeal against the order of the District Court of South Kanara dated 25th August, 1934, and made in A. S. No. 93 of 1934 preferred against the order of the Court of the District Munsiff of Karkal dated 3rd February, 1934, and made in R. E. P. No. 1137 of 1933.

*B. Sitarama Rao* for Appellant.

*K. Y. Adiga* for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal arising out of an application by the liquidator of a Co-operative Society under S. 47 (6) of the Madras Co-operative Societies Act. S. 47 (3) (*b*) describes the powers of the liquidator in the following terms:—

"To determine from time to time the contribution to be made or remaining to be made by the members or past members or by the estates or nominees, heirs or legal representatives of deceased members or by any

* A.A.A. O. No. 30 of 1935. 6th October, 1938.

Hejmady Co-operative Society v. Veeraiya Naika.

officers or former officers to the assets of the society such contributions including debts due from such members or persons."

The liquidator in the present case passed an order determining what contribution should be made by the members under this sub-section and applied to the Court under sub-S. (6) which runs as follows:—

"Save as provided in sub-S. (5) orders under this section shall on application be enforced by any Civil Court having local jurisdiction in the same manner as a decree of such Court,"

to enforce the order against the respondent. The respondent raised the plea that he was not a member of the society and therefore was not bound by the liquidator's order.

Both the Courts below instead of adjudicating upon this plea have held (1) that the liquidator had no jurisdiction to decide whether the respondent was a member or not and (2) that the Court itself to which the application was made under sub-S. (6) would be equally powerless to decide this question.

It is very difficult for me to understand how the Courts below could have brought themselves to reach a conclusion like this which is so manifestly inconvenient to everybody concerned in the case. It is quite obvious that in one sense the liquidator must have jurisdiction to decide who are members and who are not. Otherwise it is of course impossible for him to pass any kind of intelligible or reasonable order under sub-S. (3) (*b*). The whole question of the calculation of the contribution to be made by the members will of course depend upon the number of these members. Unless the liquidator can satisfy himself at least provisionally as to the number of members in the society no order under the sub-section will be possible. The matter has been considered to some extent by a Bench of this Court of which I was a member in *Vaikunta Bhat* v. *Sarvothama Rao*[1]. All that is stated in that judgment is:

"We are unable to find in the Act any clear indication that the liquidator can determine in such a way that this determination is not subject to be set aside by the Civil Courts, who are liable either as members or as past members of the society to contribute to the assets of the society."

The situation therefore is that in the present case, the liquidator has decided that the respondent is a member. This decision would be subject to any proceedings which may be taken by either party in the Civil Court to set it aside. Neither

1. (1936) 70 M.L.J. 604: I.L.R. 59 Mad. 895.

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party has taken any such proceeding. The liquidator however relying on his own view of the status of the respondent has applied under sub-S. (6). The respondent raised the plea that he is not a member. That plea when analysed amounts to this, that the liquidator has no jurisdiction to pass the order against him which he now wishes the Court to enforce. When a plea is raised involving the question of the nullity of the decree sought to be exercised that plea has clearly to be decided by the executing Court. There seems to be no bar at all to the Court below following what is obviously the most convenient procedure in this case, and proceeding to decide whether the respondent is or is not a member bound by the order of the liquidator. It is impossible for me to understand why without deciding this question, the lower Courts should immediately assume that simply because the liquidator has included the respondent amongst the list of members, he (the liquidator) has done something which he has no jurisdiction to do.

This appeal which incidentally, I may notice, has not been seriously opposed on behalf of the respondent will accordingly be allowed and the application restored to the file of the learned District Munsiff of Karkal for disposal according to law after finding whether the respondent is a member of the society or not.

Costs will abide the event.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

Aravamudhu Aiyangar and others .. *Appellants* (Plaintiffs)*

*v.*

Ramanuja Aiyangar and others .. *Respondents (Defendants 1 and 3 to 7, 9, 8 and 10 to 17 and L. R. of 6th Defendant).*

Aravamudhu Aiyangar v. Ramanuja Aiyangar.

*Trust—Right of plaintiffs to become trustees after death of their father—Breach of trust and failure to perform trust by the father—Whether plaintiffs could become* ipso facto *trustees—Madras Hindu Religious Endowments Act (II of 1927), Ss. 9 (11), 57 and 73 (1) (a)—Scope of.*

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* Appeal No. 377 of 1933. 17th August, 1938.

Aravamudhu Aiyangar *v.* Ramanuja Aiyangar.

According to a will of the grandfather of the plaintiffs, their father would be the trustee of certain charities during his lifetime and they would become trustees after their father's death. They brought a suit for recovery of certain lands which were dedicated to the charities under the will. They alleged that they had become entitled to manage and perform the trust as their father ceased to perform the trust, had alienated the suit properties as if they were his private properties, had in fact gone away to French territories and was accordingly not entitled to be in management of the trust.

*Held*, that the plaintiff's father did not *ipso facto* cease to be a trustee merely on the grounds alleged by them, though such grounds might justify his removal from office under appropriate proceedings and the plaintiffs did not become trustees nor could they be said to be in *de facto* management of the trust.

*Ramaswami Goundan* v. *Singaperumal Kadavul*, (1925) 50 M.L.J. 42, relied on.

Though the same language as in the definition of 'religious endowment' was not adopted in the 1935 amendments to Ss. 57 and 73 (1) (*a*) of the Act, the intention was to make these two provisions co-extensive with the definition of 'religious endowment' in S. 9 (11).

S. 9 (11) refers to property endowed for the performance of any service or charity connected with a temple. Ss. 57 (1), Expl. and 73 (1) (*a*) refers to a specific endowment attached to a temple.

Appeal against the decree of the District Court of East Tanjore at Negapatam dated 25th July, 1933, in O. S. No. 1 of 1932.

*K. Raja Aiyar* and *R. Sundaralingam* for Appellants.

*R. Somasundaram, P. N. Marthandam Pillai, C. Rangaswami Aiyangar* and *E. S. Chidambaram Pillai* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

*Varadachariar, J.*—Plaintiffs whose suit has been dismissed by the lower Court on certain preliminary grounds have filed this appeal. They sued for recovery of possession of certain lands and for mesne profits and also sought to set aside a decree which had been obtained against them and their father. They claimed to be entitled to possession of the suit properties on the ground that under Ex. A, their grandfather's will, they had become trustees for the charities to which these properties they said had been dedicated by the said will. They recognised that as per the terms of the will, their father, the first defendant would be the trustee during his lifetime and they would become trustees only after their father's death. They accordingly alleged in paragraphs 5 and 6 of the plaint that the first defendant had altogether ceased to perform the trust, that

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he had alienated the suit properties as if they were his private properties, that he had in fact gone away to French territories and that he is accordingly no longer entitled to be in management of the trust. On these allegations, they claimed that as descendants of the first defendant, they had become entitled to manage and perform the trust. In paragraph 8 of the plaint, they referred to O. S. No. 17 of 1927 on the file of the Sub-Court, Tiruvarur, brought by a mortgagee from their father impleading therein the plaintiffs also as defendants during their minority. For the reasons alleged in that paragraph and in the next paragraph, they claimed that the decree obtained in that suit and the sale held in pursuance thereof were not binding upon them or on the trust. The first defendant, the father, remained *ex parte*. The other defendants who are alienees raised various contentions; and numerous issues were framed in the case with reference to those contentions. Issues 4, 5 and 9 were dealt with by the lower Court as preliminary issues; on these issues, the learned District Judge held that the plaintiffs had no right to maintain this suit and dismissed it accordingly.

So far as issue No. 4 is concerned, we agree with the learned Judge that the plaintiffs are not the present trustees and that they are not entitled to maintain this suit in that capacity. Ex. A appoints them as trustees only after their father's death. It might be that the father's misconduct or breach of trust would justify his removal from office and on such removal a question might arise whether the plaintiffs would not become entitled to the office. But we cannot accede to the plaintiffs' contention that merely on the ground of breach of trust or even the total failure to perform the trust or his leaving British India, the first defendant *ipso facto* ceased to be a trustee and the plaintiffs directly became trustees. The learned Counsel for the appellants relied upon the decisions in *Mahanth Ram Charan Das* v. *Naurangi Lal*[1], *Mahadeo Prasad Singh* v. *Karia Bharti*[2] and *Rangaswami Naidu* v. *Krishnaswami Aiyar*[3]. Those cases only recognise the right of a *de facto* trustee to sue for recovery of possession of trust property for the benefit of the trust. It cannot be said on the allegations in the plaint in

1. (1933) 64 M.L.J. 505: L.R. 60 I.A. 124: I.L.R. 12 Pat. 251 (P.C.).
2. (1934) 68 M.L.J. 499: L.R. 62 I.A. 47: I.L.R. 57 All. 159 (P.C.).
3. (1922) 44 M.L.J. 116.

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the present case that the plaintiffs are in *de facto* management of the trust. The case falls within the principle of the decision in *Ramaswami Goundan* v. *Singaperumal Kadavul*[1], referred to by the learned District Judge.

It was next contended before us that even if the plaintiffs had not become trustees under the terms of Ex. A, the Court might, on the allegations in the plaint, treat this as a suit for removal of the first defendant from office and for appointment of the plaintiffs as trustees and then give the plaintiffs the appropriate reliefs. If there was no other difficulty in our way, we might have considered the possibility of allowing appropriate amendments to be made in the plaint. But it seems to us that the objection taken by respondents that these reliefs cannot be obtained in the suit even if amendments to the above effect are allowed is well founded. On the footing that the trusts alleged by the plaintiffs are public trusts, they may be either religious or charitable. If they are charitable, a suit for the removal of the trustee will be governed by the provisions of S. 92 of the Code of Civil Procedure; if they are religious, the endowment will fall within the definition of a "religious endowment" under the Madras Religious Endowments Act and any attempt to get the trustee removed from office must be made only in accordance with the provisions of Ss. 57 and 73 of the Act. Whatever the position might have been before 1935 (as to which see *Vythilinga Pandara Sannadhi* v. *Ranganatha Mudaliar*[2]) the amendment made in these two sections by Act XII of 1935 provide for such reliefs, even in respect of kattalais; and we see no reason for not giving full effect to the absolute terms of S. 73, clause 3 which precludes any suit in respect of the administration or management of religious endowments except as provided by the Act. It is not known whether the temple in which the kattalais referred to in Ex. A are to be performed is an excepted temple or a non-excepted temple. If it is an excepted temple, the case will fall under S. 73, cl. (*a*) and if it is a non-excepted temple, the case will fall under S. 57. We felt some little doubt as to the application of these two provisions to one of the charities mentioned in the will, namely, that which relates to the distribution of food to

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1. (1925) 50 M.L.J. 42.
2. (1933) 66 M.L.J. 98: I.L.R. 57 Mad. 362.

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pilgrims after offering it to the deity. In S. 73 (1) (*a*) as well as in the Explanation added in 1935 to S. 57, reference is made to endowments attached to the temple, whereas in the definition of religious endowments, even properties endowed for the performance of any charity *connected* with a temple will be included. It is possible to suggest that the word "attached" can refer only to endowments connected with the service in the temple but not to endowments merely for the purpose of feeding pilgrims after the food is offered to the deity. There would have been less difficulty if in the amendments to Ss. 57 and 73 the same language as in the definition of "religious endowment" had been adopted; but we feel little doubt that the intention was to make these two provisions co-extensive with the definition clause. We must accordingly hold that so far as the suit prays for possession and mesne profits, it was rightly dismissed by the learned Judge.

But we do not think that the total dismissal of the suit was justified. So far as the decree in O. S. No. 17 of 1927 on the file of the Tiruvarur Sub-Court was concerned, the plaintiffs were parties thereto and their right to have the decree therein set aside does not depend upon whether they have become trustees or not on the date of this suit. In *Giris Chandra* v. *Upendra Nath*[1], a Division Bench of the Calcutta High Court went the length of holding that a prospective trustee may, on the analogy of the Hindu reversioner, file suits for declarations in respect of transactions entered into by the trustee in office. We do not think it necessary for the purposes of this case to go so far. We do not however see any reason why persons who were themselves parties to a suit should not have the right to sue and obtain a declaration that that decree is void. Whether the grounds alleged against that decree justify a setting aside of that decree or not can be determined only after an enquiry into the merits of those allegations. All that we now decide is that the learned Judge's findings on issues 4, 5 and 9 will not justify the dismissal of the suit so far as it related to the decree in O.S. No. 17 of 1927. The issues relating to that decree will have to be dealt with on the merits. To that extent, the decree of dismissal is set aside

1. A.I.R. 1931 Cal. 776.

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and the case remanded to the lower Court for disposal on the merits.

As regards costs, we may observe that the question raised is not, by any means, free from difficulty and but for the amendments introduced in the Act in 1935 long after the suit had been instituted, it is not impossible that a different view could have been taken. In the circumstances and in view of the fact that the appeal succeeds in part, we direct the parties to bear their respective costs so far incurred in both the Courts. The appellants will pay to the Government the court-fee payable on the memorandum of appeal except to the extent of the reliefs relating to the O. S. No. 17 of 1927. The amount payable by them will be Rs. 82-8-0.

K. C. *Appeal partially allowed and remanded.*

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## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. MADHAVAN NAIR, *Officiating Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Dharmakartha Garudachar .. *Appellant** (*Plaintiff*)

*v.*

The Madras Hindu Religious Endowment Board .. *Respondent* (*Defendant*).

Garudachar v. Madras H. R. E. Board.

*Madras Hindu Religious Endowments Act (II of 1927), Ss. 18, 57 and 62—Excepted temple—Framing of scheme—Board proceeding on the assumption that a person was not hereditary trustee—His hereditary trusteeship established in a suit under S. 57—Case against the trustee not stated clearly—Procedure causing prejudice to trustee.*

The Commissioners of the Endowments Board proceeded under Ss. 18 and 57 of the Hindu Religious Endowments Act on the wrong assumption that *A* was not the hereditary trustee of the temple, examined a few witnesses and then framed a scheme without making clear the case against him. There was no place for him in the board of management as framed by the scheme. *A* filed a suit as contemplated by S. 57 for setting aside the scheme and also a petition under S. 84 (2) of the Act. In the petition the Court granted a declaration in his favour that he was the hereditary trustee and the suit temple was an excepted one. In the suit the Court decided that the scheme framed by the Court was not *ultra vires* and no case was made out for disturbing it. The Board filed no revision petition to the High Court against the order in the original petition. On the other hand *A* filed an appeal against the decision of the lower Court in the suit.

*Held*, that the procedure adopted by the Commissioners on the assumption that the temple in question was a non-excepted one was wrong, and the trustee, being a hereditary one, was prejudiced by such procedure. What is

* Appeal No. 150 of 1934. 25th July, 1938.

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contemplated in S. 62 of the Act which relates to excepted temples is that opportunity should be given to the trustee to hear what the case against him is and then the Board may proceed to consider whether a case for the settlement of a scheme has been made out. The inquiry under S. 62 should be more detailed and thorough than what is required under S. 57. Therefore the order of the Board was not properly passed as the Commissioners had proceeded under S. 57 which contemplates no more than taking of formal evidence.

*Zamorin of Calicut* v. *Krishnan Nambudripad*, (1930) I.L.R. 54 Mad. 532 at 541 and *Naranna Naidu* v. *Venkataramayya*, (1934) 68 M.L.J. 722: I.L.R. 58 Mad. 862 at 866, referred to.

Appeal against the decree of the Court of the Subordinate Judge of Anantapur dated 22nd February, 1934 and passed in O. S. No. 5 of 1933.

*B. Sitarama Rao* and *K. Srinivasa Rao* for Appellant.

*K. Subba Rao* and *P. V. Rajamannar* for Respondent.

The judgment of the Court was delivered by

Madhavan Nair, Offg. C.J.

*The Officiating Chief Justice.*—One Garudachar who claims to be the hereditary trustee of the temple of Nettikanti Anjaneyaswami in Kasapuram, Gooty taluk, Anantapur District, is the appellant before us. Proceedings under Ss. 18 and 57 of the Madras Hindu Religious Endowments Act were taken by this Endowments Board for his removal from trusteeship and for the settlement of a scheme for the administration of the temple. The appellant claimed that the temple was an excepted temple and that he was the hereditary trustee. The Commissioners held that there was no proof that the temple is an excepted one and they came to the conclusion that in the interests of the temple it was necessary that a scheme should be framed. They accordingly framed a scheme and appointed three other persons for the management of the temple. There was no place in the Board of management for the present appellant. He then filed a suit as contemplated by S. 57 for setting aside the scheme and also a petition under S. 84 (2) before the District Judge. He contended that the temple was an excepted temple, that he was the hereditary trustee thereof, that no case was made out for the settlement of a scheme, and that if a scheme was necessary a place must be given to him on the board of management. The learned Subordinate Judge who tried the suit agreed with the appellant's contention that the temple is an excepted one and that the appellant is the hereditary trustee, but he decided that no case was made out for disturbing the scheme framed by the Hindu Religious

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Endowments Board. He also came to the conclusion that it was left to the discretion of the Board to appoint the appellant as a trustee or not though his hereditary title to the trusteeship was established. The present appeal is against this decision of the Subordinate Judge.

The substantial contention urged before us by the appellant is that the order of the lower Court is vitiated by the fact that proceedings were taken by the Religious Endowments Board under S. 57 which lays down the procedure for settling schemes for non-excepted temples, whereas the temple in question being an excepted temple the procedure that should have been followed is the one prescribed in Ss. 62 and 63 of the Act. We may mention here that it is not contended by the respondent that the finding of the learned Judge that the appellant is the hereditary trustee and that the temple is an excepted one is wrong. We would therefore proceed upon that assumption to consider this case.

There is a marked line of distinction adopted in the Madras Hindu Religious Endowments Act with reference to the framing of schemes for excepted temples and for non-excepted temples. Chapter V deals with the procedure to be followed with reference to non-excepted temples and Chapter VI deals with excepted temples. It was pointed out in *Zamorin of Calicut* v. *Krishnan Nambudripad*[1], that "the policy of the Madras Hindu Religious Endowments Act, as seen from a comparison of Chapters IV, V and VI thereof, is to place maths and excepted temples, in normal conditions, under much less direct and detailed interference from the Religious Endowments Board in matters of internal management than ordinary temples." In *Naranna Naidu* v. *Venkataramayya*[2], it was observed by the learned Judges that the powers of the Board in respect of an "excepted temple" are clearly differentiated throughout the Act. This appears to be very clear when we peruse the provisions contained in Chapter V and those contained in Chapter VI. Under S. 57 of the Act, before framing a scheme for a non-excepted temple the Board has to be satisfied that in the interests of the proper administration of the endowments of the temple a scheme of administration should be

1. (1930) I.L.R. 54 Mad. 532 at 541.
2. (1934) 68 M.L.J. 722: I.L.R. 58 Mad. 862 at 866.

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settled, and when it is so satisfied, it may after consulting in the prescribed manner the trustee, the committee, if any, and the persons having interest, by order settle a scheme of administration for the endowments of such temple. Under S. 62 which relates to excepted temples, the Board when it is satisfied for reasons mentioned therein that in the interests of the proper administration of the endowments a scheme of administration should be settled "may hold an inquiry which shall be conducted in such manner as may be prescribed." Then in S. 63 it is stated that after the conclusion of the inquiry if the Board thinks that a scheme should be settled it may after consulting in the prescribed manner the trustee and the persons having interest, by order settle a scheme of administration for the endowments connected with such math or temple. It is obvious that a comparative study of these provisions which are important, relating to the settlement of schemes for these two different kinds of temples reveals the fact that a more detailed inquiry is contemplated in the case of excepted temples than in the case of non-excepted temples. Our attention has been drawn to the rules framed under these two sections and they also indicate that the inquiry under S. 62 should be more detailed and thorough than what is required under S. 57. As a matter of fact no inquiry is contemplated in S. 57. What is required is that when the Board is satisfied that a scheme of administration should be settled, the Board may consult the trustee, the committee, if any, and the persons having interest, and proceed to settle a scheme. This point is emphasised by Mr. Rajamannar who appears for the respondent. He points out that no inquiry is contemplated by S. 57, but he says that an inquiry was held in the present case and therefore that inquiry should be treated as the inquiry under S. 62 and that unless the appellant is in a position to satisfy the Court that he has been prejudiced, we should not interfere with the order of the lower Court. This argument means that what has been considered to be an important procedure laid down by the statute, may well be ignored, because the commissioners happened to examine a few witnesses tendered by the appellant. As to what actually took place there can be no dispute at all. The commissioners purported to proceed under S. 57 and did proceed under that section. Their order is headed "under Ss. 18 and 57." They say that certain reports submitted by their officers were perused. Then

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reference is made to the fact that witnesses produced by the appellant were examined. This was what actually took place. What the case of the Hindu Religious Endowments Board was against the appellant was not made clear. It was simply upon what was disclosed in the evidence that the order was based. This is not what is contemplated in S. 62. Opportunity should be given to the trustee to hear what the case against him is and then the Board may proceed to consider whether a case for the settlement of a scheme has been made out. It appears to us that since the procedure laid down in the statute has not been followed the appellant must necessarily be considered to have been prejudiced. Further, the Board proceeded on the assumption that the appellant was not the hereditary trustee, and the whole treatment accorded to the question was influenced by that consideration. If, on the other hand, the Board had realised that it was dealing with a party who had hereditary rights in the temple, then we think they would have certainly followed the procedure laid down in Chapter VI. That has not been done in this case. In such circumstances the argument that some inquiry has been made and that the appellant has not been able to conclusively show that he has been prejudiced thereby is beside the point. The appellant's hereditary trusteeship has been accepted as a fact and has not been challenged before us. In the circumstances, we think that he being the hereditary trustee of an excepted temple the case against him should have been properly dealt with in the manner prescribed in the Act, and since it has not been done so, we consider that the order of the Board has not been properly passed.

The appeal is allowed and the respondent will pay the costs of the appellant throughout.

K. C. *Appeal allowed.*

## PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD WRIGHT, LORD ROMER, LORD PORTER, SIR SHADI LAL AND SIR GEORGE RANKIN.

NAUTICAL ASSESSORS:—CAPTAIN A. H. RYLEY AND CAPTAIN C. ST. G. GLASSON.

The Owners and Parties interested in the S.S. "Malacca Maru" .. *Appellants**

*v.*

Deutsche Dampfschifffahrts Gesellschaft "Hansa" (Owners of S.S. "Marienfels") .. *Respondents.*

P.C.
——
S.S. "Malacca Maru" *v.* S.S. "Marienfels".

*Maritime collision—Ships proceeding in same direction—One ship overtaking another—Negligent helm action and failure to slacken speed—Liability for damages.*

Two steamships "Marienfels" and "Malacca Maru" were in collision in broad daylight in the river Hughli at a spot which was a recognised passing place. It appeared that at the time of the occurrence the weather was fine and clear and that the wind was of no material force. It was flood tide and the water was still rising. Both vessels were proceeding southwards to the sea and the "Marienfels" was overtaking. Both were in charge of duly licensed pilots. It was shown that the "Malacca Maru" failed to slacken speed when the "Marienfels" came abreast of her and the former was approaching the eddy. It was further shown that the helm action of the "Malacca Maru" was negligently late.

*Held*, that under the circumstances the "Malacca Maru" was alone to blame and that the owners of the "Marienfels" were entitled to recover damages for the loss sustained as a result of the collision.

Decision of the Calcutta High Court affirmed.

*R. F. Hayward* and *Wilmer* for Appellants.

*L. P. E. Pugh, Sir T. Strangman* and *C. Bagram* for Respondents.

22nd July, 1938. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—At 12-35 P.M. on Sunday the 16th March, 1930, the steamships "Marienfels" and "Malacca Maru" were in collision in the River Hughli at a spot south of Pukuria Point Column and north of Lower Brul Sand buoy. The "Marienfels" is a vessel belonging to the plaintiffs-respondents, a German company: her gross tonnage is 8,000 tons, her length 495 feet and her beam 58 feet. The "Malacca

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Maru" is a Japanese vessel of 5,374 tons, length 400 feet and beam 54½ feet.

The collision occurred in broad daylight: the weather was fine and clear: the wind of no material force. It was flood tide—a spring tide of 3½ knots in the navigable channel. The water had risen 17 feet above low water marks and it was still rising.

Both vessels were proceeding southwards to sea and the "Marienfels" was overtaking. They had left Garden Reach —the "Malacca Maru" at 9-25 A.M. and the "Marienfels" some twenty minutes later. The speed of the former was about ten knots and of the latter about 11½. Both vessels were part laden and both were drawing some 20 or 21 feet. Both were in charge of duly licensed pilots, Pilot King navigating the "Marienfels", Pilot Halford the "Malacca Maru".

At the time of the collision the bluff of the port bow— 14 feet from the stem—of the "Malacca Maru" struck the starboard side of the "Marienfels" a little abaft amidships. The damage sustained by the "Marienfels" was not such as to prevent her from continuing her voyage to Madras, where her master made a protest on the 24th of March. The "Malacca Maru" was more severely damaged and put back to Calcutta, where a protest was made on the 25th of March. Both pilots made reports to the port authority at Calcutta on the day of the collision.

On 12th March, 1932, the respondent company brought in the Admiralty jurisdiction of the High Court at Calcutta the suit out of which this appeal arises. The plaint claimed Rs. 64,870 as damages caused by the negligent navigation of the "Malacca Maru." The appellants, by written statement filed on 25th April, 1932, denied negligence and asserted that the collision was caused or contributed to by the negligent navigation of the "Marienfels;" but as the period of two years limited by the Maritime Conventions Act, 1911, had been allowed to elapse they were unable to maintain a cross claim for damages. At the trial in December, 1934, Cunliffe, J., heard the evidence of Pilot King but Pilot Halford had died in 1931 and his report of 16th March, 1930, was the only available means of ascertaining his version of the occurrence. Each side called the master and other witnesses from its vessel. The plaintiff company in addition called two

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pilots from the Bengal Pilot Service—Pilot Davies and Pilot Garnet; while the defendants called a river surveyor Mr. Oag and Captain Ducat-Amos master of the British India mail steamer "Karapara," plying from Calcutta to Rangoon and the Straits Settlements. Cunliffe, J. (17th December, 1934), held that both vessels were to blame for the collision and apportioned the blame three-fourths to the "Malacca Maru" and one-fourth to the "Marienfels." On appeal a Division Bench (Derbyshire, C. J. and Costello, J.) varied this finding and held the "Malacca Maru" alone to blame. From their decree dated 11th February, 1936, the defendants have appealed to His Majesty by special leave.

By Art. 24 of the General Regulations for Preventing Collisions at Sea every vessel overtaking any other is required to keep out of the way of the other and remains under a duty to keep clear of the other until she herself is finally past and clear. Art. 25, which applies to the part of the Hughli now in question, requires steam vessels to keep to the starboard side of the fairway or mid-channel.

The local rules governing navigation in the Hughli which were in force at the time contain provisions which modify Art. 24. Rules 5 and 7 are as follows:—

"5. No steam-vessel shall attempt to strive or race the one against the other. When steam-vessels are proceeding in the same direction, but with unequal speed, the vessel which is steaming slowest shall in the narrow reaches of the river offer no obstruction whatever by crossing the channel or otherwise to the free passage of the faster vessel and shall ease and, if necessary, stop the engines, as soon as the faster vessel comes abreast in order to allow her to freely pass. The Pilot of the faster vessel, if intending to pass, shall intimate such approach by a prolonged blast from his steam-whistle. But no vessel will be justified in passing such vessel at any of the turning points or bends of the river, nor in a part of the channel so narrow that a third vessel could not with safety pass them."

"7. A ball at the foremast head to be shown by every inward and outward-bound vessel. When going full speed the ball to be kept at the truck, but lowered about two fathoms when going slow."

It is common ground now that Pilot King at 12-20 P.M., while well astern of the "Malacca Maru" gave a long blast as a signal that he intended to pass her. The parties are not in agreement as to the exact position of the ships when the blast was given: the plaintiffs' case being that they were near the Fairway Outer Column while the defendants say that they were further south. So, too, while there is agreement that the time

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of collision was 12-35 P.M., the exact place of impact is disputed; the plaintiffs' witnesses say that it was very little north of the Lower Brul Sand buoy at a spot marked with the sounding 21 on Plan No. 186 (Exhibit A), while the defendants put the place of collision further north and west near a spot marked 39, very little south of Pukuria Point Column. The distance from the Fairway Outer Column to the Lower Brul Sand buoy is about 2¼ miles. Both Courts in India have accepted the evidence of Pilot King and believed the plaintiffs' story of what happened. Their Lordships see no reason to depart from their rule not to disturb concurrent findings of the fact and the main features of the case may be outlined as follows. Having given the long blast when near the Fairway marks, where the navigable channel had a width of about 1,000 feet, the "Marienfels," which was about two ships' length astern, began to overhaul the "Malacca Maru" so as to pass to the east of her, and the two ships were abreast between the Upper Brul Sand buoy on the eastern and Bight Column on the western bank. Between that place and Poadpara Beacon the "Marienfels" had gained about half a length. Thereafter the "Malacca Maru" began to gain on the "Marienfels" owing to the tide being less strong by some two knots on the western than on the eastern side of this part of the Brul Sands Reach. At a place which is marked on the western bank by a creek both vessels were still maintaining their respective speeds of 11½ and 10 knots abovementioned and the "Malacca Maru" had not quite come abreast of the "Marienfels," when the "Marienfels," which had been about 400 feet away from the "Malacca Maru" while overtaking her, opened out to port and gradually increased the lateral distance to 600 feet. At Pukuria Point Column, a little further south, an eddy is formed on the flood tide which crosses the river in a north-easterly direction and cushions off the eastern bank in a north-westerly direction but with diminished force. The vessels were abeam at this point when the "Malacca Maru," meeting the eddy, took a heavy run or sheer to port which carried her up against the "Marienfels" notwithstanding that the "Marienfels" went to port in an attempt to avoid the collision.

In the plaint the "Malacca Maru" among other heads of negligence had been charged with negligence in not porting her helm (old style) or easing or reversing her engines after the

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commencement of the sheer. The Japanese helmsman had deposed that he received the order hard-a-port almost immediately before the collision took place. Cunliffe, J., found the "Malacca Maru" to be in fault for taking helm action too late, and the learned Chief Justice considered that her helm was not put hard-a-port as soon as it ought to have been. Both Courts were also of opinion that the "Malacca Maru" was in fault in not easing her engines when the "Marienfels" first came abreast of her near Bight Column. Cunliffe, J., however, held the "Marienfels" to have been in fault in not abandoning the attempt to pass the "Malacca Maru" when she saw that the latter was taking no notice of the signal and was standing on without reducing speed. As Rule 5 of the local rules does not require the overtaken vessel to reduce speed before the vessels are abreast, the Chief Justice took a different view, holding that, the "Marienfels" having come abreast at Upper Brul Sand buoy, her pilot could not until some time had elapsed be expected to decide that the "Malacca Maru" had determined to disobey the rule as to lessening speed; and that in the meanwhile the "Marienfels" had gained half a length. In these circumstances he considered that to have slackened speed and come again abeam of the "Malacca Maru" was more dangerous and less advisable than the action which Pilot King in fact took—namely, to maintain her speed but open out to a lateral distance of 600 feet. Cunliffe, J., inferred from the behaviour of the "Malacca Maru" that she kept a bad lookout, but this criticism does not appear to have been repeated by the Appellate Court and their Lordships do not think it established as an independent ground for imputing blame to that vessel.

The first question for determination is whether the part of the river in which the "Marienfels" proceeded to pass the "Malacca Maru" was one of the "turning points or bends of the river" within the meaning of Rule 5 of the local rules. It was contended for the plaintiff company that the phrase must be construed to refer not to the navigable channel but to the river as a whole and in all its breadth, and that below the Fairway marks the Hughli's eastern bank is practically straight, though there is a bulge or bight enlarging the river on the western side. Their Lordships are not prepared to hold that such considerations are necessarily conclusive of the question and have considered the matter with reference to the channel

and from the practical standpoint of a navigator. The prohibition cannot be supposed to extend to all parts of the river where the channel is not completely straight, but must be interpreted with regard not only to the aggregate amount of deflection but to its gradualness or abruptness, which is only to say that the deflection must be considered in relation to the distance to be travelled. Their Lordships have the advantage of the opinion of the Elder Brethren upon the matter and are in agreement with them and with the Courts in India in holding that the course of the river from above the Fairway marks to Fisherman's Point is not a turning point or bend. They accept the evidence of Pilot King to the effect that Brul Reach was a recognised passing place until the local rules were changed, as a result of the collision in this case, so as to prohibit passing below Bight Column.

On this view the action of the "Malacca Maru" in failing to slacken speed when the "Marienfels" came abreast of her at Bight Column cannot be seriously defended and was a plain breach of duty under Rule 5. Indeed their Lordships consider it to be a misinterpretation of her action to suppose that her pilot had any objection to being overtaken at that point. The state of the water afforded ample width of channel: he made no protest at the time or in his report of the same date that he was wrongly overtaken. He may or may not have appreciated that under the rule the duty to ease engines was unconditional, unlike the duty to stop the engines which arose only if such action became necessary. But in any case he was content to be passed while going against the tide at his full speed through the water and took no action whatever to alter this position, thus incurring unnecessary risk in disobedience to the rule. The circumstance that the superiority of the "Marienfels" in speed was not very great made it all the more his duty to slow down to let her pass and the fact that his own course would take him into the slacker water on the western side made it still more imprudent to maintain full speed.

The result was that there soon came a time at which the "MalaccaMaru" was approaching the eddy with the "Marienfels" more or less abreast of her. This was the position opposite the creek on the western bank, and their Lordships accept the appellants' view that by this time it had become inadvisable for the "Malacca Maru" to slacken speed. They agree, however,

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with the learned Chief Justice in rejecting the contention that the "Marienfels" should have slackened speed. Before attributing blame to her in dealing with an emergency which the fault of the other vessel had produced, and for merely passing where she was entitled to expect to be allowed freely to pass, it is necessary to consider her exact position at the time when the emergency became apparent. Pilot King had opened out towards the eastern bank, increasing his lateral distance to 600 feet. He might expect to encounter some force from the eddy both in its secondary and primary stage, though not to the same degree as the "Malacca Maru" on the western side so far as regards the primary eddy. Had he eased engines, the period during which the two ships were over-lapping more or less must have been considerable even if the other pilot had not done likewise at the same time. But in any case it is in their Lordships' view unreasonable to expect him to have anticipated that the "Malacca Maru," though maintaining her own speed and keeping close to the western bank, would meet the eddy so as to sheer right across the channel. It is not possible to account for behaviour so erratic by supposing it to be an ordinary consequence of the flood tide at this point and even if it was not necessarily negligent to enter the eddy with helm amidships and without trying in advance to swing the vessel's head against the eddy, their Lordships consider that the Courts in India had solid reason for regarding it as proved that the helm action of the "Malacca Maru" was late and negligently late. Their Lordships are advised by the assessors and agree that after the "Marienfels" had gone to a distance of 600 feet she had no reason to suppose that the "Malacca Maru" would be put in any difficulty; that the pilot of the "Malacca Maru" could be expected, more particularly with a vessel to port of him, to keep his proper water and have reasonable control of his vessel, anticipating by helm action any likely falling off of his vessel's head by reason of the eddy. In these circumstances it would be unwarrantable to hold Pilot King to blame for striving or racing, or for not slackening speed at the time when he realised that the "Malacca Maru" meant to stand on without easing engines.

The able argument of Mr. Hayward for the appellants laid much stress on the fact that the ball at the truck of the "Malacca Maru" was never lowered. But Pilot King would not be certain of her intention to continue at full speed until

some time after he had come abreast of her, whether he waited to see if the ball would be lowered or whether he watched the relative position of the vessels. He could not in either case be expected to act at once on the view that the other vessel was not merely slow to respond but was minded to break the rule.

The High Court on appeal have rightly held the "Malacca Maru" alone to blame. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of the respondent company.

Solicitors for Appellants: *Waltons & Co.*

Solicitors for Respondents: *Morgan Price & Marby & Rugg.*

R. C. C. —— *Appeal dismissed.*

B. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

Nilakanta Prabhu .. *Appellant* (Petitioner—Plaintiff)*

*v.*

Appu Naika and others .. *Respondents (Respondents 2 to 5—Defendants 2 to 5).*



*Civil Procedure Code (V of 1908), O. 34, r. 6—Omission to reserve liberty to apply under—No decision on personal liability in preliminary judgment—If precludes plaintiff from later applying under O. 34, r. 6.*

Though it is the practice prevalent in mortgage suits to consider the question of the personal liability of the mortgagor even at the preliminary decree stage, the omission to consider it or provide for it in the preliminary decree will not operate as *res judicata* as the proper stage to deal with the question of personal liability is only after the mortgaged property has been sold and the proceeds are found insufficient to satisfy the mortgage claim.

Appeal against the order of the Court of the Subordinate Judge of South Kanara dated 3rd July, 1933, and made in R. I.A. No. 315 of 1933 in O.S. No. 84 of 1928.

*B. Sitarama Rao* for Appellant.

*K. Y. Adiga* for Respondents.

The judgment of the Court was delivered by



*Varadachariar, J.*—This appeal arises out of an order passed by the lower Court on an application under O. 34, r. 6, Civil Procedure Code. In that application, the plaintiff asked

* Appeal No. 182 of 1934. 22nd September, 1938.

for a decree against defendants 2 to 4 and against the assets of the first defendant in the hands of these defendants. The lower Court passed a decree only against the assets of the first defendant in the hands of defendants 2 to 5 but dismissed the application as far as it asked for a decree against defendants 2 to 4. It is this latter portion of the order that is complained of in the appeal.

Defendants 2 to 4 are the grandsons of the first defendant by a predeceased son. That son had executed a mortgage in favour of a third person and that mortgagee obtained a decree and brought to sale the mortgaged properties. As the father of defendants 2 to 4 was dead by that time, the grandfather, who was acting as guardian of his grandsons, though he had become divided from them, executed a mortgage in favour of the present plaintiff to raise money and stave off that sale. This later mortgage was executed by the grandfather for himself and as guardian of defendants 2 to 4. On this latter mortgage, the plaintiff instituted a suit obtained a decree for sale and has sold the properties covered by the mortgage. As the sale proceeds were not sufficient to satisfy the decree amount, he made this application under O. 34, r. 6, Civil Procedure Code. The learned Subordinate Judge has dismissed the application so far as it sought relief against defendants 2 to 4 on some ground of *res judicata* which it is not easy to follow. What he seems to have held is that though there has been no prior decision on this point, the omission to reserve the personal liability of these defendants in the preliminary decree precludes the plaintiff from claiming any relief against them under O. 34, r. 6, Civil Procedure Code. We do not think that this is a proper position.

It is no doubt the practice in mortgage suits to consider even at the preliminary stage the question whether the personal remedy against the mortgagor is barred or not, but the omission to consider it or the omission to provide for it in the preliminary decree will not operate as *res judicata*, because the proper stage for dealing with the question of personal liability arises only after the mortgaged property has been sold and the proceeds are found insufficient to satisfy the plaintiff's claim. There can be no suggestion in this case or any question of limitation as regards personal liability, but as defendants 2 to 4 were minors at the time of the execution

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of the suit mortgage, there can be no question of personal liability in the sense of their being arrested or their self-acquired properties being proceeded against. The utmost that the mortgagee would have been entitled to is that not merely the mortgage properties but also other family properties in their hands should be held liable for their father's debt and it is only in that sense that the application under O. 34, r. 6 can be granted against them.

Mr. Adiga, who appears for these defendants before us, points out that the mere absence of any scope for the plea of limitation does not conclude the question of their liability because the Court did not on the former occasion consider whether the other joint family properties in the hands of defendants 2 to 4 could be held liable for the debt contracted by the guardian. This question will have to be decided in the light of the principle laid down in *Ramajogayya* v. *Jagannadham*[1].

We accordingly set aside the decree of the lower Court and send the case back for disposal in the light of the above observations. We would however add that as the appeal has been limited to Rs. 800, the properties of the minor defendants 2 to 4 will not, in any event, be held liable for more than Rs. 800. Costs of this appeal will abide the result. Any application for relief under the Madras Agriculturists' Relief Act will have to be made to the lower Court to which the case has been remanded. Court-fee paid on the memorandum of appeal will be refunded.

S. V. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Sankaranarayana Aiyar Firm (Insolvent) now represented by the Official Assignee, High Court, Madras .. *Petitioner** (*Petitioner*)

*v.*

Yegnalakshmi Ammal and others .. *Respondents* (*Respondents*).

Sankaranarayana Aiyar Firm *v.* Yegnalakshmi Ammal.

*Civil Procedure Code (V of 1908), Ss. 73 and 115 and O. 22, rr. 8 and 12 and Provincial Insolvency Act, S. 28—Application by insolvent for rateable*

1. (1918) 36 M.L.J. 29: I.L.R. 42 Mad. 185 (F.B.).

* C. R. P. No. 682 of 1936. 16th September, 1938.

Sankara-narayana Aiyar Firm v. Yegna-lakshmi Ammal.

*distribution of assets—Maintainability—Interference in revision when other remedies open—Jurisdiction.*

Where an insolvent after adjudication and before discharge presented an application for rateable distribution in execution of a decree obtained by him prior to the insolvency, on the question as to the maintainability of the application by him,

*Held*, that the application was competent.

*Jayanarayana* v. *Polayya*, (1934) 68 M.L.J. 392, followed.

Case-law reviewed.

*Held also*, that a revision lay to the High Court.

*Subramaniam Chetty* v. *Ramaswami Chetty*, (1925) 49 M.L.J. 753 and *Sree Krishna Doss* v. *Chandook Chand*, (1908) 19 M.L.J. 307: I.L.R. 32 Mad. 334, referred to.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsiff of Ambasamudram dated 1st February, 1936 and made in E. A. No. 707 of 1935 in E. P. No. 138 of 1935 in O. S. No. 252 of 1932.

*K. P. Ramakrishna Aiyar* for Petitioner.

*K. Venkateswaran* for Respondents.

The Court delivered the following

JUDGMENT.—I have been invited in this case to set aside the order passed by the District Munsiff of Ambasamudram dismissing an application made to him by the petitioner under S. 73, Civil Procedure Code.

The facts, so far as they are necessary to be stated for the disposal of the questions of law raised before me, lie within a narrow compass. The respondents had obtained a decree in O. S. No. 252 of 1932 against certain judgment-debtors and had applied for execution by attachment and sale of certain properties (E. A. No. 737 of 1935). The properties were sold and the sale proceeds were brought into Court on the 8th of November, 1935. Before this, however, the petitioners, who had a decree passed in their favour in October, 1934, against the same judgment-debtors (O. S. No. 156 of 1934) had made an application on the 7th of November, 1935, that is, a day before the sale proceeds were actually brought into Court, for rateable distribution. If this were all, no objection could be raised against the application, but it appears that they had been adjudicated insolvents on 6th September, 1935, that is, about a couple of months before the application for rateable distribution was presented by them, and the first question which falls

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to be determined is whether the application could have been validly made by them after they had been adjudicated. The question has been decided by the lower Court in favour of the respondent and this revision has consequently been filed to test the correctness of that order.

A preliminary objection has been raised on behalf of the respondents that inasmuch as another remedy would be available to the petitioners, a revision of the order passed by the District Munsiff does not lie and the Court should not in any case interfere in its revisional jurisdiction but leave the matter to be decided by a regular suit. In view however of the real contention raised in this case it would not be only convenient but necessary to determine the question whether the lower Court has failed to exercise jurisdiction vested in it by law or has committed any material irregularity in exercising the same. The revision has been fully argued on behalf of the parties and I would therefore proceed to deal with the main question involved in the case.

Before I go into the merits of the petition, it must be observed that the petition for rateable distribution was filed by the insolvents in the Court of the District Munsiff, Ambasamudram, a place situated in Tinnevelly District while the Official Assignee in whom their estate had vested was in Madras. There was a distance of some 300 miles between these two places and if the petitioners had delayed the presentation of their petition even by a day, they would have been debarred from claiming a rateable distribution under the provisions of S. 73, Civil Procedure Code. It must also be noticed that the fact of their insolvency was not kept back by the petitioners from the Court. Nor was there any contest between the Official Assignee of Madras and the insolvents as regards the right of making the application and the application appears to have been made in the interests of the estate which had vested in the Official Assignee. This would be apparent from the fact that the Official Assignee filed an application on 21st November, 1935, adopting the petition for rateable distribution and praying that he might be added as a party to the same. It might also be stated that the name of the Official Assignee had not been brought on the record, and so far as the decree was concerned, it could only have been executed by the

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petitioners. With these preliminary remarks, I will address myself on the main contention raised in the case.

O. 22, r. 8, Civil Procedure Code, provides that the insolvency of a plaintiff in any suit would not cause a suit to abate unless the assignee or Receiver in whom the estate has vested either declines to continue the suit or fails to furnish security for costs in spite of an order passed by the Court to that effect. It is only then that the suit would be liable to a dismissal. This would show that the provisions contained in this rule only relate to a suit which was filed by the plaintiff at a time when he was competent to do so, but the disability to continue the suit arose while it was pending. It might also be observed here that this provision is, as I read it, in the nature of an exception and has only to be applied when certain conditions laid down in the rule are not complied with. I have been led to this conclusion as I feel that the general principle underlying the whole of O. 22, Civil Procedure Code, is that a person should not be ordinarily held to be disentitled to continue an action merely because his interest has *pendente lite* devolved on some other person either by his own act or by operation of law. O. 22, r. 12 provides that nothing in r. 8 would apply to proceedings in execution of a decree or order. Reading the two provisions together, the learned Counsel for the petitioners has argued that while a plaintiff after having been adjudicated an insolvent might not be in a position to continue a suit, he would not be debarred from making an application for execution of a decree in spite of his insolvency. It has been urged in reply that the real effect of the provisions contained in r. 12 is that the insolvents in the present case would have been entitled to continue an application, if one had been filed by them or on their behalf before they had been adjudicated insolvents, but this would not entitle them to make an application for execution. It appears to me that in as much as rule 8 does not provide for the institution of suits after an order of adjudication has been made, but for their continuance alone and as r. 12 merely exempts the proceedings in execution of a decree or order from the operation of r. 8, it would be correct to say that the provisions in r. 12 would not apply to the presentation of an application for an execution of a decree by those who have been declared to be insolvents.

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There is no doubt that the whole of an insolvent's property would vest in a Receiver and he would not be entitled to institute a suit in regard to the property of which he has been divested by law (see *Ramaswami Aiyangar* v. *Pavadai Chetty*[1], *Sayad Daud* v. *Mulna Mohammad*[2], *Rozario* v. *Mohammad Ebrahim*[3] and *Phani Bhushan Basu* v. *Shoghi Bhusan Maity*[4]). It has therefore been urged on behalf of the respondent that an insolvent should not be similarly held entitled to present an application for execution of a decree which had been obtained by him when he was not declared to be such. It can be legitimately argued that the money which may be realised in an execution would vest in the Receiver but can the power or the right to make an application for execution be considered to be 'property' within the meaning of S. 28 of the Provincial Insolvency Act and should he be held to have been deprived of that power or stripped of that right in consequence of an order of his adjudication particularly when there is no contest between him and his receiver? Should he not in that case be regarded to be aiding in the realisation of the property and the distribution of the proceeds among his creditors? Is there any statutory bar contained in the Civil Procedure Code or under the Provincial Insolvency Act which would take away the right of an insolvent from making an application for execution of a decree obtained by him before he was declared to be one? None has been pointed out to me by the learned Counsel for the respondent, and I have not been able to discover it myself. The provisions contained in S. 28 of the Provincial Insolvency Act debar a creditor during the pendency of an insolvency proceeding from having any remedy against the property of an insolvent in respect of a debt due by him or from commencing any suit or other legal proceeding against him except with the leave of the Court, but they do not preclude an insolvent from presenting an application for execution of a decree obtained by him before he was declared to be an insolvent. It may not be possible for an insolvent to recover any money from Court or to receive any payment in execution of a decree for which terms may have to be imposed on him either by the executing or the insolvency Courts but this does not entitle one to

1. (1913) 23 I.C. 813.
2. A.I.R. 1926 Bom. 366.
3. (1924) I.L.R. 48 Bom. 583.
4. (1935) 60 C.L.J. 581.

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assume that he has no power to make an application for execution. It appears to me therefore, without looking at the cases cited by the learned Counsel on behalf of the parties, that there is no warrant for the proposition that an insolvent is not entitled to make an application for execution of a decree obtained by him before an order for his adjudication was passed.

As for the cases cited by the Counsel for the parties I find that none of those relied upon by the learned Counsel for the respondent are of any help to me in coming to a conclusion on the point to be decided. Out of those cited on behalf of the petitioners there are two which may be noticed. It was held in *Asa Nand* v. *Bishan Singh*[1], that execution proceedings do not abate on a decree-holder's insolvency. Similarly in a Madras case reported in *Jayanarayana* v. *Polayya*[2], an application for execution by an insolvent, even after the decree was sold by the Official Assignee, was held by a Division Bench of this Court to have been a proper application for the purpose of S. 182 of the Limitation Act, and the applicant's insolvency was considered to be immaterial. This case was attempted to be distinguished both here and in the Court below on the grounds (*a*) that the decree had been in that case sold or assigned by the Official Assignee to a third party and the estate was no longer interested in the matter and (*b*) that the only question before the Court was whether the application would prevent the decree from being barred by limitation under Art. 182 and the present question whether a petition for rateable distribution could have been properly filed by an insolvent after adjudication was not decided. Having heard the counsel for the respondent I am of the opinion that there is no force in either of these contentions. The assignment by the Official Assignee of the decree in the case under consideration makes it more difficult for the respondent to contend in a case like the present, which is free from that complication, that the insolvent had no right to make the application for execution or to ask for a rateable distribution. The argument that after the assignment of the decree by the Official Assignee, the petitioner could not be said to have any right left in the decree to be able to execute it was more plausible in that case and yet he,

1. A.I.R. 1930 Lah. 205. 2. (1934) 68 M.L.J. 392.

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that is, the insolvent was held entitled to make an application for execution. It must be remembered that, in that case as in this there was no contest between the Official Assignee and the applicant for execution. As for the second contention it is true that the insolvent's application had been decided to have been validly presented for the purpose of S. 182 of the Limitation Act. Would that make any difference? The conclusion arrived at by the learned Judges and the reasoning adopted by them in coming to that conclusion would show that the insolvent's right to make the application for execution was held to exist and his insolvency was not considered to be a bar in his way for making such an application. Had the insolvent been held to be incompetent to make the application, the application for execution would have been found to be infructuous or useless and the limitation would not have been saved. In a sense even in the case before me, the question is really that of limitation, although not one provided by the Indian Limitation Act but by the Code of Civil Procedure in S. 73, Civil Procedure Code itself. An application for rateable distribution under S. 73 has to be made before the effects are realised by the Court and any application made beyond that day would be barred by the provisions of the section. The only two distinguishing features which were attempted to be relied upon by the learned Counsel for the respondent must be for the above reasons, taken to be of no avail to him in this case. If the *ratio decidendi* of this case were held to be correct and with which, if I may say so, I respectfully agree, the matter must be held to have been concluded by the authority of that case. Being a decision of a Division Bench of this Court, it is binding on me. I have therefore no hesitation in applying it to the present case.

The learned Counsel for the respondent cited *Bhagwan Das* v. *Amritsar National Bank*[1] and *Hari Rao* v. *Official Assignee of Madras*[2], before me in support of the proposition that an insolvent had no right to file an appeal after his adjudication. The first of these is a single Bench decision of the Lahore High Court in which it was held that a judgment-debtor had no *locus standi* to file an appeal from an order in

1. (1928) 111 I.C. 432.
2. (1926) 50 M.L.J. 358: I.L.R. 49 Mad. 461 (F.B.).

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execution proceedings after he had been declared an insolvent and that the proper person to appeal would be the Official Receiver in such a case. The decision in the second case cited is a Full Bench decision of this Court in which an insolvent was held not to be an "aggrieved person" in the sense in which those words were held to have been used in S. 8 (2) of the Presidency Towns Insolvency Act (III of 1909) and was therefore held to be incompetent to appeal. It could be noticed that in this case the contest was really between the Official Assignee and the insolvent in whom his estate had vested and a learned Judge of this Court had, while sitting on the Original Side, passed an order in the exercise of the insolvency jurisdiction rejecting his objection to a sale of a part of his estate by the former, that is, the Official Assignee on the ground that the sale was prejudicial to the latter, that is, the insolvent. It would thus be seen that both these decisions were given under the Insolvency Acts (Provincial and Presidency Towns) and did not consider the insolvent's right to present an appeal under the Code of Civil Procedure. In fact in a later Full Bench decision of this Court reported in *Subbaraya Goundan* v. *Virappa Chettiar Bank*[1], this distinction was pointed out by the learned Judges constituting that Bench who also decided that an insolvent would have a right to prefer an appeal under the Code of Civil Procedure against an order dismissing an application put in by him under O. 21, r. 90, Civil Procedure Code, in course of an execution of a decree passed against him. There are other cases of this and the Bombay High Court out of which it would be sufficient to refer to *Kondapalli Tatireddi* v. *Ramachandra Rao*[2] and *Ramachandra* v. *Shripati*[3], in which an insolvent's right to file an appeal was recognised under the Code of Civil Procedure. It is hardly necessary to pursue the matter any further. Suffice it to say that the difference in the decided cases is really based on the fact that a right of appeal has not been held to exist in an insolvent if attention has been confined by the learned Judges deciding them to the insolvency Acts while it has been held to exist by others who have taken the provisions of the Code of Civil Procedure into consideration. At all events these decisions are not directly in point in this case as the insolvents and the Official Assignee are both

1. (1933) 65 M.L.J. 719: I.L.R. 57 Mad. 89 (F.B.).
2. (1921) 13 L.W. 616.
3. A.I.R. 1929 Bom. 202.

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petitioners before me and the cases were mainly cited by way of an analogy in order to induce me to come to the conclusion that the insolvent had no right to make an application for execution and ask for rateable distribution.

For the above reasons, I am of the opinion that the judgment of the lower Court that the petitioner was not entitled to make the application for execution after an order of adjudication had been passed was incorrect.

As to the question of the competency of this revision petition, it is obvious from what has been said above that the learned Munsiff declined to entertain the application as he was of the opinion that the insolvents were precluded from making it. This was due to a misapprehension of the true effect of statutory rules contained in the Code of Civil Procedure. He has thus refused or failed to exercise the jurisdiction vested in him by law. At all events the exercise of jurisdiction by the lower Court was vitiated on account of material irregularity. In view of the authorities in *Viraraghava* v. *Parasuramai*[1], *Subramaniam Chetty* v. *Ramaswami Chetty*[2], *Sri Krishna Doss* v. *Chandook Chand*[3] and *Sundaram* v. *Mamsa Mavuthar*[4]. I am of the opinion that a revision is competent. It was in the end suggested that as a civil suit would be competent, this Court should not interfere in revision. It is true, that ordinarily the Courts would not do so and leave the parties to pursue their remedies in Civil Courts, but when multiplicity of proceedings has to be avoided and the circumstances of the case justify an interference, it should not desist from doing so simply because another remedy is available. In my opinion, there are circumstances in this case which would justify me in invoking my revisional jurisdiction and to set aside the order passed by the lower Court. I would therefore accept the revision and set aside the order. The revision is accepted with costs. The case will now go back to the District Munsiff who will proceed with the application according to law.

K. C. *Civil Revision Petition allowed.*

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1. (1891) I.L.R. 15 Mad. 372.
2. (1925) 49 M.L.J. 753.
3. (1908) 19 M.L.J. 307: I.L.R. 32 Mad. 334.
4. (1921) 40 M.L.J. 497: I.L.R. 44 Mad. 554 (F.B.).

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kistammal and others .. *Appellants** (*Defendants*)

*v.*

Saraswathi Bai Ammal (minor) by next friend, her husband, Bhimasena Rao .. *Respondent* (*Plaintiff*).

Kistammal *v.* Saraswathi Bai Ammal.

*Will—Construction of—Principles—Plain meaning of words—Duty of Court to give effect to—Intention of testator—Omission to dispose of residue—Power of Court to resist disposition—Will by Hindu—Bequest to sister and daughters and provisions for funeral expenses—Clause directing widow to do all acts with full rights—Effect of—Intestacy—Widow if entitled to all residue absolutely.*

Certain principles upon which a will should be construed are well settled. Firstly, the Court should give effect to the plain meaning of the words used. Secondly, if there is any ambiguity, the Court should, in interpreting the language, lean towards carrying out the known intentions of the testator as far as they can be ascertained from the recitals and from the surrounding circumstances. Thirdly, in interpreting ambiguous words, the Court should bear in mind the presumption that the testator was not likely to intend to create an intestacy regarding the residue of the estate. Fourthly, the Court should not strain the language of the will either in order to give effect to the apparent intention of the testator or in order to prevent an intestacy. Finally, the Court has no power to insert in the will a disposition which is missing, however desirable that disposition may be.

A Hindu testator at the time of his death left a widow, an unmarried daughter by her (the plaintiff) and two married daughters by another wife, (defendants 1 and 2). He left a will, an unprofessional document written in Tamil, which after starting with a preamble that "after my death my properties and debts should, after considering the details mentioned hereunder, be enjoyed" specified the properties and debts; then followed a legacy to the testator's sister and a small legacy to each of his married daughters, and then a provision for the payment of his funeral expenses. Finally, the last clause stated: " As per the above directions my wife Thulasi Bai should do all acts aforesaid with full rights". The wife Thulasi Bai died some time after the testator. It was contended before, and held by, the Courts below, that the testator by the last clause in his will intended that his wife should take and enjoy all the residue with full powers of ownership, and that after the death of the widow, the whole of the residue would go to her unmarried daughter, the plaintiff, and to her married step-daughters defendants 1 and 2.

*Held*, that even if the preamble and the last clause which were not juxtaposed but separated by recitals of some length, were to be read together, it was very difficult to read into the preamble a disposition in favour of the widow merely by virtue of the direction in the final clause that "she should do all acts aforesaid with full rights", and these words could not have the effect of converting the widow's management or administration into ownership; that owing to unskilled draftsmanship there

* S. A. No. 399 of 1934. 31st August, 1938.

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was a complete omission to dispose of the residue, but there was no disposition of the residue in favour of the widow, and the result must therefore be an intestacy, with the consequence that the plaintiff could not claim to be solely entitled to the residue which was divisible among the three daughters, plaintiff and defendants 1 and 2, in equal shares.

Appeal against the decree of the District Court of North Arcot at Vellore in A. S. No. 353 of 1932 (O. S. No. 305 of 1931) District Munsiff's Court, Arni.

*D. R. Krishna Rao* for Appellants.

*K. Subba Rao* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal relates to the interpretation of a will dated 11th September, 1920. The testator at the time of his death left a widow an unmarried daughter who is now the plaintiff and two married daughters by another wife who are defendants 1 and 2. The will is an unprofessional document written in Tamil and its important provisions are as follows. It starts with a preamble in which the testator says:

" After my death my properties and debts should, after considering the details mentioned hereunder, be enjoyed."

Then he goes on to specify his properties and his debts. Thereafter he makes a legacy to his sister and a small legacy to each of his married daughters, and then he makes provision for the payment of his funeral expenses. Finally there is the last clause which says:

" As per the above directions my wife Thulasi Bai should do all acts aforesaid with full rights,"

the words in Tamil being " சர்வ சுதந்திரத்துடன் நடத்த வேண்டியது." Both the Courts below reading the preamble along with the final clause have held that the testator by directing that the properties "should be enjoyed" as subsequently recited and by directing his wife to "do all acts aforesaid with full rights" intended to direct that his wife should enjoy all the residue with full powers of ownership. The effect of the interpretation is that, as the widow has now died, the whole of the residue will go to her daughter the plaintiff and not to her step-daughters defendants 1 and 2. Certain principles upon which a will should be construed are well settled. The first principle is that the Court should give effect to the plain meaning of the words used. Secondly if there is any ambiguity, the Court should in interpreting the anguage lean towards carrying out the known intentions of

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the testator as far as they can be ascertained from the recitals and from the surrounding circumstances. Thirdly in interpreting ambiguous words the Court should bear in mind the presumption that the testator was not likely to intend to create an intestacy regarding the residue of the estate. Fourthly the Court should not strain the language of the will either in order to give effect to the apparent intention of the testator or in order to prevent an intestacy. Finally, the Court has no power to insert in the will a disposition which is missing, however desirable that disposition may be. Bearing these principles in mind, I shall endeavour to construe this will. The final clause isolated from its context would naturally be interpreted as doing nothing more than making the widow the executrix of the will with full powers to carry out the directions therein. The preamble taken alone cannot be held to indicate in any way who should enjoy any of the properties. These two clauses were not juxtaposed but are separated by recitals of some length. Even if we read them together I find it very difficult to read into the preamble a disposition in favour of the widow merely by virtue of the direction in the final clause that "she should do all acts aforesaid with full rights". Granted that the words *"sarva swathanrathudan"* taken in conjunction with a verb indicating ownership would have the effect of making that ownership absolute, when taken in conjunction with a verb indicating merely management or administration, I do not think they could have the effect of converting that management into ownership. After all the preamble about the enjoyment of the property is couched in the vaguest possible terms and does not convey to my mind the impression that it was intended to be a disposing clause. Moreover its very position before the recitals of the extent of the estate and before the specific legacies is inconsistent with the theory that it was intended to make a disposition in the preamble in favour of the person specified in the final clause. I have very little doubt that what has happened has been that owing to the unskilled draftsmanship of this will, there was a complete omission to dispose of the residue. Conceivably that omission might have been intentional, for the widow even in an intestacy has the right to enjoy and has in fact enjoyed the residue for the whole of her lifetime and the only practical effect of the omission has been not to create a preference in

favour of the minor daughter as compared with the married daughters. More probably as the lower Courts have inferred, the omission was due to inadvertence. But I am clearly of opinion that there is no disposition of the residue in favour of the widow and the result must therefore be an intestacy with the consequence that the plaintiff cannot claim to be solely entitled to the property which her mother enjoyed during her life. The residue will be divisible between the three daughters in equal shares. In this view, I allow the appeal with costs throughout and dismiss the plaintiff's suit.

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Leave to appeal is refused.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE PANDRANG ROW.

Sundarammal minor by next friend
P. V. E. Ponnuswami Chettiar.. *Appellant** (*Plaintiff*)
*v.*
Jagadambal Ammal and others .. *Respondents* (*Defendants*).

Sundarammal *v.* Jagadambal Ammal.

*Civil Procedure Code (V of 1908), S. 92—Hereditary trustee of a public charitable trust—Widow succeeding as trustee—Suit by daughter as next reversioner to appoint a receiver to manage trust alleging waste, etc.—If governed by S. 92, Civil Procedure Code.*

The suit properties originally belonged to one *R* who by his will dedicated them to certain public charitable purposes. He appointed one *S* to be the hereditary trustee for the administration of these charities. *S* died in 1930 leaving him surviving the first defendant who was his third wife, the second defendant her daughter and plaintiff who was her daughter by the deceased second wife. The suit was filed against the widow making allegations of mismanagement, waste, etc., against her both in respect of the private estate of *S* and the trust properties. The question was if as regards trust properties the suit is not bad for non-conformity with S. 92, Civil Procedure Code.

*Held*, the properties are subject-matter of a public charitable trust and the plaint seeks relief on the footing of a breach of trust by the first defendant who is the present trustee. It does not in terms ask for her removal but for appointment of a receiver. It is in effect for removal of the widow from trusteeship. It is certainly a suit for the directions of the Court in respect of the administration of the trust. The plaintiff is not in the position of a co-trustee, as his right is only a *spes successionis*. Whether the present trustee is a male or a female, there is no difference with regard to the status of the next successor to the office. The suit is hit by S. 92. Civil Procedure Code.

*Venkatasubbamma* v. *Venkatarangam Chetti*, (1916) 31 M.L.J. 280 and *Ramaswami Goundan* v. *Singaperumal Kadavul*, (1925) 50 M.L.J. 42, followed.

* Appeal No. 42 of 1938. 1st September, 1938.

Sundarammal *v.* Jagadambal Ammal.

Appeal against the decree of the Court of the Subordinate Judge of South Arcot dated 23rd December, 1937 and passed in O. S. No. 68 of 1938.

*T. M. Krishnaswami Aiyar* and *A. Balasubramania Aiyar* for Appellant.

*K. V. Sesha Aiyangar* and *T. E. Ramabadrachariar* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J.

*Varadachariar, J.*—The plaintiff appeals against a decree denying relief to her in respect of the plaint B schedule properties, on the ground that the suit has not been instituted in conformity with the provisions of S. 92, Civil Procedure Code. These properties belonged to one Rajamanickam Chetti who by his will dedicated them to certain public charitable purposes and appointed one Sivaraman Chetti to be the hereditary trustee for the administration of these charities. Sivaraman Chetti died in May, 1933, leaving him surviving, the first defendant who was his third wife, the second defendant who is her daughter and the plaintiff who was his daughter by the deceased second wife. The suit out of which this appeal arises was instituted by the next friend of the plaintiff, making various allegations of mismanagement, waste, etc., against the first defendant both in respect of the private estate of Sivaraman Chetti and the trust properties. As regards the trust properties the question was argued as a preliminary issue, whether the suit should not fail for non-conformity with the provisions of S. 92, and that is the only question we are concerned with in this appeal.

It has not been denied that the B schedule properties are properties forming the subject-matter of a public charitable trust; nor has it been denied that the plaint seeks relief on the footing of a breach of trust by the first defendant who is admittedly the present trustee. The plaint does not in terms ask for her removal but prays for the appointment of a receiver for the preservation and management of the properties and the performance of the charities. As the learned Subordinate Judge points out, this is in effect a prayer for the removal of the first defendant from the trusteeship. It is certainly a request for the directions of the Court in respect of the administration of the trust.

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the cause of action and the relief which he claims are to be stated, sub-cl. (1) of the section has been so drafted as not to provide that the suit must necessarily be instituted by the very person who had served the Court of Wards with a notice. It merely enacts that no suit relating to the person or property of any ward shall be instituted in any Civil Court until the expiration of two months after notice in writing has been delivered. Had the legislature intended that the person who had served the Court of Wards with a notice would alone be entitled to sue, it could have said so without any difficulty. It is true that when the suit is to be filed on the basis of the cause of action mentioned in the notice, the person serving the notice would ordinarily be the same as the person instituting the suit; but the person, who intended to file a suit and who actually served the Court of Wards with a notice, may have died before the suit is instituted and his sons or heirs may have had to institute the suit instead. In that case it cannot be reasonably argued, in my opinion, that the notice served by the intended plaintiff has spent itself on account of his death and cannot be availed of by his sons or heirs. There is nothing in S. 49 of the Act which would make another notice essential as long as the suit is based substantially on the same cause of action which was stated in the notice. S. 49 appears to have been so drafted as to cover cases of this character. The position of an assignee, on whom the interest of the intending plaintiff may devolve by a voluntary act of the latter would be the same, in my opinion, and no objection can be raised on the ground that he had not served the Court of Wards with another notice after his assignment. It may be that if his title is denied by or on behalf of the Court of Wards, he would be called upon to establish the same before he is held entitled to any relief. But if he chooses to file a suit on the cause of action stated by his assignor, in the notice served on the Court of Wards, no legitimate objection can be raised against him on that score. A number of cases either following or decided on the lines adopted in *Bachchu Singh* v. *Secretary of State for India in Council*[1], were pressed upon us by the learned Counsel for the appellant in support of his contention. There is no doubt that the language used in S. 80, Civil Procedure Code, is very similar

1. (1902) I.L.R. 25 All. 187.

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to that employed in S. 49 of the Court of Wards Act but there is, first of all, some difference in the manner in which the two sections were drafted, that is, while the provisions of S. 80 are contained in one paragraph, those contained in S. 49 have been sub-divided into two. This might have persuaded the learned Judges in placing a different construction of S. 80, Civil Procedure Code, and holding that the intending plaintiff who has been referred to in the latter part of the section must be necessarily taken to refer to the same person who had served the notice. Secondly the word 'intending' before the word 'plaintiff' has now been taken out and this change appears to me to have been effected with the object of removing a doubt in construing S. 80, Civil Procedure Code, to which it was otherwise liable.

For these reasons, I consider that there is no merit in this appeal and it should be dismissed with costs.

S.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

T. G. Rajan .. *Plaintiff**

*v.*

The Asiatic Government Security Life Assurance Co., Ltd. .. *Defendant.*

Rajan v. Asiatic Government Security Life Assurance Co., Ltd.

*Life insurance—Payment of premium—" Days of grace "—Computation.*

In a policy of life insurance where conditions provide " 30 days grace" for payment of premium, the day following the due date is the first day of grace.

*McKenna* v. *City Life Assurance Co.*, (1919) 2 K.B. 491, followed.

*S. Parthasarathy* and *V. K. Thiruvenkatachari* for Plaintiff.

*K. Krishnaswami Aiyangar* for *V. Rajagopalachari* and *C. Deenadayalu* for Defendant.

The Court delivered the following

JUDGMENT.—This is an action for the recovery of a sum of Rs. 5,000 and interest payable on a life policy issued by the

* C. S. No. 319 of 1934. 1st August, 1938.

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defendant company on the life of Thiruvengadatha Aiyangar the father of the plaintiff in July, 1923. Under the terms of the policy the premium had to be paid quarterly during the whole period of the life of the assured on the third day of every July, October, January and April. The policy witnessed that provided the company received the premiums as set out in the schedule thereunder the company would on due proof of the occurrence of the event described in the schedule, of the age of the life assured, and of title, pay to the person to whom the assurance was granted, or his executors, administrators or assigns, the sum assured stated in the schedule. The event mentioned in the schedule was the death of the assured and as already stated, the premiums were to be paid quarterly on the dates specified above. The policy further provided that the policy and the sum thereby assured should be subject to the conditions endorsed thereon. On the back of the policy are endorsed certain rules under the heading privileges and conditions and Rules Nos. 9 and 10 are relevant for the purpose of this case. They are as follows:—

" 9. *Days of Grace*:—Thirty days of grace are allowed for the payment of annual, half-yearly and quarterly premiums while only fifteen days of grace are allowed in case of monthly premiums. If the premium be not paid within the days of grace, policy will lapse and be null and void."

"10. *Revival of Lapse Policies*:—A policy lapses to the company by non-payment of premium due within the days of grace allowed, but it may be revived within one year from the date on which the unpaid becomes due, on production of evidence satisfactory to the Directors as to the health and habits of the assured and on payment of all arrears, together with a penalty of annas four per month or part thereof on each Rs. 500 sum assured."

The quarterly premium due on the 3rd July, 1933, was paid by the assured on the 2nd August, 1933. The defendant company wrote to the assured that the premium was not paid within the days of grace allowed and that according to them the last day of grace expired on the 1st of August, and they therefore desired him to furnish them with a declaration of good health in order to revive the policy which according to them had lapsed. The assured accordingly sent a declaration of health which was accepted and the assured paid the next quarterly premium due in October and died thereafter on the 5th of November, 1933. The plaintiff as son and heir brings this suit for the recovery of the amount due under the policy, the assured having died intestate. The plaintiff was forced to bring this action as the defendant company declined to pay the

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amount on the ground that the declaration of health furnished by the assured was false to the knowledge of the assured and therefore the policy must be deemed to have been forfeited by reason of the falsity of the declaration and the plaintiff was therefore not entitled to claim anything. The case of the plaintiff is that the amount of the premium was paid in time in accordance with the terms of the policy and there was no lapse, but the assured, acting on the incorrect and untrue representation made by the defendant company, furnished them with the declaration of health and as the policy had not in fact lapsed, the plaintiff is entitled to the amount claimed. The defendant company in their answer persist in their contention that the policy had lapsed. Their plea in regard thereto is thus set out in paragraphs 4 and 11 of their written statement:

"4. The defendants state that the deceased failed to pay the quarterly premium due on the 3rd of July, 1933, within the days of grace allowed by the rules of the company, namely, 30 days from and inclusive of the due date and the policy No. 445 thereby became lapsed to the company. The deceased however paid the amount of the said premium to defendants' bankers at Madras on the 31st day from the due date but as the said payment was thus late by one day the defendants called upon the deceased to furnish to them a declaration of good health in accordance with their rules and the deceased complied with the defendants' requirement by sending them a declaration of good health dated 18th August, 1933. . . ."

"11. The defendants submit that in any case the deceased having accepted the calculation of the defendants and complied with their requirements by sending the declaration of good health, the plaintiff is estopped from contending that there was no lapse."

The main question therefore for decision is whether the policy had lapsed. Two issues have been raised in regard thereto which are issues Nos. 1 and 2, namely:

"1. Was the premium due on 3rd July, 1933, paid beyond the days of grace and was there a lapse of the policy on such account?"

"2. Is the plaintiff estopped from contending that there was no lapse for the reason alleged in paragraph 11 of the written statement?"

It is the contention of the plaintiff that he is entitled to pay the amount of the premium on the 2nd of August, because it was the last day of the thirty days of grace allowed under Rule No. 9 relating to the privileges and conditions set out above. It is the contention of the defendant that the last day of grace fell on the 1st of August because according to them the day of computation for the days of grace begins from 3rd July and the risk commences from the midnight of 2nd July.

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The question really turns upon the language of the policy. According to the terms of the policy the quarterly premium for the quarter commencing in July, 1933, was payable on 3rd July. That is the date given in the Schedule to the policy. A privilege has been accorded to the assured for his benefit by giving thirty days of grace to avoid the policy lapsing. Therefore these days of grace must *prima facie* be deemed to be in addition to the date already provided in the body of the policy. The language of the policy itself indicates the difference in idea between the two dates, the one being the day on which the amount becomes due and the other being the day up to which the amount of the premium is payable. Therefore the day of grace must be computed from the next day after the due date. It is as if the policy had stated that thirty days of grace were allowed from the due date for the payment of annual, half-yearly and quarterly premiums. Therefore, according to the plain meaning deducible from the language of the policy it seems to be clear that the day following the due date must be the first day of grace. In construing these policies two principles have to be kept in view. Rule No. 9 confers a privilege and also imposes a forfeiture or penalty. It is a settled rule of construction that provisions relating to forfeiture should be construed in favour of the assured and against the company. Again, another well-recognised principle is that where the computation is for the benefit of the person affected as much time should be given as the language admits of and where it is to his detriment the language should be considered as strictly as possible. The principle was so stated by Lord Esher in construing a provision of the English Bankruptcy Act of 1890 in In re *North*: Ex parte *Hasluck*[1], but the same principle is also applicable to contracts. According to the plea of the defendant the assured will not get 30 days of grace but only 29 because he was entitled to pay the premium until the last business hour on the 3rd of July. It would certainly operate to his detriment if the due date is not excluded. The expression 'days of grace' appears to have been taken from the law relating to law merchant where it has a well-recognised connotation. The expression in that law means that certain days are allowed to the acceptor of a bill or the maker of a note in which to make the payment in addition to the time contracted

1. (1895) 2 Q.B. 264 at 270.

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for by the bill or note itself. Originally such time was allowed by custom as a matter of grace or favour. Subsequently custom hardened into law and was confirmed or established as such in many countries by legislation—*vide* the English Bankruptcy Act, S. 14 and the Negotiable Instruments Act, S. 22. The rule of computation, where the matter is not provided for by legislation, has always been that the day upon which the negotiable paper becomes due and payable is not to be counted and the following day is the first day of grace. The same principle seems to have been adopted in the insurance law. (*Vide* Macgillivray's Law of Insurance, 1912 Ed., at p. 248, on the object and meaning of the days of grace in an insurance policy.) There appears to be no reported cases on the point but I find the judgment of Lord Justice Scrutton in *McKenna* v. *City Life Assurance Co.*[1] instructive. In that case a question arose on the construction of the terms of a life policy as to when the premium became due within the meaning of a condition in the policy. In order to appreciate the relevancy of the case it is necessary to give two or three conditions which were considered by the learned Judge. Under the terms of the policy the company covenanted that if the assured should 'on or before the last day of every succeeding January, April, July and October thereafter until the death of the assured pay to the company the premium of £3' the defendants would pay the sum so insured upon the death of the assured. By the conditions of the policy it was provided as follows:—

Condition 2:

"Thirty days of grace, without liability to fine, are allowed for the payment of each renewal premium."

Condition 3:

"This policy shall not lapse by non-payment of any renewal premium before the expiration of three calendar months from the day on which such premium shall be due."

Condition 17:

"Any policy which has acquired a surrender value will not immediately lapse if a renewal premium be not paid within the days of grace but will be kept in force for twelve calendar months from the date upon which the last premium became due."

The assured paid all the premiums upon the policy down to and including the premiums payable on 30th April, 1915, at which date the policy had acquired under the terms of the

1. (1919) 2 K.B. 491.

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conditions a surrender value. Subsequently the assured died. The legal representative was in doubt whether to claim the surrender value or to go on paying the premiums. On 7th August, 1916, she decided to continue the premiums and tendered the amount in arrear through her solicitor which the company declined to take. The question therefore was whether she had a right to pay the premiums. The exact language used in the condition was "from the date upon which the last premium became due". If the twelve months were taken from July 31st when the last premium became due, the tender on 7th August, 1916, was more than twelve months but it was contended that if the days of grace were taken into consideration it would be within time. On the exact language of the policy Lord Justice Scrutton decided that the premium must be deemed to have become due only on the 31st July. The learned Judge puts the question thus:

"When did the premium become due? Did it become due within the meaning of the policy *on 31st July or 30th August?*"

The date 'August 30' is very significant because it is the last day of grace according to condition No. 2 of the policy being thirty days excluding the 31st July. This is how the learned Judge interpreted Condition No. 2 of the policy thus indicating that the day following the due date is the first day of grace. The condition relating to the days of grace which Lord Justice Scrutton was construing was the same as that in the policy in question. Then the learned Judge proceeds thus:

"A similar question might have arisen under the Bills of Exchange Act, but there it is expressly provided that 'the bill is due and payable on the last day of grace'. In this case I come to the conclusion that a premium becomes due on the day specified in the body of the policy as the day on or before which it is to be paid as a condition of the company's liability to pay the sum assured."

He then refers to the judgment of Lord Justice Mathew in *Stuart* v. *Freeman*[1], as to the correct meaning of the term 'Days of grace' thus. He said:

"In my opinion the correct view as to the days of grace allowed by the terms of this policy is that if payment is made within the time mentioned it is to be taken to have been made on the day appointed for payment, and is to have the same effect as if it had been made on that day", thereby drawing a distinction between the date up to which the premium continued payable and the date when it became due."

1. (1903) 1 K.B. 47.

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This decision, so far as it goes, supports my view. I hold in this case that the last day of grace fell on the 2nd August, 1933, and the payment was made in accordance with the terms of the policy and the policy did not lapse.

Mr. Krishnaswami Aiyangar has not been able to cite any authority in support of the position he contended for and he also conceded that no question of estoppel arises in the view I have taken, and other issues also do not arise. The plaintiff will therefore be entitled to judgment for the amount claimed with interest and costs. But the decree will not issue until the plaintiff produces a succession certificate entitling him to claim the amount. Time for producing the succession certificate, two months.

K. C. —— *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kolisetti Ethirajamma, minor by next friend and mother Paruchuru Thayaramma .. *Appellant** *(Plaintiff)*

*v.*

Kolisetti Subbarayudu (deceased) and another .. *Respondents and Legal Representative (Defendant and Nil).*

Ethirajamma v. Subbarayudu.

*Hindu Law—Maintenance—Right of daughter-in-law as against father-in-law's self-acquired property—Suit against father-in-law—Absence of ancestral property—Death of father-in-law pending suit—Effect—Decree against father-in-law's estate as against legal representative—If can be passed.*

There is no authority for holding that whenever a minor daughter-in-law is widowed, she has a right to claim maintenance from her father-in-law's self-acquired property, more especially when she no longer lives in the father-in-law's household. A daughter-in-law who has voluntarily left her father-in-law's household after her husband's death cannot get a decree for maintenance against the father-in-law who has no ancestral property. The fact that the father-in-law dies after the filing of the suit cannot entitle the daughter-in-law to a decree in the suit against the legal representative of the father-in-law out of the estate of the father-in-law. If the plaintiff's right to claim maintenance is enlarged by the death of the father-in-law, that enlarged right cannot be enforced in the suit framed simply as a suit against the father-in-law.

Appeal against the decree of the Court of the Subordinate Judge of Nellore in Appeal Suit No. 6 of 1934 (A. S. No. 67

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* S. A. No. 604 of 1934. 19th September, 1938.

Ethirajamma v. Subbarayudu.

of 1932, District Court) preferred against the decree of the Court of the District Munsiff of Nellore in O.S. No. 523 of 1930.

*Ch. Raghava Rao* for Appellant.

*B. Somayya* for Respondents.

The Court delivered the following

JUDGMENT.—The appellant sued her father-in-law for maintenance due to her as the widow of the defendant's son. The marriage was in 1925 at which time the plaintiff must have been a mere child. Her husband died on 7th August, 1930. There are findings of fact that the defendant had no ancestral property and that the plaintiff after her husband's death left her father-in-law's household voluntarily. In appeal it is argued that by reason of the circumstance that she was a minor at the time of her marriage and that she was taken into her father-in-law's household, she has a right to claim maintenance out of her father-in-law's self-acquired property. This contention seems to rest on no authority at all. It is true that the learned Judges who decided *Meenakshi Ammal* v. *Rama Aiyar*[1], in negativing the claim to maintenance by an adult daughter-in-law against her father-in-law, refers to the possibility that special circumstances might make it equitable and just in a particular case to uphold such a claim and speak of the minority of the daughter-in-law as one such special circumstance not existing in the case with which they had to deal. But observations of this nature cannot be taken as authority for the position that whenever a minor daughter-in-law is widowed, she has a right to claim maintenance from her father-in-law's self-acquired property, more especially when she no longer lives in the father-in-law's household as is the case here. It is pointed out that since the filing of this second appeal, the father-in-law has died and his widow has been impleaded as his legal representative, and it is suggested that this will bring into operation the line of cases which have recognised the right of a daughter-in-law to claim maintenance out of the father-in-law's estate when it has descended by inheritance to others. It seems to me quite obvious that if the plaintiff's right to claim maintenance has been enlarged by the death of the defendant, that enlarged claim cannot be

1. (1912) 24 M.L.J. 106: I.L.R. 37 Mad. 396.

Ethirajamma v. Subbarayudu.

established in the present suit which has been framed simply as a suit against the father-in-law. I say nothing therefore which will either help or hinder the plaintiff from bringing a fresh suit, if so advised, against the heir of the deceased father-in-law. I may observe, however, that the present respondent—the legal representative of the deceased defendant—denies that she is in possession of her husband's estate as his heir-at-law.

The appeal is dismissed with costs.

Leave to appeal is refused.

K. C. —— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Sambangi Lakshumanna and others .. *Appellants** *(Accused).*

Lakshumanna, *In re.*

*Penal Code (XLV of 1860), S. 302—Murder committed by four accused—Sentence of transportation for life on some—Propriety—Reasons for awarding lesser sentence—Criminal Procedure Code (V of 1898), S. 367 (5).*

In a case of a brutal murder the Sessions Judge convicted four accused but sentenced only one of them to death, the others being sentenced to transportation for life. The Sessions Judge gave his reasons as follows: "Generally capital punishment is reserved for those who actually deal the fatal blow ......... After careful consideration, I am of opinion that in these days, when such murders by a number of persons for committing robbery are rare, and when public feeling is urging the total abolition of capital punishment, it is not necessary to condemn four persons to death for the murder of one man. There are also some rulings of High Courts, by eminent Judges, that in such cases no useful purpose is served by sentencing so many persons to death simply to conform to the exigencies of logic and that a life sentence is the more proper one."

*Held*, in appeal, that the reasons for giving the lesser sentence of transportation were not proper and that the persons found guilty of murder should be sentenced to death. The state of public feeling is not an admissible reason for refraining from passing the sentence of death. Nor is it permissible to refrain from sentencing the murderers to death merely because their numbers exceed the number of their victims. In such a case there is no question of conforming to exigencies of logic; the question is one of conforming to the precepts of the law.

Appeals against the order of the Court of Session of the Vizagapatam Division in Case No. 11 of the Calendar for 1938 dated the 26th day of March, 1938.

* Crl. Apps. Nos. 216 and 297 of 1938. 28th September, 1938.

Criminal Revision Case No. 320 of 1938.
Taken up No. 6 of 1938.

Case taken up by the High Court for enhancement to death of the sentences of transportation for life passed upon the above accused Nos. 1 to 4 in the said Sessions Case No. 11 of 1938.

*G. K. Damodara Rao* for Appellants.

*The Public Prosecutor* (*V. L. Ethiraj*) on behalf of the Crown.

The judgment of the Court was delivered by

Burn, J.

*Burn, J.*—These appellants were all tried together in S.C. No. 11 of 1938 on the file of the Sessions Judge, Vizagapatam. The judgment shows that they were committed for trial on charges of house trespass and robbery as well as murder but the learned Sessions Judge very properly postponed the trial for the minor offences and with the aid of Assessors tried the appellants only for the offence of murder.

The facts are comparatively simple. The deceased was a son of one Lakshminarayana (P.W. 15) a merchant who lives in the village of Pekki in Vizagapatam District. P.W. 15's family is well-to-do. They are engaged not only in sundry trade but also in money-lending. The loans were mainly secured by the pledge of jewels and these jewels were kept in a bhoshanam box $5\frac{1}{2}$ cubits long, $2\frac{1}{2}$ cubits wide and 2 cubits high. P.W. 15 has two other sons, one elder (P.W. 14), and one Cunnayya younger than the deceased. The father and his sons lived in two houses adjoining one another, one fronting on the Pedda Veedhi and the other fronting on the Nadu Veedhi. One portion is tiled and the other portion is terraced. The bhoshanam box was kept in the tiled portion in a room in which the deceased used to sleep and in which he went to sleep on a cot on the night of the 26th October 1937. The next morning his elder brother (P.W. 14) found the door into the tiled portion of the house unbolted and when he got inside he discovered that his brother had been murdered by being stabbed in the neck. The bhoshanam box had been opened and its valuable contents stolen. A report was made to the Police Station at Bobbili the same afternoon 27th October and at 2 A.M. on the 28th the Police arrived. At the inquest held on the 28th the 1st and 2nd accused were

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suspected because they had been employed by P.W. 15 and his sons to do various odd jobs in the house. The 1st accused was detained by the Sub-Inspector of Police (P. W. 25) and he made a statement implicating the 2nd, 3rd and 4th accused and thereupon the 3rd and 4th accused were arrested on the same day. The 2nd accused was absconding until the 1st November when he was arrested at 4 P.M. by P.W. 20, a head constable of Bobbili station.

The evidence against the accused was partly circumstantial and partly confessional.

[His Lordship dealt with the evidence and concluded.]

On this evidence the learned Sessions Judge convicted all the accused of murder. It would have been expected that the conviction would have been followed by a sentence of death. The learned Sessions Judge calls it a diabolical deed. He says:

"The murder was brutal, and carefully planned, and reminds one of the days of the Thugs. There is no extenuating circumstance proper."

This is quite correct and there is no ground upon which the learned Sessions Judge could with any respect for the law refrain from sentencing the murderers to death. The learned Sessions Judge however goes on to say:

"Generally capital punishment is reserved for those who actually deal the fatal blow. But here it will be unjust to sentence accused 4 alone to death. Then the question is whether all the four ought to be sentenced to death. After careful consideration, I am of opinion that in these days, when such murders by a number of persons for committing robbery are rare, and when public feeling is urging the total abolition of capital punishment, it is not necessary to condemn four persons to death for the murder of one man. There are also some rulings of High Courts, by eminent judges, that in such cases no useful purpose is served by sentencing so many persons to death simply to conform to the exigencies of logic, and that a life sentence is the more proper one. So, I sentence all the four accused in this case to transportation for life."

The learned Sessions Judge has been influenced by considerations which ought to have no weight whatever with a Judge administering the law. We are not at all satisfied that his statements of fact in the passage quoted are correct. It is not true, we think, to say that such murders by a number of persons for committing robbery are rare. On the contrary such murders are far too common. We are not aware that there is any general public feeling urging the total abolition of capital punishment. There are individuals who have strong

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views against capital punishment but we think it is quite incorrect to say that the public as a whole is urging the total abolition of capital punishment. Even if it were so, it is no part of the duty of a Sessions Judge to be influenced by public feeling. His duty is to administer the law. The law says that the proper sentence for murder is death and that whenever a person is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reasons why the sentence of death was not passed [S. 367 (5), Criminal Procedure Code]. The state of public feeling is not an admissible reason for refraining from passing the sentence of death. Nor is it permissible to refrain from sentencing the murderers to death merely because their numbers exceed the numbers of their victims. When four persons have together planned and executed the murder of a single person, each of them must be sentenced to death unless there are some legal reasons for not doing so. We do not know of the existence of the rulings of High Courts by eminent Judges to which the learned Sessions Judge refers. There is no question of conforming to the exigencies of logic. The question is one of conforming to the precepts of the law. We must therefore express our strongest disapproval of the pretexts which the learned Sessions Judge has put forward for failing to do his duty in this case. The proper sentence and the only sentence that can legally be imposed in this case on those who are guilty is the sentence of death.

But we think that the learned Sessions Judge has erred in convicting the first accused. There is no evidence that the first accused took part in the murder. The only evidence regarding his part in the occurrence comes from his own statement and the statements of the co-accused. All these show that he kept watch outside the house while the other three were inside but they do not show that he knew when they were inside that they were going to murder Chinna Venkataswami. From the fact that when they came out he demanded his share it can at most be inferred that he knew they were going to steal but we do not think it follows that he must have known that in order to commit theft they would be obliged to murder the sowcar. We think there is nothing in the statements of any of these accused to indicate that the

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first accused shared with the others the common intention of committing murder. We therefore set aside the conviction of the first accused and the sentence of transportation for life passed upon him and order that in so far as the charge of murder is concerned he be set at liberty forthwith.

The conviction of the other three accused is undoubtedly correct and we confirm it. The accused have been given notice to show cause why the sentence of death should not be passed upon them. Learned Counsel who has appeared for them is not able to defend the "reasons" put forward by the learned Sessions Judge for imposing the lesser penalty. Nor is he able to advance any reasons of his own. The most that he can do is to make a plea for leniency. It is not permissible for a judge to indulge himself in leniency in a case like this. We therefore confirm the convictions of the second, third and fourth accused for murder, set aside the sentence of transportation for life and in lieu of that sentence we sentence each of these accused to be hanged by the neck until he be dead.

B. V. V. *Appeal dismissed.*
*Sentence enhanced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Karnam Hirannayya .. *Appellant** (*Petitioner—Judgment-debtor*)

*v.*

Matan Thippeswami and another .. *Respondents* (*Respondents 1 and 2—Decree-holders*).

Hirannayya *v.* Thippeswami.

*Madras Debt Conciliation Act (XI of 1936), Ss. 4 and 25—Application to the Board—Attention of the executing Court drawn to it—Stay of sale not granted—Continuance of sale—Rejection of petition by Board—Confirmation of last bid—Validity of sale.*

A Court was holding a sale in the course of executing a decree. Before the sale was due to begin, the judgment-debtor brought to the notice of the Court that he had made an application under S. 4 of the Debt Conciliation Act. The Court refused to stay the sale proceedings without seeing a certified copy of the application to the Debt Conciliation Board. The Court ordered the sale to go on and took bids. After the judgment-debtor's application to the Board was finally rejected by it, the Court took up the execution petition and confirmed the last bid.

* A. A. O. No. 2 of 1938. 19th October, 1938.

*Held*, that the Court acted without jurisdiction when it allowed the sale to go on. The sale was entirely without jurisdiction and another sale should be held again after fresh proclamation.

Hirannayya *v.* Thippeswami.

Appeal against the order of the District Court of Bellary dated 20th day of December, 1937 and made in Execution Application No. 546 of 1937 in Execution Petition No. 27 of 1937 (in O. S. No. 38 of 1935).

*V. S. Narasimhachariar* and *N. Appa Rao* for Appellant.

*K. Bashyam Aiyangar* and *T. R. Srinivasan* for Respondents.

The judgment of the Court was delivered by

Burn, J.

*Burn, J.*—This is an appeal from the order of the learned District Judge of Bellary in a matter arising in execution. The facts which are necessary for the disposal of this appeal are simple. The appellant was the judgment-debtor in O. S. No. 38 of 1935. The respondents applied for execution of the decree by sale of the mortgaged property and the sale was fixed for 23rd August, 1937. On the 16th of August, the judgment-debtor made an application to the Debt Conciliation Board under S. 4 of the Madras Debt Conciliation Act of 1936. On the 19th August, the judgment-debtor made an application to the District Court which was executing the decree for staying the sale of the property on the ground that he had made an application under S. 25 of the Debt Conciliation Act, which runs as follows:—

" When an application has been made to a board under S. 4 any suit or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which application has been made, shall not be proceeded with until the Board has dismissed the application."

The learned Judge refused however to stay the sale proceedings without seeing a certified copy of the application to the Debt Conciliation Board. The judgment-debtor's application was posted to the 23rd of August, the dated fixed for sale. On that date the learned District Judge ordered the sale to go on because there was nothing more than the petitioner's statement to substantiate his petition. The sale was continued on the 24th of August, and on that date the judgment-debtor made another attempt to get the proceedings stayed and this time he filed an affidavit of his Vakil to the effect that an application had been made to the Debt Conciliation Board. Upon that the learned District Judge decided to stay further proceedings and he granted what he called an *interim* stay, and

posted the petition for further proceedings to the 27th of August. On that date after expressing some doubt about the feasibility of staying the sale after bids had been received the learned District Judge thought that the difficulty could be avoided because the highest bidder up to that point was the decree-holder himself and he had consented to allow his bid to await acceptance if the stay should be dissolved thereafter. Therefore the learned District Judge made the stay of sale absolute. No date was fixed for the resumption of the sale. In October, 1937, it appears to have been brought to the notice of the learned District Judge that the application to the Debt Conciliation Board had been dismissed for default. But he quite properly refused to take action on that since it was alleged that the judgment-debtor had put in a petition for restoration of his application and it was possible that that might be granted. The judgment-debtor's application to the Debt Conciliation Board was finally rejected by the Board on the 1st November. The learned District Judge took up the execution petition again on the 3rd of November to which date he had posted it on the 19th October. On that date he passed the following order:—

> "The judgment-debtor's revision petition has been dismissed and copy of the order has been filed. The judgment-debtor says he is now filing another petition. It is not necessary to give time for that as the revision petition was dismissed, not on technical grounds, but because there appears to the Board to be no possibility of any arrangement being reached. Proceedings will continue. The bid is accepted for confirmation."

The learned District Judge apparently refers to the last bid, that of the decree-holder which had been made on the 24th of August.

In these circumstances, we are quite clearly of the opinion that the learned District Judge acted without jurisdiction when he allowed the sale to go on on the 23rd and 24th of August and took bids. S. 25 of the Debt Conciliation Act says that when an application has been made proceedings such as these shall not be proceeded with until the Board has dismissed the application.

Unfortunately the section does not explain in what manner it is to be brought to the notice of the Civil Court that an application has been made to the Board. But this difficulty need not cause us any embarrassment because it is admitted that the judgment-debtor on the 19th of August before the sale was due to begin brought it to the notice of the learned

District Judge that he had made an application under S. 4 of the Act.

Hiran-nayya v. Thippe-swami. — Burn, J.

We therefore accept the contention of the judgment-debtor that the sale held in this case was entirely without jurisdiction. We allow the appeal, set aside the order of the learned District Judge confirming the sale and direct that the sale do proceed after fresh proclamation. The appellant's costs will be paid by the respondent.

K. C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

G. V. C. Babu Naidu .. *Appellant** *(Plaintiff)*

*v.*

Municipal Council, Adoni .. *Respondent (Defendant).*

Babu Naidu v. Municipal Council, Adoni.

*District Municipalities Act (V of 1920), S. 93—Manufacture of arrack at Bellary—Depot for sale—Control from Bellary—Depot-keeper to sell only to licensed vendors at prices fixed at Bellary—If owner liable to profession-tax at Adoni.*

A licensed owner of an arrack distillery at Bellary keeps a depot for distribution of his liquor at Adoni. By the terms of his licence he manufactures liquor for distribution at certain specified depots at a price fixed by the Excise Department. The depot at Adoni exists only to supply arrack for cash to licensed vendors. The depot-keeper has no authority to supply on credit. He issues liquor in return for cash which he has to deposit in the treasury subject to certain authorised deductions for standing expenses. He keeps no account except a stock book and the general control of the business apart from the daily sales is entirely exercised in Bellary.

*Held,* the owner cannot be said to have transacted business at Adoni. Business is transacted at the place where the contracts are made and where the control is exercised, not at the place where the contracts are merely executed. The Adoni depot-keeper's control over the trade is purely mechanical. The price is fixed elsewhere and the business is controlled from Bellary. The depot at Adoni is not strictly speaking an office but a mere warehouse for distributing goods. The law in this respect is not changed by the rules under the new Act.

Appeal against the decree of the District Court, Bellary, in Appeal Suit No. 26 of 1933 preferred against the decree of the Court of the District Munsiff of Bellary in O. S. No. 508 of 1932.

*P. Chandra Reddi* for Appellant.

*M. S. Ramachandra Rao* for Respondent.

The Court delivered the following

* S. A. No. 597 of 1934. 21st September, 1938.

Babu Naidu v. Municipal Council, Adoni.

JUDGMENT.—The question in this case is whether the plaintiff who owns an arrack distillery at Bellary can be said to have transacted business at Adoni, where he keeps a depot for distribution of his liquor, and incurred liability to pay profession-tax to the Adoni Municipality. The facts are well settled. The plaintiff is a licensed distiller. By the terms of his licence he manufactures liquor for distribution at certain specified depots at a price fixed by the Excise Department on a calculation of costs of production plus a reasonable profit. The depot at Adoni exists only to supply arrack for cash to licensed vendors. The depot-keeper has no authority to supply on credit. He issues liquor in return for cash which he has to deposit in the treasury subject to certain authorised deductions for standing expenses. He keeps no account except a stock book and the general control of the business apart from the daily sales is entirely exercised in Bellary. It is also established that in fact the Adoni sales have not been taken into account in assessing profession-tax at Bellary. Now on these facts, can it be said that the plaintiff transacts business through his agent at Adoni or should it be held that the transaction of the business is at Bellary and that the agent at Adoni is nothing more than a mere distributor and store-keeper.

S. 93 of the Madras District Municipalities Act does not itself define the term 'transacts business'. But S. 94-A says that:

"If a company or person employs a servant or agent to represent it or him for the purpose of transacting business in a Municipality, such company or person shall be deemed to transact business within the Municipality."

And r. 17 of Sch. IV to the Act says that:

"The company or person shall be deemed to have transacted business and the person shall be deemed to have exercised a profession, art or calling, or held an appointment in the Municipality if such company or person has an office or place of employment within such municipality."

Now the term "place of employment" in this rule undoubtedly refers back to the person who exercised the profession, art or calling, etc., and with reference to the company the criterion is whether it has an office. This criterion is not very helpful, for the dictionary definition of an office is 'a place where business is transacted' so that we are referred back to the question whether business is in fact transacted in the place where the agent works.

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Now there is a long line of cases on the question whether a firm can be said to transact business in the place where it has a mere agent for canvassing business. The leading case of *Grainger & Son* v. *Gough*[1], decided that a French firm, selling wine through commission agents in London, but keeping in the hands of the head office in France the power to accept or decline orders, could not be held to be transacting business in London. This case and other similar cases have been followed by our High Court. In *The Municipal Council of Cocanada* v. *The 'Clan' Line Steamers, Ltd.*[2], it was held that the shipping company which had an agent in Madras and a sub-agent at Cocanada, the latter being empowered merely to carry out ministerial duties in connection with the shipping of cargo and the contracts being made in Madras, was not liable to be taxed at Cocanada as a firm transacting business there. Similarly in *Hajee Shaik Meera Rowther* v. *The President of the Corporation of Madras*[3], where a firm in Tinnevelly kept a buying agent in Madras who had no office but on instructions from Tinnevelly purchased piece-goods in Madras for despatch to the shop in Tinnevelly where they were sold, it was held that the Tinnevelly merchant did not exercise a trade in Madras. There is a decision of Pandalai, J., in *Eastern Distilleries & Sugar Factories, Ltd.* v. *The Municipal Council, Negapatam*[4], which has actually considered the position of the distillery depot though not with reference to the liability to profession-tax but with reference to a somewhat analogous liability to company tax. Under the rule relating to company tax, the question was whether the company had a head office or branch office in Negapatam, where the depot was situated. The depot in question not only carried out arrack sales similar to those with which we have to deal here, but also sold sugar under orders from the head office. It was held that there was no office within the meaning of the rule, the basis of the decision being that the control was exercised from headquarters and the local agent was a mere distributing agency. I find it very difficult to differentiate that case from the present case.

The lower Courts have been influenced by the fact that there has been a change in the rules under the new Act whereby

1. (1896) A. C. 325.
2. (1918) 36 M.L.J. 226: I.L.R. 42 Mad. 455.
3. (1909) I.L.R. 33 Mad. 82.
4. A.I.R. 1933 Mad. 496.

Babu Naidu v. Municipal Council, Adoni.

instead of the criterion being the existence of the principal office within the Municipality, there has been substituted the criterion of the existence of an office there. But when once it is understood that an office is merely a place where business is transacted, we are thrown back on the decisions as to what is meant by the transaction of the business and the general rule must be taken to be that the business is transacted at the place where the contracts are made and where control is exercised, not at the place where the contracts are merely executed. It is true that the depot-keeper at Adoni has authority to deliver goods in return for cash and I suppose that on the narrowest view it might be said that every time he delivers liquor in return for cash there is an executed contract of sale. But his control over the trade is in fact purely mechanical. The price is fixed elsewhere; the vendee must be one of certain licensed persons; the money is paid straight into an account in the treasury and all those accounts from which profits can be ascertained and with the help of which control can be exercised are maintained in Bellary.

It is pointed out for the appellant that the assessment of the business on its separate income at each of its depots will entail the maintenance of separate accounts for these depots showing the profit which each makes and will involve the owner of the business in the trouble of taking separate proceedings and making separate returns in each municipality in which he distributes his wares. These are practical considerations which cannot, of course, avail to alter the law, but they may be looked into for the purpose of deciding where in fact this business is transacted and for the purpose of applying the law as laid down in the decided cases. I would observe that the appellant is not anxious to avoid his proper liability to pay profession-tax; but he is anxious to avoid the trouble incidental to the apportionment of his liability between a number of different municipalities in each of which he has sales.

On a consideration of all the facts and of the authorities which have been placed before me, I am of opinion that the appellant must be deemed to transact his business at Bellary and not at Adoni and that the depot at Adoni is not strictly speaking an office but a mere warehouse for distributing goods. In this view I must hold that the appellant is not taxable to profession-tax in respect of the profits of his Adoni depot and

I must allow the appeal and grant the plaintiff the declaration which he seeks. I do not think that any injunction is necessary, since the municipality will certainly honour this Court's declaration. The defendant will pay the plaintiff's costs throughout.



Leave granted.

S.V.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Sri Rajah Kakarlapudi Venkata Sudarsana Sundara Narasayya Garu and another .. *Appellants** (*Defendants*)

*v.*

Sri Rajah Kakarlapudi Butchi Kristnam Raju Garu and others .. *Respondents* (*Plaintiffs*).



*Madras Revenue Recovery Act (II of 1864), S. 58—Suit by one sharer against another sharer for proportionate peishcush—If maintainable—Extent of liability of the sharers.*

S. 58 of the Madras Act II of 1864 is no bar to the Civil Court apportioning the liability *inter se* as between the common sharers of a revenue-paying estate of their common burden to pay revenue. Therefore a suit by a registered proprietor of an estate for recovery of the proportionate peishcush in respect of the lands held by the other sharers of the estate is maintainable.

Appeals against the decrees of the District Court of Vizagapatam in Appeal Suits Nos. 257 to 262 of 1931, respectively, preferred against the decrees of the Court of the District Munsiff of Yellamanchili in Original Suits Nos. 447 to 450 of 1929 and 463 and 464 of 1929 respectively.

*N. Rama Rao* for Appellants.

*K. Venkatarama Raju* for Respondents.

The Court delivered the following

JUDGMENT.—These second appeals arise out of six suits instituted by the respondents the registered proprietors of the Panduru Mallavaram estate for recovery of the proportionate peishcush for faslis 1327 to 1338 in respect of the lands belonging to the appellants in Mallavaram, and the material facts are that the villages of Panduru and Mallavaram originally formed part of the Uratla estate. The suit lands were gifted to the predecessor-in-title of the appellants by the proprietrix of Uratla by Ex. XI the deed of 1859 and the deed is silent regarding separate registration or payment of proportionate share of the peishcush. The villages of Panduru

* S. A. Nos. 133 to 138 of 1934. 5th April, 1938.

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and Mallavaram were transferred to the predecessor-in-title of the respondents by Ex. A the deed of 1875 and they were separately assessed and registered as one estate in the name of the transferee in the same year. The respondents purchased the estate in 1919 and applied to the Collector some time later for separate registration and assessment of the lands of the appellants in Mallavaram. The application was opposed and the parties were referred to a Civil Suit. Suits were then instituted by the respondents and they were decreed by the District Munsiff of Yellamanchili. The decrees were confirmed by the Subordinate Judge on 25th July, 1928 and the suits out of which these second appeals arise were filed in 1929 for recovery of the proportionate peishcush in respect of faslis 1327 to 1338. They were resisted on various grounds but decreed by the trial Court and the decrees were confirmed by the District Judge.

Hence these second appeals and it was argued first that in view of S. 58 of Act II of 1864 which enacts that no Court of civil judicature shall have authority to take into consideration or decide any question as to the rate of land revenue payable to Government or as to the amount of assessment fixed or to be hereafter fixed on the portions of the divided estate, the Civil Court has no jurisdiction to apportion the assessment as between the co-sharers until the respective portions are separately registered and assessed under the provisions of Act I of 1876. But the respondents do not ask for the assessment of the land revenue payable by the appellants to the Government and as pointed out by the Chief Justice in *Muthammal* v. *Secretary of State for India*[1], which was relied upon by the appellants, the apportionment of the assessment as between two co-owners does not involve any question as to the amount of assessment as fixed or to be fixed by the Government. That a co-sharer of a revenue-paying estate who pays the whole revenue in order to save and does so save the estate from liability to be sold by the Government for realising the revenue is by operation of law entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of the revenue as between the co-sharers, was laid down by the Full Bench in *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhararaz*[2], and as pointed out in

1. (1913) 24 M.L.J. 405 at 408.
2. (1902) 13 M.L.J. 83: I.L.R. 26 Mad. 686 (F.B.).

Sri Rajah Sundara Narasayya Garu *v.* Sri Rajah Butchi Kristnam Raju Garu.

*Amman Pariyari* v. *Pakran Haji*[1], even before the amendment of Ss. 82 and 100 of the Transfer of Property Act, the burden of paying the land revenue is common to the parties whose lands are charged with the payment of the whole revenue. The liability *inter se* of the co-sharers of the common burden is not dependent on its apportionment by the Government, and the question admits of no doubt after the amendment of Ss. 82 and 100 of the Transfer of Property Act. Further the Revenue Court is not competent to apportion the liability apart from or prior to separate registry of the lands, and this can only be done by the Civil Court. It follows therefore that S. 58 of Act II of 1864 is no bar to the Civil Court apportioning the liability *inter se* as between the co-sharers of the common burden and the objection to the jurisdiction of the Civil Court is untenable.

It was argued next that on the terms of Ex. XI the deed of gift the lands of the appellants are not chargeable with any portion of the peishcush but the deed does not exempt the donee from payment of any part of the land tax assessed on the entire estate nor does it postpone his liability to pay his share of the peishcush until separate registry of his portion as in *Sri Sri Sri Chandra Deo* v. *Srinivasa Charlu*[2]. In fact the deed is silent on the point and in the absence of a contract to the contrary the sharers are liable to contribute rateably. The right of the respondents to separate registration of the lands of the appellants has since been upheld by the High Court and Ex. A the transfer in favour of the predecessor of the respondents has no bearing on the question. There was no contract to the contrary between the parties or their predecessors-in-title, and it follows that the appellants are liable to contribute rateably.

It was contended next that the liability should be fixed with reference to the peishcush of Mallavaram village in which the lands of the appellants are situate but both the villages are registered as one estate and the liability has to be fixed with reference to the charge on the entire estate.

It was finally urged that even on this basis the amount fixed is not correct but the judgment of the trial Court shows that the value of the shares was assessed with reference to

1. (1912) I.L.R. 36 Mad. 493. 2. (1913) 25 M.L.J. 433: I.L.R. 38 Mad. 235.

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their income and though exception was taken in the written statements to the income specified in the schedules attached to the plaints, the objection was withdrawn at the trial. The amount of contribution has been fixed on the value of the shares assessed on the basis of such income and it was not shown how the amount fixed is not correct.

The second appeals therefore fail and are dismissed with costs fixed at Rs. 200.

Leave is refused.

S.V.V. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Hanibabeebi Ammal .. *Appellant** (*Petitioner*)

*v.*

Syed Munurdeen Sahib .. *Respondent* (*Respondent*).

Hanibabeebi Ammal *v.* Syed Munurdeen Sahib.

*Provincial Insolvency Act (V of 1920), S. 34 (1)—Applicability—Decree for maintenance in favour of wife—Husband adjudicated an insolvent—Execution proceedings against him—Condition precedent.*

A decree had been passed in favour of the wife awarding her mahar and maintenance in 1932. The husband was adjudicated an insolvent in 1933. The wife filed an execution petition in 1934 for arrears of maintenance which were then due.

*Held*, that leave of the Insolvency Court was necessary as part at least of the arrears claimed represented an obligation incurred before the date of adjudication and S. 34 (1) of the Provincial Insolvency Act did not apply to a claim of this kind.

*Mahomed Ali Mithabhai*, In re, (1929) 31 Bom.L.R. 1366, followed.

Appeal against the order of the District Court of Madura dated 1st December, 1934 and made in A.S. No. 131 of 1934 preferred against the order of the Court of the District Munsiff of Madura Town, dated 9th October, 1934 and made in E.P. No. 740 of 1934 in O.S. No. 457 of 1931.

*K. V. Sesha Aiyangar* for Appellant.

*K. V. Srinivasa Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—The respondent in this appeal was adjudicated insolvent in 1933. The appellant is his wife in whose favour a decree had been passed in 1932 awarding her mahar and maintenance at the rate of Rs. 5 a month. In 1934 she filed an execution petition for arrears of maintenance which

* A.A.A.O. No. 109 of 1935. 19th October, 1938.

Haniba-beebi Ammal *v.* Syed Munurdeen Sahib.

were then due amounting, according to her, to Rs. 220 and prayed for the execution of her decree for that amount by the arrest of the respondent. The prayer was allowed by the first Court but was refused by the Appellate Court on the ground that her debt was one provable in insolvency and therefore she could not proceed to execute the decree for that debt without the leave of the Insolvency Court. It is against that decision that the present appeal has been filed by the wife.

Mr. Sesha Aiyangar in arguing the appeal for the appellant has laid very great stress upon two decisions of the English Courts—*Linton* v. *Linton*[1] and *Kerr* v. *Kerr*[2]. Both these cases refer to the payment of alimony in England under the orders of the Divorce Court. In *Linton* v. *Linton*[1], the claim of the husband was that his whole obligation to pay alimony for the rest of his and his wife's life was a debt provable in bankruptcy and therefore that he would be entitled to a discharge from that debt as soon as he was discharged from Bankruptcy. The Court of Appeal held that this contention was wrong, that it was impossible to form a proper estimate of the value of the claim of the wife on the husband and therefore that this was a debt not provable in bankruptcy. In *Kerr* v. *Kerr*[2], the question came up whether a wife could prove in bankruptcy a claim for arrears of alimony which had accrued due before the receiving order and it was held that the considerations which had prevailed with the learned Judges in *Linton* v. *Linton*[1] equally applied to a case of such arrears and although arrears might be stated at a particular sum they were all subject to modification by the Divorce Court which had passed the original order for alimony and therefore they too were incapable of being fairly estimated. The law in India on this subject is contained in S. 34 of the Provincial Insolvency Act which runs as follows:—

"Debts which have been excluded from the schedule on the ground that their value is incapable of being fairly estimated .... shall not be provable under this Act."

It seems to me that in considering this definition and the facts of the two English cases there is a clear distinction between orders for alimony and decrees for maintenance. Special facts were pointed out in the English cases to show that orders

1. (1885) 15 Q.B.D. 239. 2. (1897) 2 Q.B.D. 439.

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granting alimony were always subject to modification and change. When a decree has been passed awarding maintenance, that decree ordinarily remains immutable and although the judgment-debtor may take separate proceedings to have it modified it can never be modified retrospectively as the order for alimony in England can. The result is, it seems to me, that at any moment a wife who is a decree-holder under a decree of this kind can come to the Insolvency Court and say that her husband is indebted to her in a fixed sum and that therefore S. 34 (1) which says that a debt is not provable in insolvency because the debt is incapable of being fairly estimated cannot possibly apply to a claim of this kind. There may possibly be some doubt as to the date on which the wife may make the application or the date up to which she may calculate her arrears. This will depend upon an interpretation of S. 34 (2) as to from what date the obligation was incurred. It is unnecessary to decide this very interesting point now, for whether the debt provable in insolvency is the amount of arrears at the date of adjudication or at any subsequent date prior to the actual framing of the schedule it is undeniable that part at least of the Rs. 220 represents an obligation incurred before the date of adjudication. Therefore in either view of the correct date on which the amount of the debt is to be estimated, part of it was incurred before the adjudication and therefore the leave of the Insolvency Court must be necessary. The learned District Judge has already cited the case in *Mahomed Ali Mithabhai*, In re[1], in support of the view which he took. In my opinion his view was right and, as I have shown, the English cases which deal with a different situation and a different kind of order cannot prevail against it.

In the result this appeal must fail and is dismissed with costs.

Leave refused.

K.C. —— *Appeal dismissed.*

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1. (1929) 31 Bom. L.R. 1366.

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Bonthala Subbamma .. *Appellant** (*Respondent*)

*v.*

Gadamsetti Surappa Company, by surviving partner Gadamsetti Subbiah and another .. *Respondents* (*Petitioner and Nil*).

Bonthala Subbamma *v.* Gadamsetti Surappa Company.

*Provincial Insolvency Acts (III of 1907) and (V of 1920), Ss. 16 (4) and 28—Insolvency and adjudication of a person—Official Receiver—Conduct of parties as well as Receiver implying that the insolvency proceedings had terminated—Later acquisitions by the insolvent—Sale by him of property later acquired—Sale attacked as property was vested in Official Receiver—Sale not void as insolvency had terminated by conduct of all concerned.*

A person was adjudicated insolvent in 1915 under the provisions of the Act III of 1907 which was then in force. Under that Act there were no provisions fixing the time within which the insolvent should apply for discharge, etc. After the adjudication the Receiver appointed by Court took possession of the estate, realised outstandings and declared final dividends some time in the same year. The matter was thereby concluded and the Receiver accordingly sent the connected papers to the District Court and the papers were destroyed under rules for the destruction of records. The insolvent afterwards should have been earning in some business started by him and with such acquisitions should have purchased the properties concerned about 1928 and sold an item of them to the appellant which transaction was attacked by the creditors of the insolvent on the ground that the properties of the insolvent having vested in the Official Receiver, the sale of the suit property was void.

*Held*, that since the conduct of the Receiver should have been within the knowledge of the creditors who should be regarded as having deliberately acquiesced in the position indicated by such conduct, namely, that the insolvency had become finally determined, it would be no more open to any of the persons concerned to get behind what should be regarded as a representation made by them, and revive the insolvency for the purpose of challenging a sale *bona fide* made in the belief that there was no insolvency, a belief contributed to by all of them.

Ex parte *Bolland*: In re *Dysart*, (1878) 9 Ch. D. 312, applied.

Appeal against the order of the District Court of Cuddappah dated 24th September, 1936 and made in I. A. No. 227 of 1936 in I. P. No. 28 of 1914.

*Kasturi Seshagiri Rao* for Appellant.

Respondents not represented.

The judgment of the Court was delivered by

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* A. A. O. No. 129 of 1937. 28th September, 1938.

Bonthala Subbamma *v.* Gadamsetti Surappa Company.

Krishnaswami Aiyangar, J.

*Krishnaswami Aiyangar, J.*—This is an appeal from the order of the District Judge of Cuddappah vesting the property in dispute in the Official Receiver and directing him to sell it and distribute the amount realised among the creditors. That property was acquired by the husband of the appellant in 1928 and sold by him to the appellant on 4th May, 1934. The appellant claims to have become the owner of that property by virtue of this sale.

The husband of the appellant had been adjudicated an insolvent by an order made on 30th January, 1915, under the provisions of Act III of 1907 which was then in force. Under that Act, there were no provisions such as are to be found in the Act of 1920 either obliging the Court to fix a time within which the insolvent should apply for a discharge or compelling the insolvent himself to apply for an order of discharge. It would appear that the appellant's husband was therefore under no obligation to apply for a discharge and in fact he did not apply for any discharge at all. After the adjudication, the Receiver seems to have taken possession of the estate, realised it and declared the final dividend sometime in 1915. The administration became thereby concluded and the Receiver accordingly sent to the District Court all the concerned papers relating to the insolvency, papers which we are informed no longer exist having been destroyed under the rules for the destruction of records. What happened after 1915 when the administration in insolvency was concluded, till 1928 when the property in question was sold does not clearly appear though sometime after 1915—how long after it is difficult for us to say—the insolvent must have begun earning monies either by doing business or otherwise. With such acquisitions as he must have made by 1928, he purchased the property and had remained in the enjoyment of it till the sale to the appellant in 1934 already mentioned.

The first respondent filed in 1936 the petition from which this appeal has arisen claiming that the sale by the insolvent conveyed no title to the appellant, as the property became vested in the Official Receiver, the moment it was purchased and has remained with him ever since, to be applied and administered according to the provisions of the Insolvency Act. This contention based on S. 16 (4) of Act III of 1907, corresponding to S. 28 (4) of the present Act was upheld by

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the District Judge who has accordingly held that the sale in question was a nullity.

Against the order of the learned District Judge, the appellant has urged two objections; firstly that this property which was admittedly after-acquired property cannot on the principle of *Cohen* v. *Mitchell*[1], forthwith vest in the Official Receiver without an act of intervention done by him and consequently that the insolvent was at liberty to make a disposition of it binding upon the Receiver and the creditors. Secondly, that the conduct of the Official Receiver in having wound up the insolvency, made the distribution of the final dividend, and transmitted the papers to the Court is conduct by which he as well as the creditors were estopped from contending that the insolvency proceedings had not come to an end and from claiming that the Receiver as representing the creditors had a title to the property which he could assert as against a purchaser from the insolvent.

We regret that we have not had the assistance of counsel on behalf of the respondents in deciding this appeal, as they have not chosen to be represented before us. We do not think it necessary to express any opinion on the first of the points urged on behalf of the appellant which turns on the construction of the language of S. 16(4) of this Act which is, as pointed out in *Ma Phaw* v. *Maung Ba Thaw*[2], somewhat different from that to be found in the Presidency Towns Insolvency Act or the English Statute. But we think that there is considerable force in the second objection and we accordingly uphold it. The conduct of the Receiver to which we have referred, must have been within the knowledge of the creditors and they must be regarded as having deliberately acquiesced in the position indicated by that conduct, namely, that the insolvency had become finally determined. From 1915 till 1928, neither the Receiver nor the creditors took any steps showing that they or any of them regarded the insolvency as still pending though during this period they were presumably aware of the acquisitions that were being made by the insolvent. We think that these circumstances are sufficient to bring the case within the principle enunciated by Lord Justice Bramwell in Ex parte *Bolland*: In re *Dysart*[3]. The facts of that case were no doubt

1. (1890) 25 Q.B.D. 262. 2. (1926) I.L.R. 4 Rang. 125.
3. (1878) 9 Ch.D. 312.

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somewhat different but the decision proceeded upon the basis mentioned at p. 321 where, the conduct and the statement of the trustee in bankruptcy to the Bank were regarded as amounting to a statement by him that the liquidation was ended, a statement on which the Bank acted. We think that the circumstances present in this case warrant us in holding that the conduct of the Official Receiver and of the creditors amounted in effect to a statement similar in form and nature to the one that is referred to by the Lord Justice. Everybody concerned, the insolvent, the Official Receiver and the creditors all acted on the footing that the insolvency had closed, and we accordingly think that it is no more open to any of them now to get behind what must be regarded as a representation made by them, and revive the insolvency, for the purpose of challenging a sale *bona fide* made in the belief that there was no insolvency, a belief contributed to by all of them.

We therefore differ from the learned Judge and hold that the appellant has shown sufficient reasons for dismissing the petition of the creditor and we accordingly reverse the judgment of the learned District Judge and dismiss the petition with costs here and in the Court below to be paid by the first respondent.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Nanduri Sriramachandra Rao .. *Appellant* (Petitioner-Plaintiff)*

*v.*

Chintamanibhatla Venkateswara Rao and others .. *Respondents (Counter-Petitioners, Defendants 2, 6 and 7).*

Sriramachandra Rao v. Venkateswara Rao.

*Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Appeal—Meaning—Order refusing to set aside* ex parte *decree—Appeal—Order of appellate Court—Fresh starting point of limitation for execution.*

The plaintiff obtained an *ex parte* decree against the defendant on 5th March, 1930. There was an application to that Court to set aside the *ex parte* decree but the same was dismissed. Against the said order of dismissal some of the defendants appealed to the High Court. On 20th October, 1932, the High Court gave judgment allowing the appeal and

* A. A. O. No. 419 of 1936. 27th September, 1938.

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extending its benefits also to the defendants who had not appealed, on condition that they deposited the decree amount within three months. The deposit was not however made and the *ex parte* decree stood confirmed as against the defendants who did not appeal. The decree-holder filed his execution application on 15th August, 1935.

*Held*, that the execution application was competent and was not barred by limitation as it had been filed within three years of the appellate order.

An appeal against an order refusing to set aside an *ex parte* decree is an "appeal" within the meaning of Art. 182 (5) of the first Schedule of the Limitation Act. The word "appeal" there should be taken to mean an appeal in the suit which is likely to affect the decree sought to be executed.

*Nagendranath De* v. *Sureshchandra De*, (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.), relied on.

*Firm Dedhraj Lachminarayan* v. *Bhagwan Das*, (1937) I.L.R. 16 Pat. 306, followed.

Appeal against the order of the Court of the Subordinate Judge of Vizagapatam dated 15th April, 1936 and made in E. P. No. 108 of 1935 in O. S. No. 24 of 1929.

*Y. Suryanarayana* for Appellant.

*B. V. Ramanarasu* for Respondents.

The judgment of the Court was delivered by

King, J.

*King, J.*—This appeal arises out of an application by the decree-holder in O. S. No. 24 of 1929 on the file of the Principal Subordinate Judge, Vizagapatam, to execute against defendants 2, 6 and 7, the decree which he obtained against them *ex parte* on 5th March, 1930. There was an application to the Subordinate Judge to set aside this *ex parte* decree which was dismissed. Against this order of dismissal defendants 1 and 3 to 5 appealed to the High Court. On 20th October, 1932, the High Court gave judgment allowing the appeal, and extending its benefits to defendants 2, 6 and 7 also on condition that they deposited the decree amount within three months. This deposit was not however made, and so as against defendants 2, 6 and 7 the *ex parte* decree stood confirmed as from 20th October, 1932. The present application for execution was made on 15th August, 1935. It has been dismissed by the learned Subordinate Judge as being filed more than three years after the date of the decree and the question before us is whether that order of dismissal is in accordance with law.

The law which applies to these facts is formulated in Art. 182 of the Limitation Act. The description of the application in column 1 is, 'For the execution of a decree or order of any Civil Court . . .' The period of limitation in column 2

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is three years. The 'time from which period begins to run' in column 3 is (1) the date of the decree or order, (2) (where there has been an appeal) the date of the final decree or order of the Appellate Court. . . . . If the first date is to be chosen in the present case the execution application is clearly barred—if the second, it is clearly within time, and the very simple question for our determination is whether the words 'where there has been an appeal' apply to the present case or not.

Simple, however, as these words are, they have been in the past interpreted in two distinct ways. According to the first interpretation 'appeal' can and must mean only an appeal against the actual decree or order sought to be executed. The second interpretation gives it a wider meaning which for the present we may best express in the words of Venkataramana Rao, J., in *Koyakutti* v. *Veerankutti*[1] as:

"An appeal in the suit which is likely to affect the decree sought to be executed."

Although this more liberal interpretation was adopted more than fifty years ago in *Narsingh Sewak Singh* v. *Madho Das*[2] and *Lutful Huq* v. *Sumbhudin Pattuck*[3], the current of authority thereafter set strongly against it, so that by 1927 the learned Judges who decided *Fakir Chand Mandal* v. *Daiba Charan Parni*[4] were able to hold that the first view was both 'clear upon principle' and 'concluded by authority'. Then came the decision of the Privy Council in *Nagendranath De* v. *Sureshchandra De*[5] and of the four cases decided since then, *Nagappa Bandappa* v. *Gurushantappa Shankrappa*[6], *Firm Dedhraj Lachminarayan* v. *Bhagwan Das*[7], *Ahammad Kutty* v. *Kottekkat Kuttu*[8] and *Koyakutti* v. *Veerankutti*[1] only one has failed to take the more liberal view.

With all respect to the learned Judges in *Fakir Chand Mandal* v. *Daiba Charan Parni*[4], we are unable to see how the narrower view which they uphold is "clear upon principle". The only principle we can discover in the rulings cited for the respondents is that the words 'where there has been an appeal' must be taken in their context, that is to say, with reference to the words in column 1 of Art. 182. But it does not necessarily

1. (1937) 1 M.L.J. 407.
2. (1882) I.L.R. 4 All. 274.
3. (1881) I.L.R. 8 Cal. 248.
4. (1927) I.L.R. 54 Cal. 1052.
5. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).
6. (1932) I.L.R. 57 Bom. 388.
7. (1937) I.L.R. 16 Pat. 306.
8. (1932) 64 M.L.J. 251: I.L.R. 56 Mad. 458.

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follow that because a decree or order is mentioned in column 1 the appeal which is mentioned in column 3 must be *against* that decree or order. It is equally logical to say that it must be something which *affects* that decree or order, and after all, the legislature has refrained from saying what it could have said with ease if that had been its intention, 'where there has been an appeal against that decree or order'.

The true principles which we think, should govern this interpretation are set out in the judgment of the Privy Council in *Nagendranath De* v. *Sureshchandra De*[1]. On page 5 their Lordships say:

"There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent."

On page 6 they say:

"The question must be decided upon the plain words of the Article.... There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions, equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that, so long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage."

Now it is true that their Lordships were not dealing with an actual appeal against an order refusing to set aside an *ex parte* decree as we are here but with an appeal against the decree itself which was sought to be executed, and the immediate result of their decision was to hold that even if such an appeal were irregular in form and one to which the judgment-debtors were not parties it was nonetheless an appeal within the meaning of Art. 182. But the principles contained in the passages quoted are, we think, wide enough to cover the present case and other cases of a similar nature. In *Firm Dedhraj Lachminarayan* v. *Bhagwan Das*[2], it was held that the definition of an appeal given by their Lordships would

1. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).
2. (1937) I.L.R. 16 Pat. 306.

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apply to an appeal against an order refusing to set aside an *ex parte* decree—and with this we respectfully agree. And it is, of course, obvious that the 'intelligible rule' laid down by their Lordships in the concluding sentence of the second passage quoted must apply to the facts of the present case, where the success of an appeal against an order refusing to set aside an *ex parte* decree has precisely the same effect in regard to execution as a successful appeal against that decree itself.

The principles of the Privy Council ruling have also been applied to two other somewhat similar situations in *Nagappa Bandappa* v. *Gurushantappa Shankrappa*[1], to an appeal against an order granting a review of the original decree, and in *Koyakutti* v. *Veerankutti*[2], to an appeal against a preliminary decree in a mortgage suit which is not itself executable. The only case in which the principles of *Nagendranath De* v. *Sureshchandra De*[3], have apparently not been followed in *Ahammad Kutty* v. *Kottekkat Kuttu*[4], where also the appeal was against a preliminary decree. But it is significant that Madhavan Nair, J., who decided that case did so not on the ground that the final decree actually obtained in that suit was not in fact imperilled by the appeal—but on the ground that there was nothing to prevent the plaintiff from applying for a fresh final decree (*see* page 465). Such an argument even if accepted, could of course obviously not apply to an appeal against an order refusing to set aside an *ex parte* decree.

It was argued for the respondents by Mr. Ramanarasu that the narrower interpretation of the word 'appeal' must be accepted for if we choose the wider one we should be bound to apply it to a situation in which there had been a separate suit to set aside a decree on some such ground as that of fraud, and the filing of an appeal against a decree in *that* suit. That is a situation with which we have not now to deal and may well we think be left until it arises. Meanwhile it is not difficult to perceive a clear distinction between an appeal arising from an order in the very suit whose decree is sought to be executed—and an appeal from a decree in quite a different suit. We do not therefore feel deterred by the consideration

1. (1932) I.L.R. 57 Bom. 388. 2. (1937) 1 M.L.J. 407.
3. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).
4. (1932) 64 M.L.J. 251: I.L.R. 56 Mad. 458.

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of that particular hypothetical case from expressing our respectful agreement with *Firm Dedhraj Lachminarayan* v. *Bhagwan Das*1, which is a direct authority on the present facts. We accordingly allow this appeal and setting aside the order of the learned Subordinate Judge direct that E.P. No. 108 of 1935 be restored to file and be disposed of on its merits. Costs in the E.P. to abide the result. Respondents must pay appellant's costs of the appeal.

B.V.V. — *Appeal allowed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Minor Jali Basappa by next friend

Nagamma .. *Appellant** (*Petitioner*)

*v.*

Heerada Rudrappa and another .. *Respondents.*

Jali Basappa v. Heerada Rudrappa.

*Civil Procedure Code (V of 1908), O. 38, r. 9—Attachment before judgment—Dismissal of suit—Attachment ceases—Effect of restoration of suit.*

An attachment before judgment, which has come to an end with the dismissal of the suit is not restored when the suit is restored to file.

*Saranatha Aiyangar* v. *Muthiah Mooppanar*, (1933) 65 M.L.J. 844: I.L.R. 57 Mad. 308, considered.

Appeal against the order of the District Court of Bellary dated 28th August, 1934, in Appeal Suit No. 40 of 1934 (E. P. No. 441 of 1934 in O. S. No. 240 of 1932, District Munsiff's Court, Bellary).

*V. S. Narasimhachar* for Appellant.

*B. Somayya* and *D. R. Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT.—There is no authority for the contention that an attachment before judgment which has come to an end with the dismissal of the suit, is restored when the suit is restored to file, in spite of an alienation of the property in the meanwhile. The case of *Saranatha Aiyangar* v. *Muthiah Mooppanar*2, cited by the learned Advocate for the appellant is expressly against him on this point.

This appeal is accordingly dismissed with costs (one set between the two respondents).

Leave refused.

B. V. V. — *Appeal dismissed.*

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1. (1937) I.L.R. 16 Pat. 306.

*C.M.S.A. No. 25 of 1935. 29th September, 1938.

2. (1933) 65 M. L. J. 844: I.L.R. 57 Mad. 308 at 312.

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. MADHAVAN NAIR, *Officiating Chief Justice* AND MR. JUSTICE STODART.

Majeti Venkata Nagabhushanam Rao and another .. *Appellants** (*Plaintiffs*)

*v.*

Majeti Venkata Lakshminarasimha Rao and others .. *Respondents* (*Defendants 1 to 10 and 8th Defendant's L. R.*).

Nagabhushanam Rao. *v.* Lakshminarasimha Rao.

*Debtor and creditor—Trust for benefit of creditors—Effect of non-communication to creditors—Parties acting on deed—Inference.*

Where a transfer of property has been made to trustees for payment of the debts of the owner, the creditors being neither parties nor privies thereto, the creditors do not thereby become *cestui que trust* and the trustees are mere mandatories. Until the mandate has been acted upon the owner of the property, who alone stands towards the trustees in the relation of *cestui que trust* can recall the money and authority at pleasure. It is an arrangement by the debtor for his own convenience only and there can be no privity between the agent and the creditors. Where, however, a trust in favour of creditors has been communicated to the creditors, it can no longer be revoked by the settlor, because the creditors, being aware of such a trust, might have been thereby induced to a forbearance in respect of their claims which they would not otherwise have exercised; and *a fortiori* will this be the case when the deed has been acted upon. The communication may be proved by the creditors by their having acted upon it or being party or privy to it.

English cases relied on.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in O. S. No. 41 of 1931.

*The Advocate-General* (*Sir A. Krishnaswami Aiyar*) and *P. Satyanarayana Rao* for Appellants.

*V. Govindarajachari* and *K. Krishnamoorthi* for Respondents.

The judgment of the Court was delivered by

Madhavan Nair, Offg. C. J.

*The Officiating Chief Justice.*—The plaintiffs are the appellants. They are the sons of one Subba Rao, brother of the first defendant. Defendants 2 to 7 and 10 are the sons and grandsons of the first defendant, and they form members of a joint Hindu family. Eighth defendant is the son-in-law of the first defendant. Ninth defendant is the trustee appointed under the trust deed Ex. B dated 6th January, 1926, which

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* Appeal No. 168 of 1932. 15th August, 1938.

will be referred to presently, executed by defendants 1 to 8 in favour of the ninth defendant.

The plaintiffs' father and the first defendant effected a partition in 1903. Some properties were divided and some were kept joint. The joint properties were in the possession of the first defendant. The plaintiffs' father died in 1912. After his death, the plaintiffs and the first defendant referred to arbitration various matters in dispute between them regarding the joint properties and mesne profits. Generally stated, the arbitrator was asked (*see* Ex. A) to divide the undivided properties, to settle the difference in drawings between the first defendant and the plaintiffs' father and to adjust the differences which may be found payable by one party to the other by way of equalising the shares, etc. In dividing the properties the entire Lanka lands, as already arranged, were to be left to the first defendant, for which ten shares of the Imperial Bank were to be allotted to the share of the plaintiffs jointly. This was given effect to by the arbitrator and it was decided by him that the first defendant should pay to the plaintiffs jointly Rs. 2,700 with interest and to the second plaintiff Rs. 1,500 plus interest. The reference to arbitration, Ex. A was made on 29th September, 1919, and the award, Ex. G was passed on 13th June, 1926. The correctness of the sums due to the plaintiffs under the award is not disputed. In the suit out of which this appeal arises the plaintiffs claim the amount awarded to them under Ex. G together with mesne profits on the properties from 1918 to 1926. Plaintiffs 1 and 2 claim Rs. 3,224-10-11 and the second plaintiff claims Rs. 2,518-4-9.

As stated already, on 6th January, 1926, a trust deed was executed by defendants 1 to 8 in favour of the ninth defendant. The eighth defendant had been carrying on trade in conjunction with the first defendant, his sons and grandsons and they had incurred debts, some jointly and some individually. Under the trust deed defendants 1 to 8 handed over all the immovable properties which they owned jointly and separately to the ninth defendant to discharge their debts. The trust deed after authorising the ninth defendant to determine the amounts due by defendants 1 and 8 jointly and individually to outsiders and to discharge the said two kinds of debts according to the respective circumstances, stated as follows:

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"You are hereby further authorised to settle all the matters in dispute between the said Lakshminarasimha Rao Sowcar (first defendant) and others and Venduri Bapanayya (eighth defendant) and also to settle the accounts either after the discharge of debts jointly and severally due by them or after they had adjusted the matter with the creditors. Until all these affairs are settled none of us shall raise objections to the authority and power hereby conveyed to you."

Demands to pay the money due to them under the award were made to the ninth defendant by the second plaintiff's mother and second plaintiff under Exs. D and J dated 31st July, 1926 and 8th August, 1926, respectively and by the first plaintiff under Ex. C dated 14th April, 1927. The trustee, ninth defendant, did not reply to these notices; nor did he comply with the demands. In the suit, claim is made against the defendants personally as well as against their family properties, to direct the ninth defendant to pay the suit amount by sale of the trust properties in Sch. A, and if he does not do so, to sell all or some of the trust properties in item 1 of the schedule to realise the suit amount, and for costs.

The learned Judge granted a decree to the plaintiffs for the suit amounts together with interest against the first defendant personally and against defendants 1 to 7 and 10 from their family properties and against the family properties of all these defendants remaining unsold in the hands of the ninth defendant. Decree was refused against defendants 8 and 9 and their properties.

In the appeal, a decree is claimed by the appellants personally against defendants 8 and 9 and against the trust property. The personal decree claimed was not seriously pressed. The substantial argument urged is that the trust property should have been first made liable for the payment of the plaintiffs' debts. In this connection it is necessary to mention that one special aspect of the appellant's argument is that Ex. III should be declared invalid as against them. Ex. III is a sale-deed of item 5 of the suit property which belonged to the first defendant and which was entrusted with the ninth defendant under the trust deed along with the other properties. He sold this property to the eighth defendant for a sum of Rs. 14,500 on 12th May, 1917.

The main argument urged in the appeal is that the trustee cannot settle the accounts between the defendants 1 and 8 until he has discharged all the debts due to others including

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the debts due to the plaintiffs and that the said sale Ex. III to the eighth defendant is invalid. This is the subject-matter of issue 6. The learned Judge overruled this contention, as well as the contention that the sale deed is not supported by consideration. The question whether the sale in favour of the eighth defendant by the ninth defendant is invalid or not, for the reasons alleged by the plaintiffs, will depend on a construction of the document, Ex. B, provided they are able to show that they can take advantage of it. In support of their case the respondents did not rely so much on the terms of the document as on the general question whether in law the plaintiffs are entitled to take advantage of the trust deed *at all* alleging that it was never communicated to them.

In the lower Court, it was also urged that the award was not binding on defendants 1 to 7. The learned Judge held that it was binding on them and on their behalf this has not been disputed before us.

The view of the learned Judge that the property in the trust deed is not liable for the suit debt was based on various grounds: (1) that these debts did not exist at the time of the trust deed as they came into existence only on the date of the award which was after the date of the trust deed; (2) that these debts being settled by adjustment between the parties did not come under the description "sums due under the accounts" and therefore did not fall within the scope of the award; (3) that the suit claims were barred by time; (4) that defendants 8 and 9 were not parties to the award; and (5) that the plaintiffs cannot take advantage of the trust deed because it was not communicated to them. As already stated, the last ground was the only one which was seriously urged in appeal by the learned Counsel for the respondents. It appears to us that the learned Counsel was right in not pressing the other grounds. There is no meaning in saying that these debts did not exist at the time of the trust. It is true that the trust deed came into existence before the arbitrator made the award, but the reference to arbitration was long before the execution of the trust deed. That the trustee, ninth defendant, actively co-operated with the arbitrator in deciding what amount was due to the plaintiffs from the first defendant, appears to be clear from the evidence. Though he did not settle the dispute between the plaintiffs and the first

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defendant, it was he who after examining the account books sent the statement Ex. N for the information of the arbitrator. The Lanka lands which the first defendant got under the award were included in the trust deed as the property of the first defendant and though it was decided that these Lanka lands should be allotted for the share of the first defendant before hand, in paragraph 7 of the award the arbitrator specifically states that according to the arrangements entered into between the parties the Lanka lands should be allotted to the share of the first defendant. It therefore came within the scope of the award. To say that before the award was passed the Lanka lands were allotted by mutual agreement to the first defendant and therefore did not come under the award is in the circumstances meaningless. Evidence shows that the ninth defendant agreed to sell this property to the Zamindar of Chellapalle (*see* Ex. K), and to assure the Zamindar of a complete title to the property the ninth defendant sent the fee and the stamps to the arbitrator and asked him to expedite the award. The suit debts due to the plaintiffs did already exist and what the award did was only to specify the exact amount after looking into the accounts and by mutual adjustments. To say therefore that these debts did not exist at the time of the trust is to assert an argument which is not convincing. Taking the evidence as a whole with reference to the arbitration, the award and the trust deed, we have no doubt that the suit debts did exist at the time of the trust deed, the only question being whether under the trust deed these debts should be discharged before the property under Ex. III was sold by the ninth defendant to the eighth defendant. If these debts were barred by limitation at the time of the award, how could the learned Judge give a decree against defendants 1 to 7 as per the award? It appears to us that amongst the grounds on which the lower Court's decision is based the only one that requires examination is whether the plaintiffs can avail themselves of the trust deed, and if they can, whether their debts and the debts of the other creditors have got to be paid before the ninth defendant could sell the property included in the trust deed to the eighth defendant.

It is argued that the plaintiffs cannot avail themselves of the trust deed in this case because it was not communicated to them. In this connection the following well-known decisions

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and a few others not very material were brought to our notice, namely, *Biron* v. *Mount*[1], *Field* v. *Lord Donoughmore*[2], *Nicholson* v. *Tutin*[3], In re *Baber's Trusts*[4], Re *Carr*: Ex parte *Jacobs*[5], *Doe* v. *Jones*[6], *Ellis & Co.* v. *Cross*[7], *Synnot* v. *Simpson*[8] and *Johns* v. *James*[9]. We have read these decisions carefully. It is not necessary to discuss them as the gist of these decisions is succinctly stated in the well-known books of authority to which it will be advantageous to refer. The law applicable to the case has been thus succinctly stated in White and Tudors Leading Cases, 9th Edition, Volume II, at page 826:

"Where, therefore, *a legal transfer of property has been made to trustees, for payment of the debts of the owner*, the creditors being neither parties nor privies thereto, the creditors do not thereby become *cestui que trust*, and the trustees are mere mandatories. Until the mandate has been acted upon the owner of the property, who alone stands towards the trustees in the relation of *cestui que trust*, can recall the money and authority at pleasure. It is an arrangement by the debtor for his own convenience only, and there is no privity between the agent and the creditors . . . . . ."

"Where, however, a trust in favour of creditors has been communicated to the creditors—a fact, it seems, which must be clearly proved it can no longer be revoked by the settlor, because the creditors, being aware of such a trust, might have been thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised; and *a fortiori* will this be the case when the deed has been acted upon. The communication may be proved by the creditors having executed the deed, by their having acted upon it, or being party or privy to it."

More or less to the same effect is the statement of the law in Halsbury, Vol. II, page 443, para. 606, and in Godefroi on Trusts, V Edition, pages 72 and 73. In the course of a discussion on the question in Lewin on Trusts, 13th Edn. at page 548, the following statement appears:

"It is not necessary that the creditor, to entitle himself to the benefit of the deed, should execute it, but it will be sufficient if he assent to it or acquiesce in it, or act upon its provisions, and comply with its terms. But the creditor must do s ome act to testify his acceptance of the deed, and not merely stand by and remain passive."

It is thus clear that in order to enable the plaintiffs to take advantage of the trust deed and claim payment of the debts, since they were not actual parties to the trust deed they have to prove that the trust deed Ex. B was communicated to them in

1. (1857) 24 Beav. 642: 53 E.R. 506.
2. (1841) 58 R.R. 253.
3. (1855) 2 K. & J. 18: 69 E. R. 676.
4. (1870) L.R. 10 Eq. 554.
5. (1901) 85 L.T. 552.
6. (1830) 10 B. & C. 459: 109 E.R. 521.
7. (1915) 2 K.B. 654.
8. (1854) 101 R.R. 81.
9. (1878) 8 Ch. D. 744.

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the sense explained above; and to find out whether there has been such communication, evidence in the case will have to be examined.

Before examining the evidence, however, we will deal with the argument of the Advocate-General that it was not open to the contesting defendants to raise this question at all. The plaintiffs in their plaint distinctly claim to take advantage of the trust deed. They state at the end of para. 5, "And as defendants 1 to 10 disclosed to the plaintiffs and others the execution of the said trust deed and assured the plaintiffs and other creditors from the very beginning that the debts due to the plaintiffs and others would be discharged by giving effect to the said trust deed, the plaintiffs and other creditors have not taken any action against the Majeti people till now". In spite of such explicit statement the contesting defendants did not say that the trust deed was not communicated to the plaintiffs and so they cannot take advantage of it. With reference to what is stated in para. 5 of the plaint, no doubt the 9th defendant in his written statement stated that it is highly improbable that he would have disclosed the contents of the trust deed to the plaintiffs or assured them of his discharging the debts due to them, as they were not in the position of creditors on the date of the execution of the said deed of trust. This passage does not contain any denial of the communication of the trust deed to the plaintiffs. What is very important is that there is no issue on the question whether the plaintiffs are disentitled from claiming from the trustee their debts under the award as the trust deed was not communicated to them. In these circumstances there is a good deal of force in the contention of the learned Advocate-General that the lower Court should not have made the want of communication of the trust deed to the plaintiffs one of the grounds for its decision. But this objection does not seem to have been raised at the time when the evidence was adduced, for we find, though the question whether the trust deed was communicated to the plaintiffs has not been directly put to the witnesses, a good deal of evidence has been adduced which has more or less a direct bearing on the question. As the evidence has been allowed to go in unchallenged, we have to deal with it and consider how far on the evidence, *such as it is*, the finding of the learned Judge can be supported.

It may be stated that there is no reliable evidence of direct communication to the plaintiffs of the creation of the trust to pay off the debts of the creditors. But there is ample evidence to show that it was well known amongst the creditors, including the plaintiffs, that a trust deed had been executed and that the plaintiffs expected payment by the trustee of the debt due to them from the first defendant. The plaintiffs were not consulted; but the first plaintiff says that he had no objection for the trust and that he was asking defendants 1, 8 and 9, after the trust, to pay his debt. Although there is no evidence of direct consultation, we may well believe that the plaintiffs were informed, after the execution of the trust deed, that there was no fear with respect to the payment of their debts and that it would be paid by the ninth defendant. This is the gist of the evidence of P.W. 2 on this point. Evidence shows clearly that the ninth defendant was evincing considerable interest in the passing of the award. The arbitrator, P.W. 3, says that the ninth defendant, before passing the award, told him that he would pay plaintiffs 1 and 2 on behalf of the first defendant soon after the passing of the award and that after the passing of the award he (ninth defendant) said that he had Rs. 2,700 with him, that he would issue a cheque and that the arbitrator might take it. This piece of information was communicated to the maternal uncle of the second plaintiff but he refused to take it unless the whole amount mentioned in the award was given. The ninth defendant does not deny that he made the offer of Rs. 2,700, but he says that it was so done on account of the possession which he had of an ornament—kulikiturai—and that he did not offer to pay as a trustee. Why should the ninth defendant take any interest in the passing of the award at all if it was not contemplated that the debt of the plaintiffs under the award should be paid by the trustee? He was only waiting for the passing of the award before he began the discharge of his duties under the trust. The ninth defendant-trustee says that he consulted some lawyers in March or so of 1926 and that they told him that he need not pay the debts as they were not in existence at the time of the execution of the trust deed. What was the need for consultation at all if it was not understood by the persons concerned that the plaintiffs' debt should be discharged by the trustee? Evidence shows that everybody

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knew of the existence of the trust and of the object with which the trust was created and that the plaintiffs expected—we think they must have been given to understand—that their debt under the award would be discharged by the trustee. The trustee himself must have thought that he had to discharge the debt though the lawyers advised him to the contrary. In the course of his evidence the trustee says, "I had no authority to sell the properties of one of the parties to liquidate the private debts of the other party. I could sell either party's separate properties for the joint debts irrespective of his share of that liability." This was the way how he understood the significance of the trust deed. He did not pay, not because the trust deed was not communicated to the plaintiffs, but in his opinion under the trust deed he had no authority to pay the debts of the plaintiffs. Whether the opinion of the lawyers or his own opinion is right or wrong would of course depend upon the construction of the trust deed. Evidence shows that the plaintiffs acquiesced in the trust deed of which they must have been informed and they wanted that effect should be given to its terms. It is in this connection that it is important to notice that demands were made by the plaintiffs of the ninth defendant for payment of the trust immediately after its creation (*see* Exs. D and J). The award is dated 13th June, 1926, and the notice of the second plaintiff, Ex. D, was sent to the ninth defendant on 31st July, 1926, and he was addressed as the trustee of the estate property. This was followed by Ex. J on 8th August, 1926. It is significant that to none of these notices did the ninth defendant send a reply though immediate payment was requested. It is clear that they would not have sent these notices to the ninth defendant unless they had been made to understand that they could take advantage of the trust deed and as soon as their debts were ascertained by the award they issued their demands. They had no objections to the trust. In fact they acquiesced in it; what they wanted was that their debt should be paid by the trustee; and the trustee does not send a single word in reply. He might well have said if his case was true that the plaintiffs could not avail themselves of the trust deed because they were not parties to it and the existence of the trust deed was not communicated to them. This he did not do. Evidence goes further. Apart from the particular suit debt in question under

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the award, the first plaintiff was amongst the biggest creditors. The ninth defendant says, "Apart from the Imperial Bank first plaintiff was the biggest creditor." What is important to notice is that it appears that in discharge of the obligation under the trust the first plaintiff was paid Rs. 33,000 under the trust by 24th January, 1926. Three days after, a trust of Rs. 10,000 was discharged and the Rajapet factory was also sold to the first plaintiff. All these took place in pursuance of the trust deed. We are well convinced that the trust deed was acted upon between the trustee and these creditors and if that is so there can be no question of the direct communication of the trust. Reading the evidence as a whole we are firmly of the opinion that the creditors of the first and the eighth defendants knew of the execution of the trust, that the plaintiffs must have been given to understand that they would be paid their suit debt by the trustee, that it was why the ninth defendant took such an interest in the passing of the award, and that was also why he did not reply to the notices of the plaintiff. We are also further convinced that in various particulars so far as the plaintiffs were concerned the trust was performed. In these circumstances we think the trust deed was communicated to the plaintiffs in the sense explained in the extract quoted above. It therefore follows that the plaintiffs can avail themselves of the trust deed and ask the trustee to pay their debts *first* if the terms of the trust deed authorise them to make such a request.

We have already quoted the particular term of the trust deed under which the trustee is "authorised to settle the matters in dispute between the said Lakshminarasimha Rao Sowcar and others and Yenduri Bapanayya and also to settle the accounts either after the discharge of debts jointly and severally due by them or after they had adjusted the matter with the creditors." It is clear from this that the power to settle the matters in dispute between the first defendant and others and the eighth defendant would arise only "after the discharge of the debts jointly and severally due by them or after they had adjusted the matters with the creditors." The suit debt is a debt due by the first defendant. It follows from the term of the trust deed that it is only after the settlement of these debts that the trustee has authority to settle the dispute between the first defendant and the eighth defendant. It

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was in settlement of the dispute between the first defendant and the eighth defendant that Ex. III was executed by the trustee in favour of the eighth defendant. According to the trust deed he could execute this document only after the plaintiff's claim has been settled. The trustee's understanding of the document which he gave expression to in his evidence is erroneous; and it was not seriously argued by the respondents' learned counsel that under the terms of the trust deed, if the trust deed can be availed of by the plaintiffs, the plaintiffs have no right to ask for a discharge of the debts before the settlement of the disputes between the first defendant and the eighth defendant. In these circumstances we would hold that so far as the plaintiffs' claim is concerned they are entitled to say that Ex. III, inasmuch as it was executed before the discharge of their debts, is invalid against them and would not be binding on them. The declaration asked for by the plaintiffs should be granted. But it is stated by the Advocate-General that if the debts of the appellants can be paid from out of the other properties of defendants 1 to 10 against which they have got a decree they do not desire to give effect to the declaration that Ex. III is invalid. We would therefore add to the decree given in favour of the plaintiffs by the lower Court that the plaintiffs in order to realise their debts remaining unpaid after proceeding against the properties mentioned in the lower Court's decree can proceed against the Ex. III properties; but if their debts have been otherwise realised by proceeding against the other properties then no action should be taken by them against Ex. III properties. For the above reasons the lower Court's decree will be modified in the manner indicated above. The appellants are entitled to their costs of this appeal and also to their costs in the Court below.

The case having been set down for being spoken to this day, the Court made the following

ORDER.—There will be no order as to costs against the ninth respondent. The memorandum of objections is dismissed. No costs.

B. V. V. — *Decree modified.*

# IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Navanithammal .. *Appellant** (*1st Accused, Prisoner*).

Nava-nithammal, *In re.*

*Evidence Act (I of 1872), S. 24—Relevancy of confession—Judge if need find specifically—Admission of confession—Procedure at the criminal trial.*

S. 24 of the Evidence Act is a rule of exclusion because it declares that a confession made by an accused person in certain circumstances is irrelevant in a criminal proceeding. It is not necessary that there should be a decision in so many words that a confession is not irrelevant under S. 24 of the Evidence Act. In every case in which a confession is admitted in evidence in a criminal proceeding, the fact that evidence of the confession is admitted is sufficient to make the evidence confession. It is open no doubt to the defence to object to the evidence of confession going in on the ground that it is excluded by S. 24 of the Evidence Act. But till such objection is raised there is no necessity for the Court to pronounce any formal decision on the question of the relevancy of the confession. The actual admission of the evidence during the trial is sufficient for the purpose.

Appeal against the order of the Court of Session of the North Arcot Division at Vellore in C. C. No. 23 of 1937 dated the 28th July, 1937.

*K. S. Jayarama Aiyar* and *C. K. Venkatanarasimhan* for Appellant.

*K. Venkataraghavachari* for *The Public Prosecutor* (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The appellant has been convicted of robbery and causing grievous hurt in the course of the commission of the robbery and sentenced to undergo rigorous imprisonment for seven years under Ss. 392 and 397, Indian Penal Code. She was charged along with her husband with those offences, but the husband was acquitted by the Sessions Judge after a trial with the aid of a jury. It cannot be argued in this case that there was not enough evidence which if believed would not support the verdict of the jury. The case for the prosecution briefly was that P.W. 2 a little girl of six years who used to go to the appellant's house for drinking water during the school interval went to the appellant's house on the 8th of April, 1937, along with some of her school mates, that she remained behind for the purpose of answering calls of nature, and that she never returned to the house even that night. Search was

*Crl. Appeal No. 423 of 1937. 4th May, 1938.

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made for the girl and she was finally found in a room in the appellant's house in a nearly strangled condition with a coir rope round her neck and all her jewels were found missing. The jewels were soon afterwards produced by the appellant before the police from an almirah in a room in her house. There was also a confession recorded by the Tahsildar Magistrate on the 12th of April, in which the appellant admitted having pushed the girl down, taken off her jewels and finally tied the rope round her neck tightly and dragged the child to the room in which she was ultimately found. It has been argued on behalf of the appellant that the learned Sessions Judge instead of deciding himself whether the confession made by the appellant before the Tahsildar Magistrate was induced by any threat or promise, left it to the jury to decide whether the confession was voluntary and also that the Sessions Judge omitted to direct the jury that it was for the jury to decide whether the confession was a true confession. I am of opinion that there is not much substance in these contentions. No doubt there is in more than one place in the charge a direction to the jury to consider whether the confession was voluntary and indeed to decide whether it is voluntary, but this does not mean that the learned Judge did not come to a decision himself on the point before he admitted the confession in evidence. The confession was one which is recorded by the Magistrate authorised to record confessions according to law and in such a case *prima facie* the confession would be admissible and the recorded confession as well as the oral evidence of the Magistrate who recorded it must have been admitted because the learned Judge thought there was nothing to prevent their being admitted. S. 24 of the Evidence Act is a rule of exclusion because it declares that a confession made by an accused person in certain circumstances is irrelevant in a criminal proceeding. It is not necessary that there should be a decision in so many words that a confession is not irrelevant under S. 24 of the Evidence Act. In every case in which a confession is admitted in evidence in a criminal proceeding, the fact that evidence of the confession is admitted is sufficient to make the confession evidence. It is open no doubt to the defence to object to the evidence of confession going in on the ground that it is excluded by S. 24 of the Evidence Act. But till such objection is raised there is no necessity for the Court

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to pronounce any formal decision on the question of relevancy of the confession. The actual admission of the evidence during the trial is sufficient for the purpose. It cannot therefore be said in this case that there had been a failure on the part of the learned Judge to perform his duty in the matter of admission of the evidence of confession. Then again his leaving it to the jury to decide whether the confession is voluntary is certainly a point regarding which the appellant cannot complain with any reason, because it gives only a further opportunity given for the appellant to escape from the consequences of the confession. Though the learned Judge was not right in leaving this matter to the decision of the jury yet his leaving it to the jury to decide cannot be regarded as a misdirection which could have possibly prejudiced the appellant. As regards the other point, the learned Judge has asked the jury to decide whether the confession may be accepted as a true one, and this is a sufficient compliance with his duty to direct the jury to decide whether the confession admitted by him is a true confession or not.

The next argument urged on behalf of the appellant is that there was no proper direction at the end of the charge as to whether the hurt caused to the victim by the appellant was caused for the purpose of committing robbery or, as the section has it, "for that end." This in my opinion is not a reasonable criticism of the charge, for at the end of the charge the learned Judge has said that it was necessary for the jury to consider whether the violence was resorted to with a view to rob the girl of her jewels. This in my opinion is sufficient compliance with the law as regards the charge to the jury in respect of the ingredients of the offence charged. Going through the charge as a whole I see no reason to suppose that it was not on the whole fair and sufficient. There were one or two important discrepancies in the evidence, but these have been touched upon and it was open to the jury to accept the explanations put forward on behalf of the prosecution for the discrepancies. This is certainly not a case in which it can be said that there was no sufficient evidence for a conviction and the sentence imposed on the appellant is the minimum prescribed under S. 397, Indian Penal Code. The appeal is therefore dismissed.

B. V. V. —— *Appeal dismissed.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VARADACHARIAR AND MR. JUSTICE ABDUR RAHMAN.

Perianna Goundan .. *Petitioner* (8th Respondent in Appeal No. 152 of 1934 on the file of the High Court—9th Defendant in O.S. No. 9 of 1934 on the file of the Sub-Court, Coimbatore)*

*v.*

Sellappa Goundan and others .. *Respondents (Appellant and Respondents Nos. 1 to 7 in Appeal No. 152 of 1934 on the file of the High Court—Plaintiff and Defendants Nos. 2 to 8 in O.S. No. 9 of 1934 on the file of the Sub-Court, Coimbatore).*

Perianna Goundan *v.* Sellappa Goundan.

*Madras Agriculturist Relief Act (IV of 1938)—Suit on mortgage—Mortgaged properties sold in execution of money decree—Purchaser defendant to mortgage suit—If can claim benefit of the Act as an agriculturist—Purchase in 1933—If liability existing in 1932—Limit of relief if to be confined to the proportion of properties in his hands.*

A suit was filed for recovery of money due under a mortgage deed dated 27th July, 1929, executed by first defendant in favour of the plaintiff. In execution of a money decree obtained against the mortgagor, the eighth defendant purchased the equity of redemption in a portion of the hypotheca in 1930 and sold the same to ninth defendant in 1933. The plaintiff claimed to bring to sale the properties purchased by ninth defendant as part of his mortgage security. It was found that the mortgage was true and supported by consideration and a decree was passed for full amount due thereunder. Ninth defendant is an agriculturist within the meaning of Madras Act IV of 1938. The question is if this liability is a debt within the meaning of S. 3 (3) of the Act.

*Held*, the definition cannot be restricted to cases where a person is personally liable. The word "due" does not necessarily imply that it must be recoverable by imprisonment of the debtor.

Cl. (3) is wide enough to cover every person who is in any manner liable, either because he is personally liable or because he is liable on account of the possession of property and takes in his heirs, legal representatives or assigns.

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*C.M.P. No. 4192 of 1938 in Appeal No. 152 of 1934. 20th October, 1938.

Perianna Goundan *v.* Sellappa Goundan.

As for the contention that liability of petitioner was not one falling within S. 8 as he purchased only in 1933 and his liability was not one subsisting prior to 1st October, 1932,

*Held*, his liability is traceable to the original mortgage and his purchase was not the basis of any new liability.

*Held also*, that the liability cannot be limited to the extent of the properties attributable to the property in the possession of the petitioner.

Petition praying that in the circumstances stated therein the High Court will be pleased to scale down the debt forming the subject-matter of O.S. No. 9 of 1934 on the file of the Court of the Subordinate Judge of Coimbatore (Appeal No. 152 of 1934 on the file of the High Court) under the provisions of the Madras Act IV of 1938.

*K. V. Ramachandra Aiyar* for Petitioner.

*N. Somasundaram* for Respondents.

The judgment of the Court was delivered by

Varadachariar, J

*Varadachariar, J.*—This is an application filed by the ninth defendant in the Court below (eighth respondent here) for relief under Madras Act IV of 1938.

The suit out of which the appeal arose was instituted for the recovery of money due under a mortgage deed dated 27th July, 1929, executed by the first defendant in favour of the plaintiff. In execution of a money decree obtained against the mortgagor, the eighth defendant purchased the equity of redemption in a portion of the hypotheca in 1930 and he sold the same to the ninth defendant on 11th August, 1933. The plaintiff claimed to bring to sale the properties purchased by the ninth defendant as part of the mortgage security. The ninth defendant in turn contended that the mortgage in favour of the plaintiff was nominal and not supported by consideration. The lower Court substantially upheld this contention of the ninth defendant and gave a decree in the plaintiff's favour for a small amount. On appeal by the plaintiff, we reversed the decree of the lower Court and held that the mortgage was true and fully supported by consideration and that the plaintiff was entitled to a decree for almost the full amount due under the mortgage deed. As the ninth defendant stated that he was applying for relief under Madras Act IV of 1938, we allowed the matter to lie over and the question has now been argued before us.

It has not been denied by the plaintiff that the ninth defendant is an agriculturist within the meaning of the Act nor has

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it been denied that the mortgagor is an agriculturist. The only ground on which the petitioner's right to relief under the Act is challenged is that the liability of the petitioner is not a 'debt' within the meaning of S. 3(3) of the Act. The learned Counsel for the petitioner contends that this definition should be understood as limited to cases where a person is *personally* liable. We are unable to read the definition in this limited sense. There are no words in the definition clause justifying any such restriction; the clause speaks of 'any liability' and the word 'due' does not necessarily imply that it must be recoverable by imprisonment of the debtor. The inappropriateness of restricting it in the sense contended for will be realised when it is remembered that even by the time this Act was contemplated imprisonment for debt has, to a great extent, been abolished by Act XXI of 1936. It could not therefore have been the intention of the Legislature to limit the relief under the Act to cases where a person was personally liable. Its avowed purpose was to enable agriculturists to retain their property and prevent such property passing into the hands of creditors or execution purchasers.

Again, according to the contention of the plaintiff's learned Counsel, it will only be the person who actually contracts the debt that will be entitled to claim relief under the Act and not his heir at law or legal representative because the latter will ordinarily be under no personal liability. Similarly, in the case of joint families, relief under the Act will have to be limited only to the actual borrower or to those special cases in which other members of the family might on special grounds have become personally liable. But the provisions of the Act relating to joint families clearly indicate that even members who are under no personal liability are entitled to invoke the protection of the Act for the preservation of the property of the family. It was next pointed out that while clause (5) which defines 'creditor' takes care to include his heirs, legal representatives and assigns, there is no corresponding definition in the case of a 'debtor'. This omission is obviously due to the fact that the reference to liability in clause (3) is wide enough to cover every person who is in any manner liable, either because he is personally liable or because he is liable on account of the possession of property. There was no necessity to refer to any heir, legal representative or assign except in

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cases in which such person was liable within the meaning of cl. (3).

It was next contended that the liability of the petitioner was not one falling within S. 8 of the Act, because he purchased the property only in 1933 and his liability was not therefore one subsisting prior to 1st of October, 1932. This proceeds upon a misapprehension of the nature of the petitioner's liability. His liability is traceable to the original mortgage and his purchase was not the basis of any new liability. The liability that is now sought to be enforced is the liability arising out of the mortgage in 1929. The case therefore falls under S. 8.

It was finally contended that relief under the Act should be limited to the extent of the proportion attributable to the property in the possession of the petitioner and that the plaintiff must be at liberty to recover his full claim against the properties in the hands of the mortgagors. We do not think we can accede to this contention either. The relief under S. 8 is not confined to the applicant. The applicant has only to move the Court and bring certain facts to its notice and the quantum of relief is indicated by S. 8. Difficult questions may arise where some of the persons liable are agriculturists and some are not. One such case has been specifically dealt with in S. 14 of the Act. The principle to be applied in cases not so specifically dealt with need not be discussed in the present case because it has not been suggested that the other persons liable here are not agriculturists.

We accordingly hold that the debt must be scaled down in the manner indicated in S. 8. It is agreed that on this basis the amount due to the plaintiff will be Rs. 3,300 on 1st October, 1937. To this will be added interest at 6¼ per cent. per annum as per the directions in our judgment. The plaintiff will also be entitled to his costs as directed in the judgment in the main appeal. The appropriate figures calculated on the above basis will be inserted in the decree to be passed in the appeal.

S. V. V. —— *Petition allowed and debt scaled down.*

## IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—MR. JUSTICE GENTLE.

The Official Trustee of Madras .. *Petitioner**

*v.*

Nawab C. Abdul Hakim Sahib and Bahadur .. *Respondent.*

Official Trustee of Madras *v.* Abdul Hakim Sahib.

*Indian Lunacy Act (IV of 1912), Ss. 47, 48 and 61—Madras Original Side Rules, O. 33, r. 2—Official Trustee appointed to manage lunatic's properties—Application by him regarding taking of custody of Government securities standing in the name of the lunatic and his father—Application not* ultra vires *the provisions of the Act—Suit not necessary considering the question involved.*

The use of the word 'petition' in S. 48 of the Lunacy Act is used in contradistinction to a 'suit' and indicates that matters properly the subject of the provisions of S. 48 can be brought before the Court by a proceeding other than a suit. The provisions of O. 33 of the Original Side Rules supply the machinery to carry into effect the provisions of Chapter IV of the Lunacy Act as provided by S. 61 thereof.

Where the Official Trustee of Madras was appointed manager of a lunatic's properties with all powers given to him under S. 47 of the Indian Lunacy Act and the Official Trustee presented an application to Court for handing over to him from the father of the lunatic certain Government securities standing in the name of both the lunatic and his father and in the custody of the latter, and to put him in possession of some other properties belonging to the lunatic,

*Held,* on the objection that the Official Trustee should have come by an originating petition or a suit regarding the subject-matter and not by an application as he did, that (1) the Court having been seized of the matter regarding the lunatic and his estate by means of an original petition under which it was found that the person was of unsound mind and incapable of managing himself and his affairs, it would be unnecessary that any further proceedings arising in respect of the matter should have to be prosecuted by means of another original petition. The petition indicated by S. 48 of the Indian Lunacy Act is an application before the Court which is authorised by O. 33, r. 2 of the Original Side Rules and which is in conformity with S. 48 and is not *ultra vires* of the provisions of the Lunacy Act; (2) that the questions whether the father of the lunatic had intended to pass the properties in question to the lunatic and whether he had any beneficial interest in them, did not involve any complicated question of title, and investigations regarding them were not likely to be lengthy or complex. Hence the objection that a suit alone would lie was unsustainable as S. 48 gave the Court jurisdiction to entertain by means of proceedings which were before it, the matters which happened to be the subject of the present application.

*C. Srinivasachari* for Petitioner.

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* O. P. No. 295 of 1936.
Application No. 2115 of 1937. 18th October, 1937.

*S. Duraiswami Aiyar, Srinivasaraghavan* and *Tyagarajan* for Respondent.

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The Court delivered the following

JUDGMENT.—By order dated 30th April, 1937, in O. P. No. 295 of 1936, C. Abdul Salam Sahib was adjudicated a person of unsound mind and incapable of managing his own affairs, and the Official Trustee of Madras was appointed the manager of the abovenamed lunatic's properties with all powers provided under S. 47 of the Indian Lunacy Act, 1912. In the present application, the Official Trustee of Madras as such manager prays for an order against the respondent (who is the father of the lunatic).

(1) To hand over to the applicant Government securities of the face value of Rs. 1,50,000 standing in the name of the lunatic and in the respondent's custody;

(2) To put the Official Trustee of Madras in possession of the Sathgur estate belonging to the lunatic.

Since issuing this application, the applicant has ascertained that the Government securities in fact are in the joint names of the lunatic and the respondent who so transferred them about the year 1925. The sale deed of the Sathgur estate is in the sole name of the lunatic. These properties, movable and immovable, are in the possession of the respondent. The applicant bases his claim for the order which he prays upon the grounds that the respondent has made valid and completed gifts of these properties to the lunatic with the avowed object of benefiting him. In his counter-affidavit filed on 30th September, 1937, the respondent admits that the Government securities stand in the joint names of himself and the lunatic and alleges that they were purchased with his own monies and have been in his own possession throughout on his own behalf and in his own right. He says further that the Sathgur estate was purchased by him with his own monies and the sale deed was taken in the name of the lunatic without any intention to confer any benefit on him, and the respondent has never parted with possession of either of these two properties. He contends there has been no valid and completed gift according to Mohammadan law and no right has passed to the lunatic in respect of either of these properties.

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The application was issued under S. 47 of the Indian Lunacy Act. The applicant has stated that this is an error and that it should be under S. 48 of the same Act, and I propose to allow the applicant to amend the application by substituting the latter in place of the former section.

Mr. S. Doraiswami Aiyar, learned Counsel on behalf of the respondent, raises two preliminary objections to this application. That (1) proceedings of this nature should be by a petition and not by an application; and (2) the claim made by the applicant cannot be entertained or established either by an application or by a petition, and should be by way of a suit.

The objection is made on the ground that S. 48 of the Lunacy Act does not contemplate claims of the nature now made and is restricted to matters arising in connection with the estate of the lunatic which estate is in possession of a manager or is ascertained, and does not include a proceeding in which it is sought to establish that property or properties in the possession of other persons form part of the estate of the lunatic, namely, that in respect of a matter in which the title of the lunatic to property is in issue.

The relevant sections of the Lunacy Act so far as this application is concerned, are contained in Chapter IV of that Act, which chapter includes Ss. 37 to 61 inclusive.

*S. 37.*—The Courts having jurisdiction under this chapter shall be the High Courts of Judicature at Fort William, Madras and Bombay.

*S. 38.*—(1) The Court may upon application by order direct an inquisition whether a person subject to the jurisdiction of the Court who is alleged to be lunatic, is of unsound mind and incapable of managing himself and his affairs.

(2) Such order may also contain directions for inquiries concerning the nature of the property belonging to the alleged lunatic, the persons who are his relatives, the time during which he has been of unsound mind, or such other matters as to the Court may seem proper.

*S. 47.*—The Court, on the appointment of a manager of the estate of a lunatic, may direct by the order of appointment, or by any subsequent order, that such manager shall have such powers for the management of the estate as to the Court may seem necessary and proper, reference being had to the nature

of the property, whether movable or immovable, of which the estate may consist:

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Provided that no manager so appointed shall without the permission of the Court—(*a*) mortgage, charge or transfer by sale, gift, exchange or otherwise, any immovable property of the lunatic; or (*b*) lease any such property for a term exceeding five years.

Such permission may be granted subject to any condition or restriction which the Court thinks fit to impose.

*S. 48.*—The Court may, on application made to it by petition concerning any matter whatsoever connected with the lunatic or his estate, make such order, subject to the provisions of this chapter, respecting the application, as in the circumstances it thinks fit.

*S. 61.*—The Court may, from time to time, make rules for the purpose of carrying into effect the provisions of this chapter in matters of lunacy.

In regard to the first objection, namely, that the proceedings should not be by an application but by means of a petition, the High Court of Madras having jurisdiction under the Lunacy Act pursuant to S. 37 have made rules as provided by S. 61 of the Act in order to carry into effect the provisions of Chapter IV of the statute, and O. 33 of the Original Side Rules are the rules made by this Court. The rules which are material for the matter before me are:

*R. 1.*—Every application under S. 38 of the Act shall be made to the Court by a verified petition stating . . . . . . . . . . . (*e*) the nature of the lunatic's property and the income thereof.

*R. 2.*—All other applications under the Act and all applications in pending matters shall be by Master's summons in all cases of procedure or ministerial acts and by Judge's summons in other cases.

S. 38 of the Act is that by which an inquisition into the state of a person's mind is held.

There is no definition of a 'petition' either in the Civil Procedure Code or in the General Clauses Act. O. 1, r. 4 (9) of the Original Side Rules defines an "Original Petition" as meaning

"A petition to the Court whereby any proceeding, other than a suit, or appeal, or a proceeding in execution of a decree or order, is instituted in the Court."

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And it is such a petition which O. 33, r. 1 contemplates. An application is a petition inasmuch as it prays the Court to grant relief prayed therein. The use of the word 'petition' in S. 48 of the Lunacy Act is used in contradistinction to a 'suit' and indicates that matters properly the subject of the provisions of S. 48 can be brought before the Court by a proceeding other than a suit. The provisions of O. 33 of the Original Side Rules supply the machinery to carry into effect the provisions of Chapter IV of the Lunacy Act as provided by S. 61 thereof. The Court having been seized of the matter regarding the lunatic and his estate by means of an Original Petition under which it is found that the person is of unsound mind and incapable of managing himself and his affairs, it is in my view unnecessary that any further proceedings arising in respect of the matter should have to be prosecuted by means of another original petition. The petition indicated in S. 48 is the application now before the Court which is authorised by O. 33, r, 2, which order, as I have said, is prescribed by S. 48 and is in conformity with it and is not *ultra vires* of the provisions of the Lunacy Act. This objection is not one of substance but of form only, and if I had come to a contrary conclusion, I should have allowed the applicant to convert the present application into an Original Petition. In my view, the first objection fails.

In regard to the second objection, namely, that the relief now sought should not be the subject of an application but should be by way of a suit. The language of S. 48 is not mandatory but permissive. By the use of the word 'may' a discretion is given to the Court to make an order under that section. The words 'concerning any matter whatsoever connected with the lunatic or his estate' are very wide, and indeed it is difficult to imagine a wider expression. It is contended that this section does not empower a Court by the proceedings mentioned therein to decide such a question as arises in the present application, namely, whether the properties referred to in the application form part of the estate of the lunatic, but confers jurisdiction upon a Court only in regard to properties which unquestionably are part of the lunatic's estate. S. 47 of the Act confers upon the Court power to direct, either by the order of the appointment of the manager of the estate or by any subsequent order such powers for management of the

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estate as the Court may consider necessary and proper. The proviso makes it clear that the manager may not, without the permission of the Court, mortgage, charge or transfer by sale, gift, exchange or otherwise, any immovable property of the lunatic or lease any of such property for a term longer than five years. This section deals with the estate of the lunatic which is in possession and therefore with such properties as are ascertained. The provisions of S. 48 are in addition to those contained in S. 47, an argument on behalf of the respondent that the Court has no jurisdiction to grant the relief sought was based upon the analogy of the methods by which a guardian of a minor under the Guardians and Wards Act seeks the assistance of the Court in regard to the minor's estate, and it was pointed out that such a guardian cannot obtain possession of or recover the property of the minor by means of an application or petition and that he must file a suit for such a relief. The grounds upon which a guardian appointed under the Guardians and Wards Act may make an application to the Court are contained in S. 33 (1) of that Act, which section provides that he may apply by petition to the Court, which appointed or declared him, for its opinion, advice or direction on any present question respecting the management or administration of the property of the ward. The jurisdiction given to the Court under that section is clearly defined and is very limited, and the Court is unable to grant any relief other than giving its opinion, advice or direction. The wording of this section is entirely different from the wording of S. 48 of the Lunacy Act. In matters regarding the guardianship of a minor, such as obtaining possession of property of the minor, in the hands of a third party, must therefore be the subject of a suit. There is no provision in the Guardians and Wards Act comparable to that contained in S. 48 of the Lunacy Act. In my view, no support of the contention on behalf of the respondent is obtained by reference to the Guardians and Wards Act.

Mr. Doraiswami Aiyar conceded that under S. 7 of the Presidency Towns Insolvency Act, 1909, the Court has jurisdiction to decide in the insolvency proceedings all questions and matters which arise in the insolvency including the right or title to the property of the insolvent in the hands of third parties. The relevant wording of S. 7 is as follows:—

"Subject to the provisions of this Act, the Court shall have full power to

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decide all questions of priority and all other questions whatsoever, whether of law or fact which may arise in any case of insolvency."

Questions of priority do not arise in regard to lunatics and their estates as it does in the case of insolvents and insolvencies, and the words of S. 7, in regard to priority can be ignored. The words which follow "all other questions whatsoever, whether of law or fact," in my view, have the same meaning, in substance, as the words in S. 48 of the Lunacy Act "any matter whatsoever." The words in the former section "whether of law or fact" do not give any extended meaning to the words "all other questions whatsoever," which words would mean the same, if reference to law and fact were omitted.

In further support of the contention of the learned advocate on behalf of the respondent, *Nitamburree Chowdhrain* v. *Shushee Mookhee Chowdhrain*[1] was cited which is a case decided under the repealed Act XXXV of 1858. In that case, it was held that a Court having decided that a property formed part of the estate of a lunatic, it had no power to order that the Collector should take possession, although it is provided under S. 9 of this Act that in certain circumstances (which existed in the above case) the Court of Wards were authorised to take charge of the estate. In my view, this case is not in point here. In the above repealed Act, there is no section containing comparable provisions to those in S. 48 of the Lunacy Act. Whilst it is provided in S. 48 of the Lunacy Act, that the making of an order thereunder is subject to the provisions of Chapter IV, I see no provision in this chapter which prevents the subject of this application being dealt with in the way which is sought by the applicant now. In my view, S. 48 of the Lunacy Act gives to the Court jurisdiction to entertain by means of proceedings which are now before it the matters which are the subject of the present application. The intention of the Legislature, as in the case of insolvencies, is to provide a summary procedure in regard to matters concerning lunatics and their estates.

As pointed out above, this section is not mandatory but is permissive as is also the case in regard to S. 7 of the Presidency Towns Insolvency Act. The Court should refer the parties to a suit in cases which it considers likely to be complex

1. (1869) 12 W.R. 518.

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or lengthy or properly matters which should be voiced by way of a suit and which cannot conveniently be dealt with by the summary procedure indicated in S. 48 of the Lunacy Act. In the present application, it is admitted by the respondent that the Government securities are in the joint names of the lunatic and himself and that the sale deed of the immovable property is in the name of the lunatic. It is common ground that these properties were purchased out of the respondent's monies and are now in his possession. The matters for decision are whether the respondent intended in respect of either of the properties to pass and has passed any beneficial interest in these properties to the lunatic. These questions do not involve any complicated questions of title and the investigation is not likely to be lengthy or complex. In my opinion, therefore, they are matters which can conveniently and properly be tried by the method adopted by the applicant. If I had come to the conclusion that summary procedure was not an appropriate method to deal with the questions arising in the application, I should, without hesitation, have referred the parties to a suit. In my view, the second preliminary objection fails.

As the matters before me cannot be disposed of by affidavit, I direct the application to be posted in the evidence list in accordance with the established practice.

The parties before me agree there shall be mutual discovery by affidavit of documents in three weeks from to-day and inspection one week thereafter.

K. C. ——— *Application allowed.*

[END OF VOL. II.]

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# THE INDIA ACTS

AND

# THE MADRAS ACTS.

## 1938.

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# INDIA ACTS, 1938.

## THE REPEALING ACT, 1938.

ACT No. I OF 1938.

[*26th February, 1938.*

*An Act to repeal certain enactments.*

WHEREAS it is expedient that the enactments specified in the Schedule which are spent or have otherwise become unnecessary or have ceased to be in force otherwise than by expressed specific repeal, should be expressly and specifically repealed; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE REPEALING ACT, 1938.

Repeal of certain enactments.

2. The enactments specified in the Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Saving.

3. Where this Act repeals any enactment—

(*a*) which, while itself repealing another enactment, provided for the saving of rights, privileges, obligations or liabilities, acquired, accrued or incurred under that enactment or provided that references to the enactment by it repealed should be read as if made to the Act or Regulation by which that enactment was repealed, or that acts done under the enactment by it repealed should be deemed to have been done under the Act or Regulation by which that enactment was repealed, or

(*b*) which, while itself amending another enactment, provided that references to the enactment by it amended should be read as if made to that enactment as so amended, or that acts done under the enactment by it amended should be deemed to have been done under that enactment as so amended or by a new authority substituted in that enactment as so amended for a previously existing authority,

the repeal shall not affect the operation of any such provision as aforesaid.

Effect of repeal of amending enactment.

4. Where this Act repeals any enactment by which the text of any other enactment was amended by the express omission, insertion or substitution of any matter, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the commencement of this Act.

# THE SCHEDULE.

## ENACTMENTS REPEALED.

(*See* SECTION 2.)

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
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| | | PART I.—CENTRAL ACTS. | |
| 1863 | XXXI | The Official Gazettes Act, 1863 .. | The whole. |
| 1867 | XXXII | The Chief Commissioners' Powers Act .. | So much as has not been repealed. |
| 1870 | XX | The Court-fees Act (1870) Amendment Act, 1870. | The whole. |
| 1870 | XXVII | The Indian Penal Code Amendment Act, 1870. | So much as has not been repealed. |
| 1871 | I | The Cattle-trespass Act, 1871 .. | Section 2 and the Schedule. |
| 1871 | V | The Prisoners Act, 1871 .. | So much as has not been repealed. |
| 1871 | XXII | The Bengal Chaukidari (Amendment) Act, 1871. | So much as has not been repealed. |
| 1871 | XXIII | The Pensions Act, 1871 .. | Section 2 and the Schedule. |
| 1872 | I | The Indian Evidence Act, 1872 .. | Section 2 and the Schedule. |
| 1872 | XV | The Indian Christian Marriage Act, 1872 .. | Section 2 and the Fifth Schedule. |
| 1872 | XVIII | The Indian Evidence Act Amendment Act .. | So much as has not been repealed. |
| 1872 | XIX | The Indian Penal Code Amendment Act,1872. | The whole. |
| 1873 | X | The Indian Oaths Act, 1873 .. | Section 15. |
| 1874 | IX | The European Vagrancy Act, 1874 .. | Section 2. |
| 1874 | XV | The Laws Local Extent Act, 1874 .. | Part XII of the Sixth Schedule. |
| 1875 | XIII | The Probate and Administration Act, 1875 .. | So much as has not been repealed. |
| 1875 | XV | The Punjab Laws Amendment Act, 1875 .. | The whole. |
| 1876 | X | The Bombay Revenue Jurisdiction Act, 1876. | Section 15. |
| 1876 | XVI | The Stage-Carriages Act (1861) Amendment Act, 1876. | So much as has not been repealed. |
| 1876 | XVIII | The Oudh Laws Act, 1876 .. | Section 2 and the First Schedule. |
| 1877 | IX | The Punjab Murderous Outrages (Amendment) Act, 1877. | Section 2. |
| 1877 | XVI | An Act to amend the Bombay Revenue Jurisdiction Act, 1876. | The whole. |
| 1877 | XIX | The Madras Civil Courts (Amendment) Act, 1877. | So much as has not been repealed. |
| 1878 | VIII | The Sea Customs Act, 1878 .. | Section 2 and Part I of the Schedule. |
| 1878 | XI | The Indian Arms Act, 1878 .. | Section 3 and the First Schedule. |
| 1878 | XII | The Punjab Laws (Amendment) Act, 1878 .. | Sections 1 and 5. |
| 1878 | XIV | An Act to assimilate certain powers of the Local Governments of the North-Western Provinces and Oudh. | So much as has not been repealed. |
| 1878 | XVII | The Northern India Ferries Act, 1878 | Section 2. |
| 1879 | II | The Central Provinces Laws Act, 1879 .. | The whole. |
| 1879 | XVIII | The Legal Practitioners Act, 1879 .. | Sections 2 and 42. The First Schedule. |
| 1880 | IX | The Bombay Civil Courts Act, 1880 .. | So much as has not been repealed. |
| 1880 | XV | The Bombay Revenue Jurisdiction Act, 1880. | So much as has not been repealed. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1881 | VII | The Bengal Cess (Amendment No. 1) Act, 1881. | The whole. |
| 1881 | X | The Coroners Act, 1881 .. | So much as has not been repealed. |
| 1881 | XIV | The Benares Family Domains Act, 1881 .. | So much as has not been repealed. |
| 1881 | XXI | The Broach and Kaira Incumbered Estates Act, 1881. | Section 2. |
| 1881 | XXIII | The Dekkhan Agriculturists' Relief Act, 1881. | So much as has not been repealed. |
| 1881 | XXIV | The Punjab Laws Amendment Act, 1881 .. | So much as has not been repealed. |
| 1882 | VIII | The Indian Penal Code Amendment Act, 1882. | The whole. |
| 1882 | XII | The Indian Salt Act, 1882 .. | Section 2 and the Schedule. |
| 1882 | XV | The Presidency Small Cause Courts Act, 1882. | Sections 2 and 3. The First Schedule. |
| 1882 | XXII | The Dekkhan Agriculturists' Relief Act, 1882. | So much as has not been repealed. |
| 1883 | I | The Central Provinces Local Self-Government Act, 1883. | So much as has not been repealed. |
| 1883 | II | The Elephants Preservation Act (1879) Amendment Act, 1883. | The whole. |
| 1883 | V | The Indian Merchant Shipping Act, 1883 .. | So much as has not been repealed. |
| 1883 | VI | The Calcutta Pilots (Amendment) Act, 1883. | The whole. |
| 1883 | XX | The Punjab District Boards Act, 1883 .. | The whole of Chapter V. |
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| 1884 | IX | The Legal Practitioners Act, 1884 .. | So much as has not been repealed. |
| 1884 | XII | The Agriculturists' Loans Act, 1884 .. | Section 3. |
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| 1885 | III | The Transfer of Property Act (1882) Amendment Act, 1885. | The whole. |
| 1885 | IX | The Excise and Sea Customs Law Amendment Act, 1885. | So much as has not been repealed. |
| 1885 | X | An Act to amend the Oudh Estates Act, 1869. | The whole. |
| 1885 | XIII | The Indian Telegraph Act, 1885 .. | Section 2. |
| 1885 | XXI | The Madras Civil Courts Act, 1885 .. | So much as has not been repealed. |
| 1886 | III | The Northern India Ferries Act Amendment Act, 1886. | The whole. |
| 1886 | IV | The Indian Contract Act (1872) Amendment Act, 1886. | So much as has not been repealed. |
| 1886 | VI | The Births, Deaths and Marriages Registration Act, 1886. | The whole of Chapter IV. |
| 1886 | VIII | The Bengal Tenancy (Amendment) Act, 1886. | The whole. |
| 1886 | X | The Indian Criminal Law Amendment Act, 1886. | So much as has not been repealed. |
| 1886 | XIX | An Act to legalize the discharge by the Lieutenant-Governor of the North-Western Provinces of certain functions of the Governor-General in Council. | The whole. |
| 1886 | XXII | The Oudh Rent Act, 1886 .. | Section 2. |
| 1886 | XXIII | The Dekkhan Agriculturists' Relief Act, 1886. | So much as has not been repealed. |
| 1887 | II | The Sea Customs Act (1878) Amendment Act, 1887. | So much as has not been repealed. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1887 | III | The Indian Evidence Act (1872) Amendment Act, 1887. | The whole. |
| 1887 | IX | The Provincial Small Cause Courts Act, 1887. | So much of section 2 as has not been repealed. |
| 1887 | XVII | The Punjab Land-revenue Act, 1887 .. | Section 2 and the Schedule. |
| 1888 | XI | The Indian Telegraph (Presidency-towns) Act, 1888. | The whole. |
| 1889 | I | The Metal Tokens Act, 1889 .. | Section 9. |
| 1889 | IV | The Indian Merchandise Marks Act, 1889 .. | Sections 3, 10 and 11. |
| 1889 | V | The Coroners (Madras) Act, 1889 .. | So much as has not been repealed. |
| 1889 | VII | The Succession Certificate Act, 1889 .. | So much as has not been repealed. |
| 1889 | VIII | The Sea Customs Act (1878) Amendment Act, 1889. | So much as has not been repealed. |
| 1889 | XVI | The Central Provinces Land-revenue Act, 1889. | So much as has not been repealed. |
| 1890 | VIII | The Guardians and Wards Act, 1890 .. | Sections 2 and 52. The Schedule. |
| 1890 | IX | The Indian Railways Act, 1890 .. | Sections 2, 149 and 150. The First Schedule. |
| 1890 | X | The Press and Registration of Books Act (1867) Amendment Act, 1890. | So much as has not been repealed. |
| 1890 | XVI | The Births, Deaths and Marriages Registration Act (1886) Amendment Act, 1890. | So much as has not been repealed. |
| 1890 | XX | The North-Western Provinces and Oudh Act, 1890. | Section 8 (1)—the words from "and in Part IV" (where they first occur) to "shall be repealed". Section 8 (2). Section 9 (1). Sections 38, 44 to 47, 49 and 51 to 53. Section 55. Sections 57 to 61. |
| 1891 | I | The Cattle-trespass Act (1871) Amendment Act, 1891. | So much as has not been repealed. |
| 1891 | II | The Indian Christian Marriage Act (1872) Amendment Act, 1891. | So much as has not been repealed. |
| 1891 | III | The Indian Evidence Act (1872) Amendment Act, 1891. | So much as has not been repealed. |
| 1891 | VII | The Indian Registration of Ships Act (1841) Amendment Act, 1891. | So much as has not been repealed. |
| 1891 | IX | The Indian Merchandise Marks and Sea Customs Acts Amendment Act, 1891. | So much as has not been repealed. |
| 1891 | X | The Indian Criminal Law Amendment Act, 1891. | So much as has not been repealed. |
| 1891 | XII | The Amending Act, 1891 .. | So much as has not been repealed. |
| 1892 | IV | The Court of Wards Act (Bengal) Amendment Act, 1892. | So much as has not been repealed. |
| 1892 | VII | The Madras City Civil Courts Act, 1892 .. | Section 12. |
| 1893 | I | The Bankers' Books Evidence Act, 1893 .. | So much as has not been repealed. |
| 1894 | I | The Land Acquisition Act, 1894 .. | So much of section 2 as has not been repealed. |
| 1894 | III | The Indian Criminal Law Amendment Act, 1894. | So much as has not been repealed. |
| 1894 | IV | The Amending Act, 1894 .. | So much as has not been repealed. |
| 1894 | IX | The Prisons Act, 1894 .. | Section 2 and the Schedule. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1894 | XIII | The Amending (Army) Act, 1894 .. | So much as has not been repealed. |
| 1895 | I | The Presidency Small Cause Courts Act, 1895. | So much as has not been repealed. |
| 1895 | III | The Indian Criminal Law Amendment Act, 1895. | So much as has not been repealed. |
| 1895 | VI | The Dekkhan Agriculturists' Relief Act, 1895. | The whole. |
| 1895 | VII | The Punjab Laws Act Amendment Act, 1895. | So much as has not been repealed. |
| 1895 | VIII | The Police Act (1861) Amendment Act, 1895. | The whole. |
| 1895 | XVI | The Amending Act, 1895 .. | So much as has not been repealed. |
| 1896 | VI | The Indian Penal Code Amendment Act, 1896. | The whole. |
| 1896 | VIII | The Inland Bonded Warehouses Act, 1896 .. | Section 3. |
| 1896 | IX | The Indian Railways Act (1890) Amendment Act, 1896. | So much as has not been repealed. |
| 1896 | XI | The Legal Practitioners Act, 1896 .. | The whole. |
| 1896 | XVII | The Punjab Land-revenue (Amendment) Act, 1896. | The whole. |
| 1897 | I | The Public Servants (Inquiries) Act (1850) Amendment Act, 1897. | Sections 2, 3 and 4. |
| 1897 | V | The Amending Act, 1897 .. | Sub-section (2) of section 2 and the Second Schedule. |
| 1897 | VI | The Negotiable Instruments Act Amendment Act, 1897. | So much as has not been repealed. |
| 1897 | VIII | The Reformatory Schools Act, 1897 .. | Sections 2 and 3. |
| 1898 | I | The Stage-Carriages Act (1861) Amendment Act, 1898. | So much as has not been repealed. |
| 1898 | IV | The Indian Penal Code Amendment Act, 1898. | So much as has not been repealed. |
| 1898 | XI | The Central Provinces Tenancy Act, 1898 .. | Section 100 and the Schedule. |
| 1898 | XII | The Central Provinces Land-revenue Act, 1898. | The whole. |
| 1899 | III | The Presidency Small Cause Courts Act, 1899. | So much as has not been repealed. |
| 1899 | V | The Indian Evidence Act, 1899 .. | So much as has not been repealed. |
| 1899 | VI | The Indian Contract Act Amendment Act, 1899. | The whole. |
| 1899 | IX | The Indian Arbitration Act, 1899 .. | Section 21. |
| 1899 | X | The Carriers Act, 1899 .. | So much as has not been repealed. |
| 1899 | XI | The Court-fees Amendment Act, 1899 .. | So much as has not been repealed. |
| 1899 | XII | The Currency Notes Forgery Act, 1899 .. | So much as has not been repealed. |
| 1899 | XVI | The Northern India Canal and Drainage (Amendment) Act, 1899. | So much as has not been repealed. |
| 1899 | XVIII | The Land Improvement Loans (Amendment) Act, 1899. | So much as has not been repealed. |
| 1899 | XIX | The Currency Conversion (Army) Act, 1899. | So much as has not been repealed. |
| 1899 | XXIV | The Central Provinces Court of Wards Act, 1899. | Section 41 and the Schedule. |
| 1900 | II | The Transfer of Property Act, 1900 .. | So much as has not been repealed. |
| 1900 | VII | An Act amending Act XIX of 1899 .. | So much as has not been repealed. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1900 | XII | The Bankers' Books Evidence Act, 1900 .. | So much as has not been repealed. |
| 1900 | XIII | The Punjab Alienation of Land Act, 1900 .. | Section 22. |
| 1901 | X | The Court-fees (Amendment) Act, 1901 .. | So much as has not been repealed. |
| 1901 | XI | The Amending Act, 1901 .. | Section 3 and the Second Schedule. |
| 1902 | VII | The United Provinces (Designation) Act, 1902. | The whole. |
| 1903 | I | The Amending Act, 1903 .. | Section 3 and the Second Schedule. |
| 1903 | II | The Indian Post Office (Amendment) Act, 1903. | The whole. |
| 1903 | XIII | The Lepers (Amendment) Act, 1903 .. | The whole. |
| 1904 | VI | The Transfer of Property (Amendment) Act, 1904. | The whole. |
| 1904 | XV | The Indian Stamp (Amendment) Act, 1904 .. | The whole. |
| 1905 | VI | The Court-fees (Amendment) Act, 1905 .. | The whole. |
| 1906 | II | The Sindh Incumbered Estates (Amendment) Act, 1906. | The whole. |
| 1906 | IV | The Presidency Small Cause Courts Act, 1906. | So much as has not been repealed. |
| 1906 | V | The Indian Stamp (Amendment) Act, 1906 .. | The whole. |
| 1906 | VIII | The Land Improvement and Agriculturists' Loans (Amendment) Act, 1906. | So much as has not been repealed. |
| 1907 | IV | The Repealing and Amending (Rates and Cesses) Act, 1907. | The whole. |
| 1908 | I | The Legal Practitioners (Amendment) Act, 1908. | So much as has not been repealed. |
| 1908 | III | The Indian Trusts (Amendment) Act, 1908. | The whole. |
| 1908 | IV | The Coroners (Amendment) Act, 1908 .. | So much as has not been repealed. |
| 1908 | XIII | The Central Provinces Financial Commissioner's Act, 1908. | Sections 4, 5 and 6. |
| 1908 | XV | The Indian Ports Act, 1908 .. | Section 69 and Schedule II. |
| 1908 | XVI | The Indian Registration Act, 1908 .. | Section 93 and the Schedule. |
| 1909 | IV | The Whipping Act, 1909 .. | Section 7. |
| 1910 | III | The Indian Penal Code Amendment Act, 1910. | The whole. |
| 1910 | VI | The Indian Stamp (Amendment) Act, 1910 .. | The whole. |
| 1910 | VII | The Court-fees (Amendment) Act, 1910 .. | The whole. |
| 1910 | XII | The Glanders and Farcy Law Amendment Act, 1910. | The whole. |
| 1910 | XIII | The Prisons (Amendment) Act, 1910 .. | The whole. |
| 1911 | I | The Opium (Amendment) Act, 1911 .. | Sections 2 and 3. |
| 1911 | IV | The Indian Ports (Amendment) Act, 1911 .. | The whole. |
| 1911 | V | The Indian Tramways (Amendment) Act, 1911. | The whole. |
| 1911 | IX | The Births, Deaths and Marriages Registration (Amendment) Act, 1911. | The whole. |
| 1911 | XI | The Indian Universities (Amendment) Act, 1911. | The whole. |
| 1911 | XIII | The Indian Christian Marriage (Amendment) Act, 1911. | The whole. |
| 1911 | XIV | The Court-fees (Amendment) Act, 1911 .. | The whole. |
| 1911 | XVI | The Bengal, Agra and Assam Civil Courts (Amendment) Act, 1911. | The whole. |
| 1912 | I | The Indian Stamp (Amendment) Act, 1912 .. | The whole. |
| 1912 | III | The Indian Post Office (Amendment) Act, 1912. | The whole. |
| 1912 | VII | The Bengal, Bihar and Orissa and Assam Laws Act, 1912. | Sections 7 and 8 and Schedule E. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1912 | IX | The Presidency Small Cause Courts (Amendment) Act, 1912. | The whole. |
| 1912 | X | The Indian Divorce (Amendment) Act, 1912. | The whole. |
| 1913 | I | The Indian Extradition (Amendment) Act, 1913. | The whole. |
| 1913 | V | The White Phosphorus Matches Prohibition Act, 1913. | Section 3. |
| 1913 | VIII | The Indian Criminal Law Amendment Act, 1913. | The whole. |
| 1914 | I | The Code of Civil Procedure (Amendment) Act, 1914. | The whole. |
| 1914 | IV | The Decentralization Act, 1914 .. | So much as has not been repealed. |
| 1914 | V | The Negotiable Instruments (Amendment) Act, 1914. | The whole. |
| 1914 | VI | The Provincial Small Cause Courts (Amendment) Act, 1914. | The whole. |
| 1914 | VII | The Indian Telegraph (Amendment) Act, 1914. | The whole. |
| 1914 | X | The Repealing and Amending Act, 1914 .. | So much as has not been repealed. |
| 1914 | XI | The Indian Companies (Amendment) Act, 1914. | The whole. |
| 1914 | XII | The Sea Customs (Amendment) Act, 1914 .. | The whole. |
| 1914 | XIII | The Indian Life Assurance Companies (Amendment) Act, 1914. | The whole. |
| 1914 | XIV | The Indian Post Office and Telegraph (Amendment) Act, 1914. | The whole. |
| 1914 | XV | The Indian Army (Amendment) Act, 1914 .. | The whole. |
| 1914 | XVII | The Second Repealing and Amending Act, 1914. | So much as has not been repealed. |
| 1915 | III | The Foreigners (Amendment) Act, 1915 .. | The whole. |
| 1915 | VII | The Delhi Laws Act, 1915 .. | Section 7. |
| 1915 | IX | The Sea Customs (Amendment) Act, 1915 .. | The whole. |
| 1915 | XI | The Repealing and Amending Act, 1915 .. | So much as has not been repealed. |
| 1915 | XIII | The North-West Frontier Constabulary Act, 1915. | Section 22. |
| 1916 | I | The Indian Trusts (Amendment) Act, 1916. | The whole. |
| 1916 | VI | The Indian Ports (Amendment) Act, 1916 .. | The whole. |
| 1916 | XII | The Indian Lunacy (Amendment) Act, 1916. | The whole. |
| 1916 | XIII | The Amending Act, 1916 .. | So much as has not been repealed. |
| 1917 | X | The Indian Army (Amendment) Act, 1917 .. | The whole. |
| 1917 | XIV | The Prevention of Cruelty to Animals (Amendment) Act, 1917. | The whole. |
| 1917 | XV | The Indian Registration (Amendment) Act, 1917. | The whole. |
| 1917 | XVII | The Government Savings Banks (Amendment) Act, 1917. | The whole. |
| 1917 | XXI | The Indian Trusts (Amendment) Act, 1917. | The whole. |
| 1917 | XXIII | The Presidency Small Cause Courts (Amendment) Act, 1917. | The whole. |
| 1917 | XXIV | The Repealing and Amending Act, 1917 .. | So much as has not been repealed. |
| 1918 | IV | The Indian Coinage (Amendment) Act, 1918. | The whole. |
| 1918 | XI | The Indian Army (Amendment) Act, 1918 .. | So much as has not been repealed. |
| 1919 | V | The Termination of the Present War (Definition) Act, 1919. | The whole. |
| 1919 | VI | The Indian Oaths (Amendment) Act, 1919 .. | The whole. |
| 1919 | VIII | The Negotiable Instruments (Amendment) Act, 1919. | The whole. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1919 | X | The Excess Profits Duty Act, 1919 .. | So much as has not been repealed. |
| 1919 | XIII | The Sea Customs (Amendment) Act, 1919 .. | The whole. |
| 1919 | XVII | The Land Acquisition (Amendment) Act, 1919. | The whole. |
| 1919 | XVIII | The Repealing and Amending Act, 1919 .. | So much as has not been repealed. |
| 1919 | XX | The Indian Arms (Amendment) Act, 1919 .. | The whole. |
| 1919 | XXI | The Indian Coinage (Amendment) Act, 1919 | The whole. |
| 1919 | XXIII | The Cinematograph (Amendment) Act, 1919 | The whole. |
| 1919 | XXVII | The Indemnity Act, 1919 .. | The whole. |
| 1920 | II | The Indian Army (Amendment) Act, 1920 .. | The whole. |
| 1920 | VI | The Inland Steam-vessels (Amendment) Act, 1920. | The whole. |
| 1920 | VIII | The Dourine (Amendment) Act, 1920 .. | The whole. |
| 1920 | IX | The Glanders and Farcy (Amendment) Act, 1920. | The whole. |
| 1920 | XI | The Presidency-towns Insolvency (Amendment) Act, 1920. | The whole. |
| 1920 | XXII | The Lepers (Amendment) Act, 1920 .. | The whole. |
| 1920 | XXIV | The Code of Civil Procedure (Amendment) Act, 1920. | The whole. |
| 1920 | XXV | The Negotiable Instruments (Amendment) Act, 1920. | The whole. |
| 1920 | XXVI | The Indian Limitation and Code of Civil Procedure (Amendment) Act, 1920. | The whole. |
| 1920 | XXVII | The Indian Motor Vehicles (Amendment) Act, 1920. | The whole. |
| 1920 | XXIX | The Indian Patents and Designs (Amendment) Act, 1920. | The whole. |
| 1920 | XXXI | The Repealing and Amending Act, 1920 .. | So much as has not been repealed. |
| 1920 | XXXII | The Post Office Cash Certificates (Amendment) Act, 1920. | The whole. |
| 1920 | XXXVII | The Indian Army (Amendment) Act, 1920 .. | So much as has not been repealed. |
| 1920 | XXXVIII | The Devolution Act, 1920 .. | So much as has not been repealed. |
| 1920 | XXXIX | The Indian Elections Offences and Inquiries Act, 1920. | The whole of Part I. |
| 1920 | XLII | The Indian Companies (Amendment) Act, 1920. | The whole. |
| 1920 | XLIX | The Auxiliary Force Act, 1920 .. | Section 35. |
| 1921 | I | The Indian Tea Cess (Amendment) Act, 1921 | The whole. |
| 1921 | III | The Code of Civil Procedure (Amendment) Act, 1921. | The whole. |
| 1921 | VII | The Calcutta University Act, 1921 .. | The whole. |
| 1921 | XI | The Indian Works of Defence (Amendment) Act, 1921. | So much as has not been repealed. |
| 1921 | XII | The Negotiable Instruments (Amendment) Act, 1921. | The whole. |
| 1921 | XIII | The Carriers (Amendment) Act, 1921 .. | The whole. |
| 1921 | XV | The Indian Post Office (Amendment) Act, 1921. | The whole. |
| 1921 | XVI | The Indian Penal Code (Amendment) Act, 1921. | So much as has not been repealed. |
| 1921 | XIX | The Land Acquisition (Amendment) Act, 1921. | The whole. |
| 1922 | I | The Indian Electricity (Amendment) Act, 1922. | The whole. |
| 1922 | III | The Benares Hindu University (Amendment) Act, 1922. | The whole. |
| 1922 | VI | The Indian Lunacy (Amendment) Act, 1922. | The whole. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1922 | X | The Indian Limitation (Amendment) Act, 1922. | The whole. |
| 1922 | XIV | The Press Law Repeal and Amendment Act, 1922. | The whole. |
| 1922 | XV | The Indian Ports (Amendment) Act, 1922 .. | The whole. |
| 1922 | XVI | The Indian Extradition (Amendment) Act, 1922. | The whole. |
| 1922 | XVII | The Indian Museum (Amendment) Act, 1922 | The whole. |
| 1922 | XVIII | The Negotiable Instruments (Amendment) Act, 1922. | The whole. |
| 1922 | XIX | The Court-fees (Amendment) Act, 1922 .. | The whole. |
| 1922 | XX | The Parsi Marriage and Divorce (Amendment) Act, 1922. | The whole. |
| 1922 | XXI | The Official Trustees and Administrator-General's Acts Amendment Act, 1922. | The whole. |
| 1923 | XI | The Repealing and Amending Act, 1923 .. | So much as has not been repealed. |
| 1923 | XII | The Criminal Law Amendment Act, 1923 .. | So much as has not been repealed. |
| 1923 | XIII | The Married Women's Property (Amendment) Act, 1923. | The whole. |
| 1923 | XV | The Indian Income-tax (Amendment) Act, 1923. | So much as has not been repealed. |
| 1923 | XVI | The Government Savings Banks (Amendment) Act, 1923. | The whole. |
| 1923 | XVII | The Prisoners (Amendment) Act, 1923 .. | The whole. |
| 1923 | XVIII | The Code of Criminal Procedure (Amendment) Act, 1923. | So much as has not been repealed. |
| 1923 | XX | The Indian Penal Code (Amendment) Act, 1923. | The whole. |
| 1923 | XXVI | The Code of Civil Procedure (Amendment) Act, 1923. | The whole. |
| 1923 | XXVII | The Indian Income-tax (Further Amendment) Act, 1923. | The whole. |
| 1923 | XXIX | The Code of Civil Procedure (Second Amendment) Act, 1923. | The whole. |
| 1923 | XXX | The Special Marriage (Amendment) Act, 1923. | The whole. |
| 1923 | XXXI | The Indian Territorial and Auxiliary Forces (Amendment) Act, 1923. | The whole. |
| 1923 | XXXII | The Indian Lunacy (Amendment) Act, 1923. | The whole. |
| 1923 | XXXIII | The Indian Army (Amendment) Act, 1923. | The whole. |
| 1923 | XXXIV | The Cutchi Memons (Amendment) Act, 1923. | The whole. |
| 1923 | XXXV | The Code of Criminal Procedure (Further Amendment) Act, 1923 | The whole. |
| 1923 | XXXVII | The Code of Criminal Procedure (Second Amendment) Act, 1923 | So much as has not been repealed. |
| 1923 | XXXVIII | The Land Acquisition (Amendment) Act 1923. | The whole. |
| 1923 | XXXIX | The Indian Ports (Amendment) Act, 1923. | The whole. |
| 1923 | XL | The Indian Electricity (Amendment) Act, 1923. | The whole. |
| 1923 | XLI | The Charitable and Religious Trusts (Amendment) Act, 1923. | The whole. |
| 1923 | XLIII | The Indian Stamp (Amendment) Act, 1923. | The whole. |
| 1924 | I | The Indian Cotton Cess (Amendment) Act, 1924. | The whole. |
| 1924 | VII | The Repealing and Amending Act, 1924 .. | So much as has not been repealed. |
| 1924 | X | The Indian Coinage (Amendment) Act, 1924. | The whole. |
| 1924 | XI | The Indian Income-tax (Amendment) Act, 1924. | The whole. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1924 | XV | The Indian Motor Vehicles (Amendment) Act, 1924. | The whole. |
| 1924 | XVI | The Indian Post Office (Amendment) Act, 1924. | The whole. |
| 1924 | XVII | The Imperial Bank of India (Amendment) Act, 1924. | The whole. |
| 1924 | XVIII | The Indian Criminal Law Amendment Act, 1924. | The whole. |
| 1925 | I | The Indian Merchant Shipping (Amendment) Act, 1925. | The whole. |
| 1925 | V | The Indian Income-tax (Amendment) Act, 1925. | The whole. |
| 1925 | VII | The Cantonments (Amendment) Act, 1925. | The whole. |
| 1925 | VIII | The Obscene Publications Act, 1925 .. | The whole. |
| 1925 | IX | The Indian Ports (Amendment) Act, 1925. | The whole. |
| 1925 | X | The Cantonments (House-Accommodation Amendment) Act, 1925. | The whole. |
| 1925 | XI | The Indian Merchant Shipping (Second Amendment) Act, 1925. | The whole. |
| 1925 | XV | The Indian Stamp (Amendment) Act, 1925. | The whole. |
| 1925 | XVI | The Indian Income-tax (Second Amendment) Act, 1925. | The whole. |
| 1925 | XVII | The Prisons (Amendment) Act, 1925 .. | The whole. |
| 1925 | XVIII | The Indian Cotton Cess (Amendment) Act, 1925. | The whole. |
| 1925 | XX | The Code of Civil Procedure (Amendment) Act, 1925. | The whole. |
| 1925 | XXI | The Religious Endowments (Amendment) Act, 1925 | The whole. |
| 1925 | XXIII | The Legislative Members Exemption Act, 1925. | The whole. |
| 1925 | XXIV | The Sikh Gurdwaras (Supplementary) Act, 1925. | Section 3. |
| 1925 | XXVII | The Opium (Amendment) Act, 1925 .. | So much as has not been repealed. |
| 1925 | XXVIII | The Provident Funds (Amendment) Act, 1925 | The whole. |
| 1925 | XXIX | The Indian Penal Code (Amendment) Act, 1925. | The whole. |
| 1925 | XXX | The Indian Limitation (Amendment) Act, 1925. | The whole. |
| 1925 | XXXII | The Oudh Courts (Supplementary) Act, 1925. | The whole. |
| 1925 | XXXIII | The Criminal Tribes (Amendment) Act, 1925 | The whole. |
| 1925 | XXXIV | The Cotton Transport (Amendment) Act, 1925. | The whole. |
| 1925 | XXXVI | The Indian Ports (Amendment) Act, 1925 .. | So much as has not been repealed. |
| 1925 | XXXVII | The Repealing and Amending Act, 1925 .. | So much as has not been repealed. |
| 1925 | XXXVIII | The Transfer of Property (Amendment) Act 1925. | The whole. |
| 1926 | I | The Small Cause Courts (Attachment of Immoveable Property) Act, 1926. | The whole. |
| 1926 | II | The Code of Criminal Procedure (Amendment) Act, 1926. | So much as has not been repealed. |
| 1926 | IV | The Guardians and Wards (Amendment) Act 1926. | So much as has not been repealed. |
| 1926 | V | The Indian Lunacy (Amendment) Act, 1926. | The whole. |
| 1926 | VI | The Code of Civil Procedure (Amendment) Act, 1926. | The whole. |
| 1926 | IX | The Insolvency (Amendment) Act, 1926. | The whole. |
| 1926 | X | The Code of Criminal Procedure (Second Amendment) Act, 1926. | The whole. |
| 1926 | XIII | The Indian Registration (Amendment) Act, 1926. | The whole. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1926 | XIV | The Madras Civil Courts (Amendment) Act, 1926. | The whole. |
| 1926 | XV | The Legal Practitioners (Amendment) Act, 1926. | The whole. |
| 1926 | XVIII | The Madras Civil Courts (Second Amendment) Act, 1926. | The whole. |
| 1926 | XXII | The Code of Civil Procedure (Second Amendment) Act, 1926. | So much as has not been repealed. |
| 1926 | XXIV | The Indian Income-tax (Amendment) Act, 1926. | The whole. |
| 1926 | XXV | The Indian Divorce (Amendment) Act, 1926. | The whole. |
| 1926 | XXVII | The Transfer of Property (Amendment) Act, 1926. | The whole. |
| 1926 | XXVIII | The Usurious Loans (Amendment) Act, 1926. | The whole. |
| 1926 | XXIX | The Workmen's Compensation (Amendment) Act, 1926. | The whole. |
| 1926 | XXX | The Negotiable Instruments (Interest) Act, 1926. | So much as has not been repealed. |
| 1926 | XXXI | The Indian Evidence (Amendment) Act, 1926. | The whole. |
| 1926 | XXXII | The Administrator-General's (Amendment) Act, 1926. | The whole. |
| 1926 | XXXIII | The Indian Companies (Amendment) Act, 1926. | The whole. |
| 1926 | XXXV | The Cantonments (Amendment) Act, 1926 .. | The whole. |
| 1926 | XXXVI | The Code of Criminal Procedure (Third Amendment) Act, 1926. | The whole. |
| 1926 | XXXIX | The Provincial Insolvency (Amendment) Act, 1926. | So much as has not been repealed. |
| 1926 | XL | The Indian Succession (Second Amendment) Act, 1926. | The whole. |
| 1927 | I | The Indian Limitation (Amendment) Act, 1927. | The whole. |
| 1927 | II | The Indian Registration (Amendment) Act, 1927. | The whole. |
| 1927 | V | The Indian Finance Act, 1927 .. | So much as has not been repealed. |
| 1927 | VI | The Madras Salt (Amendment) Act, 1927 .. | The whole. |
| 1927 | VII | The Provident Funds (Amendment) Act, 1927 | The whole. |
| 1927 | VIII | The Sea Customs (Amendment) Act, 1927 .. | The whole. |
| 1927 | IX | The Indian Limitation (Second Amendment) Act, 1927. | The whole. |
| 1927 | X | The Repealing and Amending Act, 1927 .. | So much as has not been repealed. |
| 1927 | XI | The Insolvency (Amendment) Act, 1927 .. | The whole. |
| 1927 | XIII | The Indian Bar Councils (Amendment) Act, 1927. | The whole. |
| 1927 | XIV | The Indian Merchant Shipping (Amendment) Act, 1927. | The whole. |
| 1927 | XV | The Indian Divorce (Amendment) Act, 1927. | The whole. |
| 1927 | XVII | The Indian Lighthouse Act, 1927 .. | Section 22 and the Schedule. |
| 1927 | XVIII | The Indian Succession (Amendment) Act, 1927. | The whole. |
| 1927 | XIX | The Presidency-towns Insolvency (Amendment) Act, 1927. | The whole. |
| 1927 | XXI | The Indian Securities (Amendment) Act, 1927. | The whole. |
| 1927 | XXII | The Societies Registration (Amendment) Act, 1927. | The whole. |
| 1927 | XXV | The Criminal Law Amendment Act, 1927 .. | The whole. |
| 1927 | XXVI | The Cantonments (Amendment) Act, 1927 .. | The whole. |
| 1927 | XXVII | The Indian Emigration (Amendment) Act, 1927. | The whole. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1927 | XXVIII | The Indian Income-tax (Amendment) Act, 1927. | The whole. |
| 1927 | XXX | The Indian Divorce (Second Amendment) Act, 1927. | The whole. |
| 1928 | II | The Indian Securities (Amendment) Act, 1928. | The whole. |
| 1928 | III | The Indian Income-tax (Amendment) Act, 1928. | The whole. |
| 1928 | IV | The Inland Bonded Warehouses (Amendment) Act, 1928. | The whole. |
| 1928 | VI | The Indian Merchant Shipping (Amendment) Act, 1928. | The whole. |
| 1928 | IX | The Indian Territorial Force (Amendment) Act, 1928. | The whole. |
| 1928 | X | The Auxiliary Force (Amendment) Act, 1928. | The whole. |
| 1928 | XI | The Chittagong Port (Amendment) Act, 1928. | The whole. |
| 1928 | XIV | The Indian Succession (Amendment) Act, 1928. | The whole. |
| 1928 | XV | The Indian Trade Unions (Amendment) Act, 1928. | The whole. |
| 1928 | XVI | The Indian Income-tax (Amendment) Act, 1928. | The whole. |
| 1928 | XVIII | The Repealing and Amending Act, 1928 .. | So much as has not been repealed. |
| 1928 | XIX | The Madras Salt (Amendment) Act, 1928 .. | The whole. |
| 1929 | I | The Indian Limitation (Amendment) Act, 1929. | The whole. |
| 1929 | III | The Presidency-towns Insolvency (Amendment) Act, 1929. | The whole. |
| 1929 | IX | The Indian Boilers (Amendment) Act, 1929.. | The whole. |
| 1929 | XI | The Bengal Pilot Service (Centralisation of Administration) Act, 1929. | The whole. |
| 1929 | XII | The Indian Income-tax (Provident Funds Relief, Act, 1929. | The whole. |
| 1929 | XIII | The Indian Territorial Force (Amendment) Act, 1929. | The whole. |
| 1929 | XIV | The Indian Cotton Cess (Amendment) Act, 1929. | The whole. |
| 1929 | XV | The Indian Registration (Amendment) Act, 1929. | The whole. |
| 1929 | XVII | The Guardians and Wards (Amendment) Act, 1929. | The whole. |
| 1929 | XVIII | The Indian Succession (Amendment) Act, 1929. | The whole. |
| 1929 | XX | The Transfer of Property (Amendment) Act, 1929. | The whole. |
| 1929 | XXI | The Transfer of Property (Amendment) Supplementary Act, 1929. | Sections 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14., |
| 1930 | I | The Provident Funds (Amendment) Act, 1930 | The whole. |
| 1930 | II | The Dangerous Drugs Act, 1930 .. | Sections 40 and so much of Schedule II as has not been repealed. |
| 1930 | III | The Indian Sale of Goods Act, 1930 .. | Section 65. |
| 1930 | IV | The Indian Contract (Amendment) Act, 1930 | The whole. |
| 1930 | V | The Transfer of Property (Amendment) Act, 1930. | The whole. |
| 1930 | VI | The Prisons (Amendment) Act, 1930 .. | The whole. |
| 1930 | VII | The Indian Patents and Designs (Amendment) Act, 1930. | The whole. |
| 1930 | VIII | The Repealing and Amending Act, 1930 .. | So much as has not been repealed. |
| 1930 | IX | The Cantonments (House-Accommodation Amendment) Act, 1930. | The whole. |
| 1930 | X | The Insolvency Law (Amendment) Act, 1930 | The whole. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1930 | XIII | The Inland Steam-vessels (Amendment) Act, 1930. | The whole. |
| 1930 | XIV | The Indian Railways (Amendment) Act, 1930. | The whole. |
| 1930 | XVI | The Transfer of Property (Amendment) Supplementary Act, 1930. | The whole. |
| 1930 | XIX | The Indian Companies (Amendment) Act, 1930. | Section 2. |
| 1930 | XX | The Destructive Insects and Pests (Amendment) Act, 1930. | The whole. |
| 1930 | XXI | The Indian Income-tax (Amendment) Act, 1930. | The whole. |
| 1930 | XXII | The Indian Income tax (Second Amendment) Act, 1930. | The whole. |
| 1930 | XXIII | The Indian Income-tax (Third Amendment) Act, 1930. | The whole. |
| 1930 | XXIV | The Indian Lac Cess Act, 1930 .. | Section 11. |
| 1930 | XXV | The Negotiable Instruments (Amendment) Act, 1930. | The whole. |
| 1930 | XXVI | Th Indian Forest (Amendment) Act, 1930 .. | The whole. |
| 1930 | XXVII | The Indian Telegraph (Amendment) Act, 1930. | The whole. |
| 1930 | XXVIII | The Bombay Civil Courts (Amendment) Act, 1930. | The whole. |
| 1930 | XXIX | The Benares Hindu University (Amendment) Act, 1930. | The whole. |
| 1931 | IV | The Indian Income-tax (Amendment) Act, 1931. | The whole. |
| 1931 | V | The Indian Territorial Force (Amendment) Act, 1931. | The whole. |
| 1931 | VI | The Auxiliary Force (Amendment) Act, 1931. | The whole. |
| 1931 | VII | The Cantonments (Amendment) Act, 1931 .. | The whole. |
| 1931 | VIII | The Indian Naval Armament (Amendment) Act, 1931. | The whole. |
| 1931 | IX | The Indian Merchant Shipping (Amendment) Act, 1931. | The whole. |
| 1931 | X | The Vizagapatam Port Act, 1931 .. | The whole. |
| 1931 | XI | The Indian Ports (Amendment) Act, 1931 .. | The whole. |
| 1931 | XII | The Indian Reserve Forces (Amendment) Act, 1931. | The whole. |
| 1931 | XVI | The Provisional Collection of Taxes Act, 1931. | Section 6. |
| 1931 | XVII | The Indian Succession (Amendment) Act, 1931. | The whole. |
| 1931 | XVIII | The Aligarh Muslim University (Amendment) Act, 1931. | The whole. |
| 1931 | XIX | The Land Customs (Amendment) Act, 1931.. | The whole. |
| 1932 | I | The Indian Companies (Supplementary Amendment) Act, 1932. | The whole. |
| 1932 | VII | The Salt Additional Import Duty (Extending) Act, 1932. | The whole. |
| 1932 | VIII | The Bengal Criminal Law Amendment (Supplementary) Act, 1932. | Section 5. |
| 1932 | IX | The Indian Partnership Act, 1932 .. | Section 73 and Schedule II. |
| 1932 | X | The Code of Civil Procedure (Amendment) Act, 1932. | The whole. |
| 1932 | XIII | The Sugar Industry (Protection) Act, 1932.. | Section 2 and the Schedule. |
| 1932 | XIV | The Indian Air Force Act, 1932 .. | Section 130 and the Schedule. |
| 1932 | XVI | The Indian Emigration (Amendment) Act, 1932. | The whole. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1932 | XVII | The Cantonments (Amendment) Act, 1932 .. | The whole. |
| 1932 | XVIII | The Ancient Monuments Preservation (Amendment) Act, 1932. | The whole. |
| 1932 | XIX | The Trade Disputes (Amendment) Act, 1932 | The whole. |
| 1932 | XX | The Port Haj Committees Act, 1932 .. | Section 24. |
| 1932 | XXI | The Code of Criminal Procedure (Amendment) Act, 1932. | The whole. |
| 1932 | XXIII | The Criminal Law Amendment Act, 1932 .. | Sections 11, 12, 13, 14 and 16. |
| 1933 | III | The Indian Forest (Amendment) Act, 1933.. | The whole. |
| 1933 | X | The Auxiliary Force (Amendment) Act, 1933. | The whole. |
| 1933 | XI | The Indian Merchant Shipping (Amendment) Act, 1933. | The whole. |
| 1933 | XII | The Indian Income-tax (Amendment) Act, 1933. | The whole. |
| 1933 | XV | The Workmen's Compensation (Amendment) Act, 1933. | The whole. |
| 1933 | XVI | The Land Acquisition (Amendment) Act, 1933. | The whole. |
| 1933 | XVIII | The Indian Income-tax (Second Amendment) Act, 1933. | The whole. |
| 1933 | XIX | The Indian Railways (Amendment) Act, 1933. | The whole. |
| 1933 | XXI | The Indian Arbitration (Amendment) Act, 1933. | The whole. |
| 1933 | XXII | The Cantonments (House-Accommodation Amendment) Act, 1933. | The whole. |
| 1933 | XXV | The Indian Merchant Shipping (Second Amendment) Act, 1933. | The whole. |
| 1933 | XXVI | The Dangerous Drugs (Amendment) Act 1933. | The whole. |
| 1933 | XXVIII | The Indian Tariff (Second Amendment) Act, 1933. | So much as has not been repealed. |
| 1934 | III | The Imperial Bank of India (Amendment) Act, 1934. | The whole. |
| 1934 | V | The Indian Medical Council (Amendment) Act, 1934. | The whole. |
| 1934 | XVII | The Negotiable Instruments (Amendment) Act, 1934. | The whole. |
| 1934 | XVIII | The Indian Trusts (Amendment) Act, 1934 .. | The whole. |
| 1934 | XXI | The Sea Customs (Amendment) Act, 1934... | The whole. |
| 1934 | XXII | The Indian Aircraft Act, 1934 .. | Section 20. |
| 1934 | XXIV | The Repealing and Amending Act, 1934 .. | So much as has not been repealed. |
| 1934 | XXIX | The Indian Income-tax (Amendment) Act, 1934. | The whole. |
| 1934 | XXX | The Petroleum Act, 1934 .. | Section 32 and the Schedule. |
| 1934 | XXXIII | The Indian Army (Amendment) Act, 1934 .. | The whole. |
| 1934 | XXXIV | The Indian Navy (Discipline) Act, 1934 .. | Section 4 and the Second Schedule. |
| 1934 | XXXV | The Amending Act, 1934 .. | The whole. |
| 1935 | I | The Indian Naturalization (Amendment) Act, 1935. | The whole. |
| 1935 | III | The Indian Tea Cess (Amendment) Act, 1935. | The whole. |
| 1935 | VI | The Aligarh Muslim University (Amendment) Act, 1935. | The whole. |
| 1935 | VII | The Indian Army (Amendment) Act, 1935 .. | The whole. |
| 1935 | VIII | The Central Provinces Courts (Supplementary) Act, 1935. | The whole. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1935 | IX | The Provincial Small Cause Courts (Amendment) Act, 1935. | The whole. |
| 1935 | X | The Provincial Insolvency (Amendment) Act, 1935. | The whole. |
| 1935 | XI | The Factories (Amendment) Act, 1935. | The whole. |
| | | PART II.—REGULATIONS. | |
| 1876 | III | The Andaman and Nicobar Islands Regulation, 1876. | Section 2. |
| 1880 | II | The Assam Frontier Tracts Regulation, 1880. | So much as has not been repealed. |
| 1883 | 1 | The Sylhet and Cachar Rural Police Regulation, 1883. | So much as has not been repealed. |
| 1884 | I | The Andaman and Nicobar Islands Regulation, 1884. | The whole. |
| 1884 | III | The Assam Frontier Tracts Regulation, 1884. | The whole. |
| 1886 | II | The Sonthal Parganas Rent Regulation, 1886. | Sections 4 and 28. |
| 1887 | XIII | The Hazara Tenancy Regulation, 1887 .. | Section 2. |
| 1888 | I | The Ajmer Government Wards Regulation, 1888. | Section 2. |
| 1889 | II | The Assam Land and Revenue Regulation, 1889. | The whole. |
| 1891 | VII | The Assam Forest Regulation, 1891 .. | Section 2. |
| 1892 | III | The Sindh Frontier Regulation, 1892 .. | Section 2 (2). |
| 1893 | V | The Sonthal Parganas Justice Regulation, 1893. | Section 24. |
| 1893 | IX | The Ajmere Amending Regulation, 1893 .. | So much as has not been repealed. |
| 1896 | VIII | The British Baluchistan Criminal Justice Regulation, 1896. | Section 2. |
| 1896 | IX | The British Baluchistan Civil Justice Regulation, 1896. | Section 2 and the Schedule |
| 1898 | II | The Assam Frontier Tracts Regulation (1880) Amendment Regulation, 1898. | The whole. |
| 1899 | I | The Coorg Land and Revenue Regulation, 1899. | Section 2 and the First Schedule. |
| 1899 | III | The Sonthal Parganas Justice and Laws Regulation, 1899. | So much as has not been repealed. |
| 1901 | I | The Coorg Courts Regulation, 1901 .. | Section 20 and the Schedule. |
| 1901 | III | The Frontier Crimes Regulation, 1901 .. | Section 64. |
| 1904 | I | A Regulation to provide for certain modifications in the Punjab Alienation of Land Act, 1900, in its application to the North-West Frontier Province. | The whole. |
| 1904 | III | The Hazara Tenancy (Amendment) Regulation, 1904. | The whole. |
| 1904 | V | The North-West Frontier Province Court of Wards Regulation, 1904. | Section 3. |
| 1905 | II | The Assam Land and Revenue (Amendment) Regulation, 1905. | The whole. |
| 1905 | IV | The Coorg Courts (Amendment) Regulation, 1905. | The whole. |
| 1906 | I | The North-West Frontier Province Law and Justice (Amendment) Regulation, 1906. | The whole. |
| 1907 | II | The Coorg Municipal Regulation, 1907 .. | Section 167. |
| 1907 | III | The Sonthal Parganas Rent (Amendment) Regulation, 1907. | The whole. |
| 1907 | IV | The Coorg Land and Revenue (Amendment) Regulation, 1907. | The whole. |
| 1907 | V | The Ajmere Land and Revenue (Amendment) Regulation, 1907. | The whole. |

| Year. 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1908 | I | The Coorg Land and Revenue (Amendment) Regulation, 1908. | The whole. |
| 1908 | III | The Sonthal Parganas Settlement (Amendment) Regulation, 1908. | Sections 2, 4, 5, 8, 9 and 10. |
| 1908 | IV | The Andaman and Nicobar Islands Regulation, 1908. | The whole. |
| 1911 | I | The North-West Frontier Gazette Regulation, 1911. | The whole. |
| 1911 | IV | The Coorg Land and Revenue (Amendment) Regulation, 1911. | So much as has not been repealed. |
| 1911 | V | The Coorg District Fund (Amendment) Regulation, 1911. | The whole. |
| 1912 | II | The North-West Frontier Province Law and Justice (Amendment) Regulation, 1912. | So much as has not been repealed. |
| 1912 | III | The Assam Forest (Amendment) Regulation, 1912. | The whole. |
| 1912 | IV | The Sonthal Parganas Justice (Amendment) Regulation, 1912. | The whole. |
| 1912 | V | The British Baluchistan Forest (Amendment) Regulation, 1912. | The whole. |
| 1913 | I | The Coorg District Fund (Amendment) Regulation, 1913. | The whole. |
| 1914 | II | The Ajmer Repealing and Amending Regulation, 1914. | So much as has not been repealed. |
| 1915 | II | The Andaman and Nicobar Islands (Amendment) Regulation, 1915. | The whole. |
| 1919 | I | The North-West Frontier Province Law and Justice (Amendment) Regulation, 1919. | Section 2. |
| 1919 | II | The British Baluchistan Criminal and Civil Justice (Amendment) Regulation, 1919. | Sections 2 and 3. |
| 1919 | III | The Hazara Upper Tanawal (Amendment) Regulation, 1919. | The whole. |
| 1919 | IV | The Hazara Forest (Amendment) Regulation, 1919. | The whole. |
| 1920 | II | The British Baluchistan Civil Justice (Amendment) Regulation, 1920. | The whole. |
| 1920 | IV | The Chittagong Hill Tracts (Amendment) Regulation, 1920. | The whole. |
| 1921 | III | The British Baluchistan Bazars (Amendment) Regulation, 1921. | The whole. |
| 1921 | IV | The Ajmere Land and Revenue (Amendment) Regulation, 1921. | The whole. |
| 1922 | I | The Assam Forest (Amendment) Regulation, 1922. | The whole. |
| 1923 | II | The Coorg Courts (Amendment) Regulation, 1923. | The whole. |
| 1925 | IV | The Chittagong Hill Tracts (Amendment) Regulation, 1925. | The whole. |
| 1925 | V | The Bengal Eastern Frontier (Amendment) Regulation, 1925. | The whole. |
| 1925 | VI | The Ajmere-Merwara Municipalities Regulasion, 1925. | Section 2 and the First Schedule. |
| 1925 | VII | The Sonthal Parganas Settlement (Amendment) Regulation, 1925. | The whole. |
| 1926 | I | The Laccadive Islands and Minicoy (Amendment) Regulation, 1926. | So much as has not been repealed. |
| 1926 | III | The Andaman and Nicobar Islands (Land-tenure) Regulation, 1926. | Section 27. |
| 1926 | IV | The North-West Frontier Province Law and Justice (Amendment) Regulation, 1926. | So much as has not been repealed. |
| 1926 | V | The Ajmere Rural Boards (Amendment) Regulation, 1926, | The whole. |
| 1926 | VII | The Frontier Crimes (Amendment) Regulation 1926. | The whole. |

| Year 1 | No. 2 | Short title. 3 | Extent of repeal. 4 |
|---|---|---|---|
| 1926 | VIII | The British Baluchistan Bazars (Amendment) Regulation, 1926. | The whole. |
| 1927 | II | The Andaman and Nicobar Islands (Amendment) Regulation, 1927. | The whole. |
| 1927 | III | The Punjab Frontier Crossing (Amendment) Regulation, 1927. | The whole. |
| 1928 | I | The Sonthal Parganas Settlement (Amendment) Regulation, 1928. | The whole. |
| 1928 | V | The Frontier Crimes (Amendment) Regulation, 1928. | The whole. |
| 1930 | I | The Andaman and Nicobar Islands (Amendment) Regulation, 1930. | The whole. |
| 1930 | III | The Andaman and Nicobar Islands (Second Amendment) Regulation, 1930. | The whole. |
| 1930 | VI | The Panth Piploda Laws (Amendment) Regulation, 1930. | The whole. |
| 1930 | VII | Tha Coorg Courts (Amendment) Regulation, 1930. | The whole. |
| 1931 | I | The North-West Frontier Province Courts Regulation, 1931. | Sections 38 and 39. |
| 1931 | VII | The Panth Piploda Laws (Amendment) Regulation, 1931. | The whole. |
| 1932 | I | The Ajmer Courts (Amendment) Regulation, 1932. | The whole. |
| 1932 | III | The Ajmer Rural Boards (Amendment) Regulation, 1932. | The whole. |
| 1933 | IV | The Sonthal Parganas Justice (Amendment) Regulation, 1933. | The whole. |
| 1934 | I | The Sonthal Parganas Settlement (Amendment) Regulation, 1934. | The whole. |
| 1935 | IV | The Ajmer-Merwara Municipalities (Amendmend) Regulation, 1935. | The whole |

## THE INDIAN COMPANIES (AMENDMENT) ACT, 1938.

### ACT No. II OF 1938.

[*26th February, 1938.*

*An Act further to amend the Indian Companies Act, 1913, for certain purposes.*

WHEREAS it is expedient further to amend the Indian Companies Act, 1913, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN COMPANIES (AMENDMENT) ACT, 1938.

Amendment of section 17, Act VII of 1913.

2. In the first proviso to sub-section (2) of section 17 of the Indian Companies Act, 1913 (hereinafter referred to as the said Act), for the word and figure "regulation 78" the words and figures "regulations 78, 79, 80, 81 and 82" shall be substituted.

Amendment of section 34, Act VII of 1913.

3. In sub-section (1) of section 34 of the said Act, for the word, brackets and figure "sub-section (4)" the word, brackets and figure "sub-section (7)" shall be substituted.

Amendment of section 861, Act VII of 1913.

4. In clause (*a*) of sub-section (1) of section 861 of the said Act, for the figure "84" the figure "85" shall be substituted.

Amendment of section 86-D, Act VII of 1913.

5. In sub-section (1) of section 86-D of the said Act, for the words "or to a private company of which such director is a director" the words "or to a private company of which such director is a member of director" shall be substituted.

Amendment of section 87-D, Act VII of 1913.

6. In sub-section (1) of section 87-D of the said Act, for the words "or to any director of the private company" the words "or to any member or director of the private company" shall be substituted.

Amendment of section 102, Act VII of 1913.

7. In sub-sections (1) and (2) of section 102 of the said Act, for the word and figure "section 101" the words and figures "section 98 or section 101" shall be substituted.

Amendment of section 130, Act VII of 1913.

8. In section 130 of the said Act, sub-section (3) shall be re-numbered as sub-section (4) and the following shall be inserted as sub-section (3), namely:—

"(3) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (1) and sub-section (2) if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarised returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (2)."

Amendment of section 134, Act VII of 1913.

9. In section 134 of the said Act,—

(*a*) in sub-section (1),—

(*i*) after the words "profit and loss account" the words "or the income and expenditure account as the case may be" shall be inserted; and

(*ii*) for the words "a copy of the balance-sheet" the words "three copies thereof" shall be substituted;

(*b*) in sub-section (2), for the word "copy" the word "copies" shall be substituted.

Amendment of section 153-A, Act VII of 1913.

10. In sub-section (5) of section 153-A of the said Act, for the word, brackets and figure "sub-section (4)" the word, brackets and figure "sub-section (6)" shall be substituted.

Amendment of section 237, Act VII of 1913.

11. In section 237 of the said Act,—

(*a*) in sub-section (6), the words beginning with "and it shall be the duty of" and ending "which he is reasonably able to give", and the words beginning with "For the purposes of this sub-section" and ending "whether that person is or is not an officer of the company" shall be omitted;

(*b*) after sub-section (6) the following sub-section shall be inserted, namely:—

"(7) Notwithstanding anything contained in the Indian Evidence Act, 1872, when any proceedings are instituted under this section it shall be the duty of the liquidator and of every officer and agent of the company past and present (other than the defendant in the proceedings) to give all assistance in connection with the prosecution which he is reasonably able to give, and for the purposes of this sub-section the expression agent in relation to a company shall be deemed to include any banker or legal adviser of the company and any

person employed by the company as auditor, whether that person is or is not an officer of the company"; and

(*c*) existing sub-section (7) shall be re-numbered as sub-section (8), and in that sub-section as so re-numbered, for the word, brackets and figure "sub-section (6)" the word, brackets and "sub-section (7)" shall be substituted.

Amendment of section 277, Act VII of 1913.

12. In section 277 of the said Act,—

(*a*) in sub-section (1),—

(*i*) after clause (*d*) the following clause shall be inserted, namely:—

"(*e*) the full address of that office of the company in British India which is to be deemed the principal place of business in British India of the company;" and

(*ii*) for the words "or in such address" the words "or in any such address" shall be substituted;

(*b*) in sub-section (3),—

(*i*) in sub-clause (*i*), for the words "a copy of that balance-sheet" the words "three copies of that balance-sheet" shall be substituted, and after the words "such supplementary statements" the words "in triplicate" shall be inserted;

(*ii*) in sub-clause (*ii*), after the words "such a statement" the words "in triplicate" shall be inserted.

Amendment of section 227-D, Act VII of 1913.

13. Section 277-D of the said Act shall be re-numbered as sub-section (1) of that section and to the sub-section so re-numbered the following shall be added, namely:—

"Provided that references in the said sections to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company:

Provided further that, where a charge is created outside British India or the completion of the acquisition of property takes place outside British India, sub-clause (*i*) of the proviso to sub-section (1) of section 109 and the proviso to sub-section (1) of section 109-A shall apply as if the property wherever situated were situated outside British India.

(2) This section shall be deemed not to have come into force until the commencement of the Indian Companies (Amendment) Act, 1938:

Provided that where the provisions of section 109 and sections 117 to 120 have not been complied with in respect of any charge or mortgage created since the 15th day of January, 1937, as required by this Act, those provisions shall be complied with within four weeks from the commencement of the Indian Companies (Amendment) Act, 1938."

Amendment of section 227-E, Act VII of 1913.

14. To section 277-E of the said Act the following shall be added, namely:—

"Provided that references in the said section to the registrar shall be deemed to be references to the registrar of the province in which the principal place of business in British India of such company is situated, and references to the registered office of the company shall be deemed to be references to the principal place of business in British India of the company."

Amendment of section 277-F, Act VII of 1913.

15. In clause (2) of section 277-F of the said Act, after the words "managing agent" the words "of a company not being a banking company" shall be inserted.

Amendment of section 277-L, Act VII of 1913.

16. In sub-section (1) of section 277-L of the said Act, before the words "a statement" the words "three copies of" shall be inserted.

Amendment of section 277-M, Act VII of 1913.

17. (1) Section 277-M of the said Act shall be re-numbered as sub-section (1) of that section and, in the said section so re-numbered, for the words "A banking company shall not form or hold shares in any subsidiary company except a subsidiary company of its own" the words "A banking company shall not form any subsidiary company except a subsidiary company" shall be substituted.

(2) To the said section as so re-numbered the following sub-section shall be added, namely:—

"(2) Save as provided in sub-section (1), a banking company shall not hold shares in any company whether as pledgee, mortgagee or absolute owner of an amount exceeding forty per cent. of the issued share capital of that company:

Provided that nothing in this sub-section shall apply to shares held by a banking company before the commencement of the Indian Companies (Amendment) Act, 1936".

Substitution of new section for section 284, Act VII of 1913.

18. For section 284 of the said Act the following section shall be substituted, namely:—

Saving of pending proceedings for winding up.

"284. The provisions with respect to winding up contained in this Act as amended by the Indian Companies (Amendment) Act, 1936, shall not apply to any company of which the winding up has commenced before the commencement of the Indian Companies (Amendment) Act, 1936, but every such company shall be wound up in the same manner and with the same incidents as if the Indian Companies (Amendment) Act, 1936, had not been passed."

Amendment of First Schedule, Act VII of 1913.

19. In the First Schedule to the said Act, in Table A,—

(*a*) in regulation 56, for the words "by at least three members" the following shall be substituted, namely:—

"in accordance with the provisions of clause (*c*) of sub-section (1) of section 79 of the Indian Companies Act, 1913";

(*b*) in clause (*a*) of regulation 77, for the figure "84" the figure "85" shall be substituted;

(*c*) in regulation 106, after the words "such profit and loss accounts" the words "income and expenditure accounts" shall be inserted;

(*d*) in regulation 109, for the word "seven" the word "fourteen" shall be substituted; and

(*e*) in regulation 116, the words "No other persons shall be entitled to receive notices of general meetings" shall be omitted.

Amendment of Second Schedule, Act VII of 1913.

20. In the Second Schedule to the said Act, in the last entry of the left hand column of Form I, for the word "amounts" the word "accounts" shall be substituted.

Amendment of Third Schedule, Act VII of 1913.

21. In the Third Schedule to the said Act, for the entry "BOOK DEBITS" in the right hand column of Form F the entry "BOOK DEBTS" shall be substituted.

## PART II.

### PROVISIONS APPLICABLE TO INSURERS.

Registration.

3. (1) No insurer shall, after the commencement of this Act, begin to carry on any class of insurance business in British India, and no insurer carrying on any class of insurance business in British India shall, after the expiry of three months from the commencement of this Act, continue to carry on any such business, unless he has obtained from the Superintendent of Insurance a certificate of registration.

(2) Every application for registration shall be accompanied by—

(*a*) a certified copy of the memorandum and articles of association, where the applicant is a company and incorporated under the Indian Companies Act, 1913, or, in the case of any other insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, a certified copy of the deed of partnership or of the deed of constitution of the company, as the case may be, or, in the case of an insurer having his principal place of business or domicile outside British India, the document specified in clause (*a*) of section 63;

(*b*) the name, address and the occupation, if any, of the directors where the insurer is a company incorporated under the Indian Companies Act, 1913, and in the case of an insurer specified in sub-clause (*a*) (*ii*) of clause (9) of section 2 the names and addresses of the proprietors and of the manager in British India, and in any other case the full address of the principal office of the insurer in British India, and the names of the directors and the manager at such office and the name and address of some one or more persons resident in British India authorised to accept any notice required to be served on the insurer;

(*c*) a statement of the class or classes of insurance business done or to be done, and a statement that the amount required to be deposited by section 7 or section 98 before application for registration is made has been deposited together with a certificate from the Reserve Bank of India showing the amount deposited;

(*d*) where the provisions of section 6 or section 97 apply, a declaration verified by an affidavit made by the principal officer of the insurer authorised in that behalf that the provisions of those sections as to working capital have been complied with;

(*e*) in the case of an insurer having his principal place of business or domicile outside British India, a statement verified by an affidavit made by the principal officer of the insurer setting forth the requirements (if any) not applicable to nationals of the country in which such insurer is constituted, incorporated or domiciled which are imposed by the laws or practice of that country upon Indian nationals as a condition of carrying on insurance business in that country;

(*f*) a certified copy of the published prospectus, if any, and of the standard policy forms to the insurer and statements of the assured rates, advantages, terms and conditions to be offered in connection with insurance policies together with a certificate in connection with life insurance business by an actuary that such rates, advantages, terms and conditions are workable and sound:

Provided that in the case of marine, accident and miscellaneous insurance business other than workmen's compensation and motor car insurance the above requirements regarding prospectus, forms and statements shall be complied with only in so far as the prospectus, forms and statements may be available; and

(*g*) the prescribed fee for registration being not more than one hundred rupees for each class of business.

(3) In the case of any insurer having his principal place of business or domicile outside British India, the Superintendent of Insurance shall withhold

registration or shall cancel a registration already made, if he is satisfied that in the country in which such insurer has his principal place of business or domicile Indian nationals are debarred by the law or practice of the country relating to, or applied to, insurance from carrying on the business of insurance, or that any requirement imposed on such insurer under the provisions of section 62 is not satisfied.

(4) In the case of any insurer the Superintendent of Insurance shall cancel a registration already made if the insurer fails to comply with the provisions of section 7 or section 98 as to deposits.

(5) When the Superintendent of Insurance withholds or cancels any registration under sub-section (3) or sub-section (4) he shall give notice in writing to the insurer of his decision, and the decision shall take effect on such date as he may specify in that behalf in the notice, such date not being less than one month nor more than two months from the date of the receipt of the notice in the ordinary course of transmission.

(6) The Superintendent of Insurance shall, on being satisfied that the applicant has fulfilled all the requirements of the Act applicable to him, grant the insurer a certificate of registration.

Minimum limit for annuities and other benefits secured by policies of life insurance.

4. (1) No insurer, not being a provident society to which Part III, or a Co-operative Life Insurance Society or a Mutual Insurance Company to which Part IV, of this Act applies, shall pay or undertake to pay on any policy of life insurance issued after the commencement of this Act an annuity of fifty rupees or less or a gross sum of rupees five hundred or less exclusive of any profit or bonus provided that this shall not prevent an insurer from converting any policy into a paid up policy of any value or payment of surrender value of any amount.

(2) Nothing contained in this section shall apply to group policies, that is to say, policies in respect of a group of persons engaged in the same occupation or kindred occupations under a single employer, for an aggregate sum of not less than rupees five thousand, under which an insurer pays or undertakes to pay a gross sum of rupees five hundred or less on an individual life.

Restriction on name of insurer.

5. (1) An insurer shall not be registered by a name identical with that by which an insurer in existence is already registered, or so nearly resembling that name as to be calculated to deceive except when the insurer in existence is in the course of being dissolved and signifies his consent to the Superintendent of Insurance.

(2) If an insurer, through inadvertence or otherwise, is without such consent as aforesaid registered by a name identical with that by which an insurer already in existence whether previously registered or not is carrying on business or so nearly resembling it as to be calculated to deceive, the first-mentioned insurer shall, if called upon to do so by the Superintendent of Insurance on the application of the second-mentioned insurer, change his name within a time to be fixed by the Superintendent of Insurance:

Provided that nothing in this section shall apply to any insurer carrying on business before the 27th day of January, 1937, under the Indian Life Assurance Companies Act, 1912.

(3) No insurer other than a provident society to which Part III applies, who begins to carry on insurance business after the commencement of this Act, shall adopt as its name and no such insurer carrying on business before the commencement of this Act shall continue after the expiry of six months from the commencement thereof to use as its name any combination of words which includes the word "provident".

Requirements as to capital.

6. No insurer incorporated after, or who commenced carrying on the business of life insurance in British India, whether solely or in common with any other business, after the 26th day of January, 1937, shall be registered unless he has as working capital a net sum of not less than fifty thousand rupees exclusive of the deposit to be made before registration under sub-section (5) of section 7 of this Act, and exclusive in the case of a company of any sums payable as preliminary expenses in the formation of the company.

Deposits.

7. (1) Every insurer not being an insurer specified in sub-clause (*c*) of clause (9) of section 2 shall, in respect of the insurance business carried on by him in British India, deposit and keep deposited with the Reserve Bank of India in one of the offices in India of the Bank for and on behalf of the Central Government cash or approved securities, estimated at the market value of the securities on the day of deposit, of the amount hereafter specified, namely:—

(*a*) where the business done or to be done is life insurance only, two hundred thousand rupees;

(*b*) where the business done or to be done is fire insurance only, one hundred and fifty thousand rupees;

(*c*) where the business done or to be done is marine insurance only, one hundred and fifty thousand rupees;

(*d*) where the business done or to be done is accident and miscellaneous insurance including workmen's compensation, and motor car insurance, one hundred and fifty thousand rupees;

(*e*) where the business done or to be done includes life insurance and any one of the three classes specified in clauses (*b*), (*c*) and (*d*), three hundred thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business;

(*f*) where the business done or to be done includes life insurance and any two of the three classes specified in clauses (*b*), (*c*) and (*d*), four hundred thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business;

(*g*) where the business done or to be done includes life insurance and all three classes specified in clauses (*b*), (*c*) and (*d*), four hundred and fifty thousand rupees of which two hundred thousand rupees shall be the deposit for life insurance business;

(*h*) where the business done or to be done does not include life insurance but includes any two of the classes specified in clauses (*b*), (*c*) and (*d*), two hundred and fifty thousand rupees;

(*i*) where the business done or to be done does not include life insurance but includes all three classes specified in clauses (*b*), (*c*) and (*d*), three hundred and fifty thousand rupees; and

(*j*) where the business done or to be done is marine insurance relating to country craft or its cargo, ten thousand rupees only.

(2) Where the insurer is an insurer specified in sub-clause (*c*) of clause (9) of section 2, he shall be deemed to have complied with the provisions of this section as to deposits, if in respect of any class of insurance business transacted by him in British India under a standing contract of the nature referred to in sub-clause (*c*) of clause (9) of section 2 a deposit of an amount one-and-a-half times that specified in sub-section (1) as the deposit for that class of insurance business has been made in the Reserve Bank of India in one of the offices in India of the Bank for and on behalf of the Central Government in cash or approved securities estimated at the market value of the securities on the day of deposit by or on behalf of the underwriters who are members of the Society of Lloyd's with whom he has his standing contract.

(3) Where the deposit is to be made by an insurer incorporated before, or carrying on the business of insurance in British India before, the 27th day of January, 1937, the deposit referred to in sub-section (1) may be made in not more than seven instalments, of which the first shall be not less than one-fourth of the total amount of the deposit and shall be paid before the application for registration is made, the second shall be not less than one-sixth of the balance of the deposit and shall be paid before the 1st day of January, 1939, and the subsequent instalments shall be of not less than the minimum amount required as the second instalment and shall be paid before the 1st day of January of each succeeding year:

Provided that in the case of insurers carrying on life insurance business only, the deposit may be made in not more than ten instalments, of which the first shall be not less than one-fourth of the total amount of the deposit, and shall be paid before the application for registration is made, the second shall be not less than one-ninth of the balance of the deposit, and shall be paid before the 1st day of January, 1939, and the subsequent instalments shall be of not less than the minimum amount required as the second instalment, and shall be paid before the 1st day of January of each succeeding year.

(4) Notwithstanding anything contained in sub-section (3), in the case of an insurer not being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, and not being an insurer incorporated in or domiciled in the United Kingdom, the deposit referred to in sub-section (1) shall be made in two instalments of which the first shall be not less than one-half of the total amount of the deposit and shall be made before the application for registration is made, and the second shall be made before the expiry of one year from the date of registration.

(5) Where the deposit is to be made by an insurer neither incorporated before, nor carrying on insurance business in British India before, the 27th day of January, 1937, the deposit may be made in instalments of not less than one-fourth the total amount before the application for registration is made, not less than one-third the balance before the expiry of one year from the commencement of business in British India, and not less than one-half the residue before the expiry of two years from the commencement of business in British India, and the balance before the expiry of three years from the commencement of business in British India:

Provided that in the case of any insurer not being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, and not being an insurer incorporated in or domiciled in the United Kingdom, the deposit shall be made in full before the application for registration is made.

(6) No class of insurance business in addition to the class or classes in respect of which an insurer is already liable to make a deposit under sub-section (1) or sub-section (2) shall be undertaken by the insurer until the deposit to which he is already liable has been made in full, and the additional deposit required in respect of the additional class of business or so much thereof as under the provisions of sub-section (3), (4) or (5) is to be made before the application for registration, has also been made in full.

(7) Securities already deposited with the Controller of Currency in compliance with the Indian Life Assurance Companies Act, 1912, shall be transferred by him to the Reserve Bank of India and shall, to the extent of their market value on the day of the first deposit made in compliance with this Act, be deemed to be deposited under this Act in respect of the life insurance business of the insurer.

(8) A deposit made in cash shall be held by the Reserve Bank of India to the credit of the insurer and shall be returnable to the insurer in cash in any case in which under the provisions of this Act a deposit is to be returned; and any interest accruing due and collected on securities deposited under sub-

tion (1) or sub-section (2) shall be paid to the insurer, subject only to deduction of the normal commission chargeable for the realization of interest.

(9) The insurer may at any time substituted for securities lodged with the Bank under this section other approved securities of equal value at the market rate prevailing at the time of substitution, and the Reserve Bank of India shall, if so requested by a depositor, invest in approved securities the whole or any part of a deposit made originally in cash or the whole or any part of cash received by the Bank on sale of or on the maturing of securities lodged by the depositor.

(10) If any part of a deposit made under this section is used in the discharge of any liability of the insurer, the insurer shall deposit such additional sum in cash or approved securities as will make up the amount so used. The insurer shall be deemed to have failed to comply with the requirements of sub-section (1), unless the deficiency is supplied within a period of two months from the date when the deposit or any part thereof is so used for discharge of liabilities.

Reservation of deposits.

8. (1) Any deposit made under section 7 shall be deemed to be part of the assets of the insurer but shall not be susceptible of any assignment or charge; nor shall it be available for the discharge of any liability of the insurer other than liabilities arising out of policies of insurance issued by the insurer so long as any such liabilities remain undischarged; nor shall it be liable to attachment in execution of any decree except a decree obtained by a policy-holder of the insurer in respect of a debt due upon a policy which debt the policy-holder has failed to realise in any other way.

(2) Where a deposit is made in respect of life insurance business the deposit made in respect thereof shall not be available for the discharge of any liability of the insurer other than liabilities arising out of policies of life insurance issued by the insurer.

Refund of deposits.

9. Where an insurer has ceased to carry on in British India any class of insurance business in respect of which a deposit has been made under section 7 and his liabilities in British India in respect of business of that class have been satisfied or are otherwise provided for, the Court may, on the application of the insurer, order the return to the insurer of so much of the deposit as does not relate to the classes of insurance, if any, which he continues to carry on.

Separation of accounts and funds.

10. (1) Where the insurer carries on business of more than one of the classes specified in clauses (*a*), (*b*), (*c*) and (*d*) of sub-section (1) of section 7, he shall keep a separate account of all receipts and payments in respect of each such class of insurance business.

(2) Where the insurer carries on the business of life insurance, the excess of receipts over payments in respect of such business shall be carried to and shall form a separate fund to be called the life insurance fund and the deposit made by the insurer in respect of life insurance business shall be deemed to be part of such fund.

(3) The life insurance fund shall be as absolutely the security of the life policy-holders as though it belonged to an insurer carrying on no other business than life insurance business and shall not be liable for any contracts of the insurer for which it would not have been liable had the business of the insurer been only that of life insurance and shall not be applied directly or indirectly save as provided in section 49 for any purposes other than those of life insurance.

Accounts and balance-sheet.

11. (1) Every insurer, in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2 in respect of all insurance business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall at the expiration of each calendar year prepare with reference to that year—

(*a*) in accordance with the regulations contained in Part I of the First Schedule, a balance-sheet in the form set forth in Part II of that Schedule;

(*b*) in accordance with the regulations contained in Part I of the Second Schedule, a profit and loss account in the forms set forth in Part II of that Schedule, except where the insurer carries on business of one class only of the classes specified in clauses (*a*), (*b*) and (*c*) of sub-section (1) of section 7 and no other business;

(*c*) in respect of each class of insurance business carried on by him in accordance with the regulations contained in Part I of the Third Schedule, a revenue account in the form or forms set forth in Part II of that Schedule applicable to that class of insurance business.

(2) Unless the insurer is a company to which the Indian Companies Act, 1913, applies, the accounts and statements referred to in sub-section (1) shall be signed by the insurer, or in the case of a company by the chairman, if any, and two directors and the principal officer of the company, or in the case of a firm by two partners of the firm, and shall be accompanied by a statement containing the names and descriptions of the persons in charge of the management of the business during the period to which such accounts and statements refer and by a report by such persons on the affairs of the business during that period.

(3) Where an insurer carrying on the business of insurance at the commencement of this Act has prepared the balance-sheet and accounts required by the Indian Life Assurance Companies Act, 1912, or has based his accounts upon the financial and not the calendar year, the provisions of this section shall, if the Central Government so directs in any case, apply until the 31st day of December, 1939, as if in sub-section (1) references to the calendar year were references to the financial year.

Audit.

12. The balance-sheet, profit and loss account, revenue account and profit and loss appropriation account of every insurer, in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2 in respect of all insurance business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall, unless they are subject to audit under the Indian Companies Act, 1913, be audited annually by an auditor, and the auditor shall in the audit of all such accounts have the powers of, exercise the functions vested in, and discharge the duties and be subject to the liabilities and penalties imposed on, auditors of companies by section 145 of the Indian Companies Act, 1913.

Actuarial report and abstract.

13. (1) Every insurer carrying on life insurance business shall, in respect of the life insurance business transacted by him in India, and also in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2 in respect of all life insurance business transacted by him, once at least in every five years cause an investigation to be made by an actuary into the financial condition of the life insurance business carried on by him, including a valuation of his liabilities in respect thereto and shall cause an abstract of the report of such actuary to be made in accordance with the regulations contained in Part I of the Fourth Schedule and in conformity with the requirements of Part II of that Schedule.

(2) The provisions of sub-section (1) regarding the making of an abstract shall apply whenever at any other time an investigation into the financial

condition of the insurer is made with a view to the distribution of profits or an investigation is made of which the results are made public.

(3) There shall be appended to every such abstract as is referred to in sub-section (1) or sub-section (2) a certificate signed by the principal officer of the insurer that full and accurate particulars of every policy under which there is a liability either actual or contingent have been furnished to the actuary for the purpose of the investigation.

(4) There shall be appended to every such abstract a statement, in conformity with the requirements of Part II of the Fifth Schedule and prepared in accordance with the regulations contained in Part I of that Schedule, of the life insurance business in force at the date to which the accounts of the insurer are made up for the purposes of such abstract:

Provided that, if the investigation referred to in sub-sections (1) and (2) is made annually by any insurer, the statement need not be appended every year but shall be appended at least once in every five years.

(5) Where an investigation into the financial condition of an insurer is made as at a date other than the expiration of the year of account, the accounts for the period since the expiration of the last year of account and the balance-sheet as at the date at which the investigation is made shall be prepared and audited in the manner provided by this Act.

Register of policies and register of claims.

14. Every insurer, in the case of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2 in respect of all business transacted by him, and in the case of any other insurer in respect of the insurance business transacted by him in India, shall maintain—

(*a*) a register or record of policies, in which shall be entered, in respect of every policy issued by the insurer, the name and address of the policy-holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the insurer has notice, and

(*b*) a register or record of claims, in which shall be entered every claim made together with the date of the claim, the name and address of the claimant and the date on which the claim was discharged, or, in the case of a claim which is rejected, the date of rejection and the grounds therefor.

Submission of returns.

15. (1) The audited accounts and statements referred to in section 11 and the abstract and statement referred to in section 13 shall be printed, and four copies thereof shall be furnished as returns to the Superintendent of Insurance within six months from the end of the period to which they refer. The Superintendent of Insurance may extend the time allowed for furnishing the abstract and statement referred to in section 13 by a period not exceeding three months:

Provided that the said period of six months shall in the case of insurers having their principal place of business or domicile outside India and in the case of insurers constituted, incorporated or domiciled in British India but also carrying on business outside India be extended by three months, and provided further that the Central Government may in any case extend the time allowed by this sub-section for the furnishing of such returns by a further period not exceeding three months.

(2) Of the four copies so furnished one shall be signed in the case of a company by the chairman and two directors and by the principal officer of the company and, if the company has a managing director or managing agent, by that director or managing agent, in the case of a firm, by two partners of the firm, and, in the case of an insurer being an individual, by the insurer himself.

(3) Where the insurer's principal place of business or domicile is outside British India, he shall forward to the Superintendent of Insurance, along with

the documents referred to in section 11, the balance-sheet, profit and loss account and revenue account and the valuation reports and valuation statements, if any, which the insurer is required to file with the public authority of the country in which the insurer is constituted, incorporated or domiciled, or, where such documents are not required to be filed, a certified statement showing the total assets and liabilities of the insurer at the close of the period covered by the said documents and his total income and expenditure during that period.

Returns by insurers established outside British India.

16. (1) Where, by the law of the country in which an insurer, not being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, is constituted, incorporated or domiciled, the insurer is required to prepare and to furnish to a public authority of that country documents of substantially the same nature as the documents required to be furnished as returns in accordance with the provisions of section 15, the provisions of sub-section (2) of this section shall apply to such insurer in lieu of the provisions of sections 11, 12, 13 and 15.

(2) The insurer shall, within the time specified in sub-section (1) of section 15, furnish to the Superintendent of Insurance four certified copies in the English language of every balance-sheet, account, abstract, report and statement supplied to the public authority referred to in sub-section (1) of this section, and, in addition thereto, four copies in the English language of each of the following statements, namely:—

(*a*) a statement showing the assets held by the insurer in India,

(*b*) for each class of insurance business carried on by him, a revenue account in the form or forms set forth in Part II of the Third Schedule applicable to that class of business, showing separately with respect to business transacted by the insurer in India the details required to be supplied in a revenue account furnished under this clause of this sub-section.

(*c*) an abstract of the valuation report in respect of all life insurance business transacted by the insurer in India, prepared in the manner required by sub-section (1) of section 13, and

(*d*) a declaration in the prescribed form stating that all amounts received by the insurer directly or indirectly whether from his head office or from any other source outside India have been shown in the revenue account except such sums as properly appertain to the capital account.

Exemption from certain provisions of the Indian Companies Act, 1913.

17. Where an insurer, being a company incorporated under the Indian Companies Act, 1913, in any year furnishes his accounts and balance-sheet in accordance with the provisions of section 15, he may at the same time send to the Registrar of Companies a copy of such accounts and balance-sheet; and where such copy is so sent it shall not be necessary for the company to file a balance-sheet with the Registrar as required by sub-section (1) of section 134 of that Act and the copy of the accounts and balance-sheet so sent shall be dealt with in all respects as if they were filed in accordance with that section.

Furnishing reports.

18. Every insurer shall furnish to the Superintendent of Insurance a certified copy of every report on the affairs of the concern which is submitted to the members or policy-holders of the insurer immediately after its submission to the members or policy-holders, as the case may be.

Abstract of proceedings of general meetings.

19. Every insurer, being a company or body incorporated under any law for the time being in force in British India, shall furnish to the Superintendent of Insurance an abstract of the proceedings of every general meeting within thirty days from the holding of the meeting to which it relates.

Custody and inspection of documents and supply of copies.

20. (1) Every return furnished to the Superintendent of Insurance or a certified copy thereof shall be kept by the Superintendent and shall be open to inspection; and any person may procure a copy of any such return, or of any part thereof, on payment of a fee of six annas for every hundred words or fractional part thereof required to be copied, any five figures being deemed equivalent to one word.

(2) A printed or certified copy of the accounts, statements and abstract furnished in accordance with the provisions of section 15 or section 16 shall, on the application of any shareholder or policy-holder made at any time within two years from the date on which the document was so furnished, be supplied to him by the insurer within fourteen days when the insurer is constituted, incorporated or domiciled in British India and in any other case within one month of such application.

(3) A copy of the memorandum and articles of association of the insurer if a company shall on the application of any policy-holder be supplied to him by the insurer on payment of one rupee.

Powers of Superintendent of Insurance regarding returns.

21. (1) If it appears to the Superintendent of Insurance that any return furnished to him under the provisions of this Act is inaccurate or defective in any respect, he may—

(*a*) require from the insurer such further information, certified if he so directs by an auditor or actuary, as he may consider necessary to correct or supplement such return;

(*b*) call upon the insurer to submit for his examination at the principal place of business of the insurer in British India any book of account, register or other document or to supply any statement which he may specify in a notice served on the insurer for the purpose;

(*c*) examine any officer of the insurer on oath in relation to the return;

(*d*) decline to accept any such return unless the inaccuracy has been corrected or the deficiency has been supplied before the expiry of one month from the date on which the requisition asking for correction of the inaccuracy or supply of the deficiency was delivered to the insurer and if he declines to accept any such return, the insurer shall be deemed to have failed to comply with the provisions of section 15 or section 16 relating to the furnishing of returns.

(2) The Court may on the application of an insurer and after hearing the Superintendent cancel any order made by the Superintendent under clause (*a*), (*b*) or (*c*) of sub-section (1) or may direct the acceptance of any return which the Superintendent has declined to accept, if the insurer satisfies the Court that the action of the Superintendent was in the circumstances unreasonable.

Power of Superintendent of Insurance to order re-valuation.

22. If it appears to the Superintendent of Insurance that an investigation or valuation to which section 13 refers does not properly indicate the condition of the affairs of the insurer by reason of the faulty basis adopted in the valuation, he may, after giving notice to the insurer and giving him an opportunity to be heard, cause an investigation and valuation to be made at the expense of the insurer by an actuary appointed by the insurer for this purpose and approved by the Superintendent of Insurance.

Evidence of documents.

23. (1) Every return furnished to the Superintendent of Insurance, which has been certified by the Superintendent to be a return so furnished, shall be deemed to be a return so furnished.

(2) Every document, purporting to be certified by the Superintendent of Insurance to be a copy of a return so furnished, shall be deemed to be a copy of that return and shall be received in evidence as if it were the original return, unless some variation between it and the original return is proved.

Summary of returns to be published.

24. The Central Government shall every year cause to be published, in such manner as it may direct, a summary of the accounts, balance-sheets, statements, abstracts and other returns under this Act or purporting to be under this Act which have been furnished to the Superintendent of Insurance for the year preceding the year of publication and may append to such summary any note of the Central Government and any correspondence in relation thereto.

Returns to be published in statutory forms.

25. No insurer shall publish in British India any return in a form other than that in which it has been furnished to the Superintendent of Insurance:

Provided that nothing contained in this section shall prevent an insurer from publishing a true and accurate abstract from such returns for the purposes of publicity.

Alterations in the particulars furnished with application for registration to be reported.

26. Whenever any alteration occurs or is made which affect any of the matters which are required under the provisions of sub-section (2) of section 3 to accompany an application by an insurer for registration, the insurer shall forthwith furnish to the Superintendent of Insurance full particulars of such alteration.

INVESTMENT, LOANS AND MANAGEMENT.

Investment of assets and restriction on loans.

27. (1) Every insurer incorporated or domiciled in British India shall, subject to the provisions of sub-section (3), at all times invest and hold invested assets equivalent to not less than fifty-five per cent. of the sum of the amount of his liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India, less the amount of any deposit made under section 7 by the insurer in respect of his life insurance business and less any amount due to the insurer for loans granted by him on policies of life insurance, in the manner following, namely, twenty-five per cent. of the said sum in Government securities and a further sum equal to not less than thirty per cent. of the said sum in Government securities or other approved securities or securities of or guaranteed as to principal and interest by the Government of the United Kingdom.

*Explanation.*—The provisions of this sub-section shall apply also to insurers incorporated in or domiciled in the United Kingdom.

(2) An insurer incorporated or domiciled elsewhere than in British India or the United Kingdom shall, subject to the provisions of sub-section (3), at all times invest and hold invested assets equivalent to not less than the sum of his liabilities to holders of life insurance policies in India on account of matured claims and the amount required to meet the liability on policies of life insurance maturing for payment in India, less the amount of any deposit made under section 7 by the insurer in respect of his life insurance business and less any amount due to the insurer on loans granted by him on policies of life insurance in the manner following, namely, thirty-three and one-third per cent. of the said sum in Government securities, and the balance in Government securities or other approved securities or securities of or guaranteed as to principal and interest by the Government of the United Kingdom.

(3) An insurer carrying on business at the commencement of this Act to whom sub-section (1) or sub-section (2) applies shall before the expiry of

four years from the commencement of this Act invest the total amount required to be invested by those sub-sections in the manner required thereby:

Provided that of such total amount the insurer shall have invested not less than one-fourth in securities of the nature specified in sub-section (1) before the expiry of one year, not less than one-half before the expiry of two years, and not less than three-fourths before the expiry of three years from the commencement of this Act.

(4) The assets required by this section to be held invested by an insurer to whom sub-section (2) applies shall be held in trust for the discharge of claims of the nature referred to in sub-section (2) and shall be vested in trustees resident in British India and approved by the Central Government by an instrument of trust which shall be executed by the insurer and approved by the Central Government and shall define the manner in which alone the subject matter of the trust shall be dealt with.

*Explanation.*—Sub-Sections (*2*) and (*4*) shall apply to an insurer incorporated in British India whose share capital to the extent of one-third is owned by, or the members of whose Governing Body to the extent of one-third consists of, individuals domiciled elsewhere than in British India or the United Kingdom.

Statement of investments of assets.

28. (*1*) Every insurer registered under this Act carrying on the business of life insurance, not being a provident society, shall twice in every year, namely, within fourteen days of the 30th day of June and within fourteen days of the 31st day of December, submit to the Superintendent of Insurance a statement showing as at the said dates the assets held invested in accordance with section 27 and such statement shall be certified by the principal officer of the insurer.

(2) The Superintendent of Insurance shall be entitled at any time to take such steps as he may consider necessary for the inspection or verification of the assets invested in compliance with section 27 and the insurer shall comply with all requisitions made by the Superintendent in that behalf.

Prohibition of loans.

29. No insurer shall grant loans or temporary advances either on hypothecation of property or on personal security or otherwise, except loans on life policies issued by him within their surrender value, to any director, manager, managing agent, actuary, auditor or officer of the insurer if a company, or where the insurer is a firm, to any partner therein, or to any other company or firm in which any such director, manager, managing agent, actuary, officer or partner holds the position of a director, manager, managing agent, actuary, officer or partner:

Provided that nothing herein contained shall apply to loans made by an insurer to a banking company:

Provided further that every existing loan to any director, manager, managing agent, auditor, actuary, officer or partner, notwithstanding any contract to the contrary, shall be repaid within one year from the commencement of this Act, and in case of default, such defaulting director, manager, managing agent, auditor, actuary, officer or partner shall cease to hold office on the expiry of one year from the commencement of this Act:

Provided further that nothing in this section shall prohibit a company from granting such loans or advances to a subsidiary company or to any other company of which the company granting the loan or advance is a subsidiary company.

Liability of directors, etc., for loss due to contraventions of sections 27 and 29.

30. If, by reason of a contravention of any of the provisions of section 27 or section 29, any loss is sustained by the insurer or by the policy-holders, every director, manager, managing agent, officer or partner who is knowingly a party to such contravention shall, without prejudice to any other penalty to which he may be liable under this Act, be jointly and severally liable to make good the amount of such loss.

5

Assets of insurer how to be kept.

31. None of the assets in British India of any insurer shall, except in the case of deposits made with the Reserve Bank of India under section *7* or in so far as assets are required to be vested in trustees by sub-section (4) of section *27*, be kept otherwise than in the corporate name of the undertaking, if a company, or in the name of the partners, if a firm, or in the name of the proprietor, if an individual.

Limitation on employment of managing agents and on the remuneration payable to them.

32. (*1*) No insurer shall, after the commencement of this Act, appoint a managing agent for the conduct of his business.

(2) Where any insurer engaged in the business of insurance before the commencement of this Act employs a managing agent for the conduct of his business, then, notwithstanding anything to the contrary contained in the Indian Companies Act, 1913, and notwithstanding anything to the contrary contained in the articles of the insurer, if a company, or in any agreement entered into by the insurer, such managing agent shall cease to hold office on the expiry of three years from the commencement of this Act and no compensation shall be payable to him by the insurer by reason only of the premature termination of his employment as managing agent.

(*3*) After the commencement of this Act, notwithstanding anything contained in the Indian Companies Act, 1913, and notwithstanding anything to the contrary contained in any agreement entered into by an insurer or in the articles of association of an insurer being a company, no insurer shall pay to a managing agent and no managing agent shall accept from an insurer as remuneration for his services as managing agent more than two thousand rupees per month in all, including salary and commission and other remuneration payable to and receivable by him, for his services as managing agent.

INSPECTION.

Power of Superintendent of Insurance to order Inspection.

33. (*1*) If the Superintendent of Insurance has reason to believe that the interest of the policy-holders of an insurer are in danger or that an insurer is unable to meet his obligations or has made default in complying with any of the provisions of this Act, or that an offence under this Act has been or is likely to be committed by an insurer or any officer of an insurer, or if he receives a requisition in this behalf signed by shareholders of an insurer being a company not less in number than one-tenth of the whole body of shareholders and holding not less than one-tenth of the whole share capital or if he receives a requisition in this behalf signed by not less than fifty policy-holders holding policies of life insurance that have been in force for not less than three years and are of the total value of not less than fifty thousand rupees and supported by an affidavit, he may, after giving notice to the insurer and giving him an opportunity to be heard, appoint an auditor or actuary or both, not being an auditor or actuary in the employ of the insurer, to investigate the affairs of the insurer, or may himself make such investigation.

(2) The Court may, on the application of an insurer and after giving notice to and hearing the Superintendent of Insurance, forbid such action by the Superintendent, if the insurer satisfies the Court that it is unnecessary in the circumstances.

(3) The results of any investigation made under this section shall be embodied in a report of which one copy shall be lodged with the Superintendent of Insurance and one copy shall be furnished to the insurer; and a copy of such report shall be furnished to the policy-holders who have sent a requisition for such an investigation.

(4) The Superintendent of Insurance may require the insurer to comply within a time to be specified by him (not being less than fifteen days from the receipt of the notice by the insurer) with any directions he may issue to remedy defects disclosed by such inspection.

(5) If, as a result of any investigation made under this section, the Superintendent of Insurance is of opinion that it is necessary in the interests of the policy-holders that the business of the insurer should be wound up, or if the insurer fails to comply with any directions issued under sub-section (4), the Superintendent may, after giving notice to the insurer and giving him an opportunity to be heard, apply to the Court to have the business of the insurer wound up.

Powers of investigator.

34. When any investigation is made in pursuance of section 33 the provisions of section 140 of the Indian Companies Act, 1913, shall apply for the purposes of such investigation as they apply to an investigation made in pursuance of section 138 of that Act, and all expenses of and incidental to such investigation shall be defrayed by the insurer.

AMALGMATION AND TRANSFER OF INSURANCE BUSINESS.

Amalgamation and transfer of insurance business.

35. (1) No life insurance business of an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2 shall be transferred to or amalgamated with the life insurance business of any other insurer except in accordance with a scheme prepared under this section and sanctioned by the Court having jurisdiction over one or other of the insurers concerned.

(2) Any scheme prepared under this section shall set out the agreement under which the transfer or amalgamation is proposed to be effected, and shall contain such further provisions as may be necessary for giving effect to the scheme.

(3) Before an application is made to the Court to sanction any such scheme, notice of the intention to make the application together with a statement of the nature of the amalgamation or transfer, as the case may be, and of the reason therefor shall, at least two months before the application is made, be sent to the Central Government, and certified copies of the following documents shall be furnished to the Central Government and shall during the two months aforesaid be kept open for the inspection of the members and policy-holders at the principal and branch offices and chief agencies of the insurers concerned, namely:—

(*a*) a draft of the agreement or deed under which it is proposed to effect the amalgamation or transfer;

(*b*) statements of the assets and liabilities of the insurers concerned in such amalgamation or transfer; and

(*c*) the actuarial or other reports on which the scheme was founded including a report by an independent actuary on the proposed amalgamation or transfer.

(4) Where an application under sub-section (3) is made to the Court within three months from the commencement of this Act, the Court may, on application, extend for the insurer whose business is to be transferred to or amalgamated with the business of another insurer, the time allowed for registration and for the payment of the first instalment of the deposit under sections 3 and 7 for such period not exceeding nine months as the Court may think fit.

Sanction of amalgamation and transfer by Court.

36. When any application such as is referred to in sub-section (3) of section 35 is made to the Court, the Court shall cause, if for special reasons it so directs, notice of the application to be sent to every person resident in British India or in an Indian State who is the holder of a life policy of any insurer concerned and shall cause a statement of the nature and terms of the amalgamation or transfer, as the case may be, to be published in such manner and for such period as it may direct, and, after hearing the directors and such policy-holders as apply to be heard and any other persons whom it considers entitled to be heard, may sanction the arrangement, if it is satisfied that no sufficient objection to the arrangement has been established.

Statements required after amalgamation and transfer.

37. Where an amalgamation takes place between any two or more insurers, or where any business of one insurer is transferred to another, whether in accordance with a scheme confirmed by the Court or otherwise, the insurer carrying on the amalgamated business or the insurer to whom the business is transferred, as the case may be, shall, within three months from the date of the completion of the amalgamation or transfer, furnish to the Central Government—

(*a*) a certified copy of the scheme, agreement or deed under which the amalgamation or transfer has been effected, and

(*b*) a declaration signed by every insurer concerned or in the case of a company by the chairman and the principal officer that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities or other property by or with the knowledge of any parties to the amalgamation or transfer, and

(*c*) where the amalgamation or transfer has not been made in accordance with a scheme confirmed by the Court—

(*i*) certified copies of statements of the assets and liabilities of the insurers concerned, and

(*ii*) certified copies of the actuarial or other reports upon which the agreement or deed was founded.

## Assignment or Transfer of Policies and Nominations.

Assignment and transfer of life insurance policies.

38. (1) A transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorised agent and attested by at least one witness, specifically setting forth the fact of transfer or assignment.

(2) The transfer or assignment shall be complete and effectual upon the execution of such endorsement or instrument duly attested but shall not be operative as against an insurer and shall not confer upon the transferee or assignee, or his legal representative, any right to sue for the amount of such policy or the moneys secured thereby until a notice in writing of the transfer or assignment has been delivered to the insurer at his principal place of business in British India by or on behalf of the transferor or transferee.

(3) The date on which the notice referred to in sub-section (2) is delivered to the insurer shall regulate the priority of all claims under a transfer or assignment as between persons interested in the policy; and where there is more than one instrument of transfer or assignment the priority of the claims under such instruments shall be governed by the order in which the notices referred to in sub-section (2) are delivered.

(4) Upon the receipt of the notice referred to in sub-section (2), the insurer shall record the fact of such transfer or assignment together with the date thereof and the name of the transferee or the assignee and shall, on the request of the person by whom the notice was given, or of the transferee or assignee, on payment of a fee not exceeding one rupee, grant a written acknowledgment of the receipt of such notice; and any such acknowledgment shall be conclusive evidence against the insurer that he has duly received the notice to which such acknowledgment relates.

(5) From the date of the receipt of the notice referred to in sub-section (2) the insurer shall recognise the transferee or assignee named in the notice as the only person entitled to benefit under the policy, and such person shall be subject to all liabilities and equities to which the transferor or assignor was subject at the date of the transfer or assignment and may institute any proceedings in relations to the policy without obtaining the consent of the transferor or assignor or making him a party to such proceedings.

(6) The rights and remedies of the assignee or transferee of a policy of life insurance existing prior to the commencement of this Act shall not be affected by the provisions of this section.

(7) Notwithstanding any law or custom having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the life of the policy-holder, and an assignment in favour of the survivor or survivors of a number of persons, shall be valid.

Nomination by policy-holder.

39. (1) The holder of a policy of life insurance may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death.

(2) Any such nomination in order to be effectual shall, unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records relating to the policy and any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement or a further endorsement or a will, as the case may be.

(3) The insurer may charge a fee not exceeding one rupee for registering any such endorsement and shall furnish to the policy-holder a written acknowledgment of having done so.

(4) A transfer or assignment of a policy made in accordance with section 38 shall automatically cancel a nomination.

(5) Where the policy matures for payment during the lifetime of the policy-holder or where the nominee or, if there are more nominees than one, all the nominees die before the policy matures for payment, the amount secured by the policy shall be payable to the policy-holder or his heirs or legal representatives or the holder of a succession certificate, as the case may be.

(6) Where the nominee or, if there are more nominees than one, a nominee or nominees survive the policy-holder, the amount secured by the policy shall be payable to such survivor or survivors.

(7) The provisions of this section shall not apply to any policy of life insurance to which section 6 of the Married Women's Property Act, 1874, applies.

COMMISSION AND REBATES AND LICENSING OF AGENTS.

Prohibition of payment by way of commission or otherwise for procuring business.

40. (1) No person shall, after the expiry of six months from the commencement of this Act, pay or contract to pay any remuneration or reward whether by way of commission or otherwise for soliciting or procuring insurance business in India to any person except an insurance agent licensed under section 42 or a person acting on behalf of an insurer who for the purposes of insurance business employs licensed insurance agents.

(2) No insurance agent licensed under section 42 shall be paid or contract to be paid by way of commission or as remuneration in any form an amount exceeding, in the case of the life insurance business, forty per cent. of the first year's premium payable on any policy or policies effected through him and five per cent. of a renewal premium, or, in the case of business of any other class, fifteen per cent. of the premium:

Provided that insurers, in respect of life insurance business only, may pay, during the first ten years of their business, to their insurance agents fifty-five per cent. of the first year's premium payable on any policy or policies effected through them and six per cent. of the renewal premiums.

(3) Nothing in this section shall prevent the payment under any contract existing prior to the 27th day of January, 1937, gratuities or renewal commission to an insurance agent or to his representatives after his decease in respect of insurance business effected through him before the said date.

Prohibition of rebates.

41. (1) No person shall allow or offer to allow, either directly, or indirectly, as an inducement to any person to effect or renew an insurance in respect of any kind of risk relating to lives or property in India, any rebate of the whole or part of the commission payable or any rebate of the premium shown on the policy, nor shall any person taking out or renewing a policy accept any rebate, except such rebate as may be allowed in accordance with the published prospectuses or tables of the insurer.

(2) Any person making default in complying with the provisions of this section shall be punishable with fine which may extend to one hundred rupees, unless the default is made by a person effecting or renewing a policy, in which case he shall be punishable with fine which may extend to fifty rupees only.

Licensing of insurance agents.

42. (1) The Superintendent of Insurance or an officer authorised by him in this behalf shall, in the prescribed manner and on payment of the prescribed fee which shall not be more than one rupee, issue to any individual making an application under this section and not suffering from any of the disqualifications hereinafter mentioned a licence to act as an insurance agent for the purpose of soliciting or procuring insurance business.

(2) A licence issued under this section shall entitle the holder to act as an insurance agent for any registered insurer.

(3) A licence issued under this section shall expire on the 31st day of March in each year, but shall, if the applicant does not suffer from any of the disqualifications hereinafter mentioned, be renewed from year to year on payment of a fee of one rupee.

(4) The disqualifications above referred to shall be the following:—

(*a*) that the person is a minor;

(*b*) that he is found to be of unsound mind by a Court of competent jurisdiction;

(*c*) that he has been found guilty of criminal misappropriation or criminal breach of trust or cheating by a Court of competent jurisdiction;

(*d*) that in the course of any judicial proceeding relating to any policy of insurance or the winding up of an insurance company or in the course of an investigation of the affairs of an insurer it has been found that he has been guilty of or has knowingly participated in or connived at any fraud, dishonesty or misrepresentation against an insurer or an assured.

(5) If it be found that an insurance agent suffers from any of the foregoing disqualifications, without prejudice to any other penalty to which he may be liable, the Superintendent of Insurance shall, and if the agent has knowingly contravened any provision of this Act may, cancel the licence issued to the agent under this section.

Register of insurance agents.

43. (1) Every insurer and every person who acting on behalf of an insurer employs licensed insurance agents shall maintain a register showing the name and address of every licensed insurance agent appointed by him and the date on which his appointment began and the date, if any, on which his appointment ceased.

(2) Any individual not holding a licence issued under section 42 who acts as an insurance agent shall be punishable with fine which may extend to fifty rupees, and any insurer who, or any person acting on behalf of an insurer who, appoints as an insurance agent any individual not so licensed, or transacts any insurance business in India through any such individual, shall be punishable with fine which may extend to one hundred rupees.

(3) The provisions of sub-section (2) shall not take effect until the expiry of six months from the commencement of this Act.

Prohibition of cessation of payments of commission.

44. Notwithstanding anything to the contrary in a contract between any person and an insurance agent licensed under section 42 forfeiting or stopping payment of renewal commission to such insurance agent, no such person shall in respect of life insurance business done in India refuse payment to an insurance agent of commission on renewal premiums due to him under the agreement by reason only of the termination of his agreement except for fraud:

Provided that such agent has served such person continually and exclusively for at least ten years, and provided further that, after his ceasing to act as agent, he does not directly or indirectly solicit or procure insurance business for any other person.

## SPECIAL PROVISIONS OF LAW.

Policy not to be called in question on ground of mis-statement after two years.

45. No policy of life insurance effected before the commencement of this Act shall after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter and fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false.

Application of British Indian law to policies issued in British India.

46. The holder of a policy of insurance issued by an insurer in respect of insurance business transacted in British India after the commencement of this Act shall have the right, notwithstanding anything to the contrary contained in the policy or in any agreement relating thereto, to

receive payments in British India of any sum secured thereby and to sue for any relief in respect of the policy in any Court of competent jurisdiction in British India; and if the suit is brought in British India any question of law arising in connection with any such policy shall be determined according to the law in force in British India.

Payment of money into Court.

47. (1) Where in respect of any policy of life insurance maturing for payment an insurer is of opinion that by reason of conflicting claims to or insufficiency of proof of title to the amount secured thereby or for any other adequate reason it is impossible otherwise for the insurer to obtain a satisfactory discharge for the payment of such amount, the insurer shall before the expiry of nine months from the date of the maturing of the policy apply to pay the amount into the Court within the jurisdiction of which is situated the place at which such amount is payable under the terms of the policy or otherwise.

(2) A receipt granted by the Court for any such payment shall be a satisfactory discharge to the insurer for the payment of such amount.

(3) An application for permission to make a payment into Court under this section shall be made by a petition verified by an affidavit signed by a principal officer of the insurer setting forth the following particulars namely:—

(*a*) the name of the insured person and his address;

(*b*) if the insured person is deceased, the date and place of his death;

(*c*) the nature of the policy and the amount secured by it;

(*d*) the name and address of each claimant so far as is known to the insurer with details of every notice of claim received;

(*e*) the reasons why in the opinion of the insurer a satisfactory discharge cannot be obtained for the payment of the amount; and

(*f*) the address at which the insurer may be served with notice of any proceeding relating to disposal of the amount paid into Court.

(4) An application under this section shall not be entertained by the Court if the application is made before the expiry of six months from the death of the insured, or the maturing of the policy by survival.

(5) If it appears to the Court that a satisfactory discharge for the payment of the amount cannot otherwise be obtained by the insurer it shall allow the amount to be paid into Court and shall invest the amount in Government securities pending its disposal.

(6) The insurer shall transmit to the Court every notice of claim received after the making of the application under sub-section (3), and any payment required by the Court as costs of the proceedings or otherwise in connection with the disposal of the amount paid into Court shall as to the costs of the application under sub-section (3) be borne by the insurer and as to any other costs be in the discretion of the Court.

(7) The Court shall cause notice to be given to every ascertained claimant of the fact that the amount has been paid into Court, and shall cause notice at the cost of any claimant applying to withdraw the amount to be given to every other ascertained claimant.

(8) The Court shall decide all questions relating to the disposal of claims to the amount paid into Court.

Directors of insurers being companies.

48. (1) Where the insurer is a company incorporated under the Indian Companies Act, 1913, and carries on the business of life insurance, not less than one-fourth of the whole number of the directors of the company shall be per-

sons having the prescribed qualifications and holding policies of life insurance issued by the company, and shall be elected to the Board of Directors of the company in the prescribed manner by the holders of policies of life insurance issued by the company.

(2) This section shall not take effect until the expiry of one year from the commencement of this Act.

Restriction on dividends and bonuses.

49. No insurer, being an insurer specified in sub-clause (*a*) (*ii*) or sub-clause (*b*) of clause (9) of section 2, who carries on the business of life insurance shall in respect of such life insurance business declare or pay any dividend to shareholders or any bonus to policy-holders except out of a surplus ascertained as the result of an actuarial valuation of the assets and liabilities of the insurer.

Notice of options available to the assured on the lapsing of a policy.

50. An insurer shall, within three months of the lapsing of a policy of life insurance, give notice to the policy-holder informing him of the options available to him.

Supply of copies of proposals and medical reports.

51. Every insurer shall, on application by a policy-holder and on payment of a fee not exceeding one rupee, supply to the policy-holder certified copies of the questions put to him and his answers thereto contained in his proposal for insurance and in the medical report supplied in connection therewith.

Prohibition of business on dividing principle.

52. No insurer shall after the commencement of this Act begin, or after three years from that date continue to carry on, any business upon the dividing principle, that is to say, on the principle that the benefit secured by a policy is not fixed but depends either wholly or partly on the results of a distribution of certain sums amongst policies becoming claims within certain time-limits, or on the principle that the premiums payable by a policy-holder depend wholly or partly on the number of policies becoming claims within certain time-limits:

Provided that nothing in this section shall be deemed to prevent an insurer from allocating bonuses to holders of policies of life insurance as a result of a periodical actuarial valuation either as reversionary additions to the sums insured or as immediate cash bonuses or otherwise:

Provided further that an insurer who continues to carry on insurance business on the dividing principle after the commencement of this Act shall with-hold from distribution a sum of not less than forty per cent. of the premiums received during each year after the commencement of this Act in which such business is continued so as to make up the amount required for investment under section 27.

## WINDING UP.

Winding up by the Court.

53. (1) The Court may order the winding up in accordance with the Indian Companies Act, 1913, of any insurance company and the provisions of that Act shall, subject to the provisions of this Chapter, apply accordingly.

(2) In addition to the grounds on which such an order may be based, the Court may order the winding up of an insurance company—

(*a*) if with the sanction of the Court previously obtained a petition in this behalf is presented by share-holders not less in number than one-tenth of the whole body of share-holders and holding not less than one-tenth of the whole share capital or by not less than fifty policy-holders holding policies of life insurance that have been in force for not less than three years and are of the total value of not less than fifty thousand rupees; or

(*b*) if the Superintendent of Insurance, who is hereby authorised to do so, applies in this behalf to the Court on any of the following grounds, namely:—

(*i*) that the company has failed to deposit or to keep deposited with the Reserve Bank of India the amounts required by section 7,

(*ii*) that the company having failed to comply with any requirement of this Act has continued such failure for a period of three months after notice of such failure has been conveyed to the company by the Superintendent of Insurance,

(*iii*) that it appears from the returns furnished under the provisions of this Act or from the results of any investigation made thereunder that the company is insolvent, or

(*iv*) that the continuance of the company is prejudicial to the interests of the policy-holders.

Voluntary winding up.

54. Notwithstanding anything contained in the Indian Companies Act, 1913, an insurance company shall not be wound up voluntarily except for the purpose of effecting an amalgamation or a re-construction of the company, or on the ground that by reason of its liabilities it cannot continue its business.

Valuation of liabilities.

55. (1) In the winding up of an insurance company or in the insolvency of any other insurer the value of the assets and the liabilities of the insurer shall be ascertained in such manner and upon such basis as the liquidator or receiver in insolvency thinks fit, subject, so far as applicable, to the rule contained in the Sixth Schedule and to any directions which may be given by the Court.

(2) For the purposes of any reduction by the Court of the amount of the contracts of any insurance company the value of the assets and liabilities of the company and all claims in respect of policies issued by it shall be ascertained in such manner and upon such basis as the Court thinks proper having regard to the rule aforesaid.

(3) The rule in the Sixth Schedule shall be of the same force and may be repealed, altered or amended as if it were a rule made in pursuance of section 246 of the Indian Companies Act, 1913, and rules may be made under that section for the purpose of carrying into effect the provisions of this Act with respect to the winding up of insurance companies.

Application surplus assets of life insurance fund in liquidation or insolvency.

56. (1) In the winding up of an insurance company and in the insolvency of any other insurer the value of the assets and the liabilities of the insurer in respect of life insurance business shall be ascertained separately from the value of any other assets or any other liabilities of the insurer and no such assets shall be applied to the discharge of any liabilities other than those in respect of life insurance business except in so far as those assets exceed the liabilities in respect of life insurance business.

(2) In the winding up of an insurance company carrying on the business of life insuance or in the insolvency of any other insurer carrying on such business where any proportion of the profits of the insurer was before the commencement of the winding up or insolvency allocated to policy-holders, if, when the assets and liabilities of the insurer have been ascertained, there is found to be a surplus of assets over liabilities (hereinafter referred to as a *prima facie* surplus) there shall be added to the liabilities of the insurer in respect of the life insurance business an amount equal to such proportion of the *prima facie* surplus as is equivalent to such proportion of the profits allocated to share-holders and policy-holders as was allocated to policy-holders during the ten years immediately preceding the commencement of the winding up and the assets of the insurer shall be deemed to exceed his liabilities only in so far as those assets exceed those liabilities after such addition:

Provided that—

(*a*) if in any case there has been no such allocation or if it appears to the Court that by reason of special circumstances it would be inequitable that the amount to be added to the liabilities of the insurer in respect of the life insurance business should be an amount equal to such proportion as aforesaid, the amount to be so added shall be such amount as the Court may direct, and

(*b*) for the purpose of the application of this sub-section to any case where before the commencement of the winding up or insolvency a proportion of such profits as aforesaid of a branch only of the life insurance business in question has been allocated to policy-holders, the value of the assets and liabilities of the insurer in respect of that branch shall be separately ascertained in like manner as the value of his assets and liabilities in respect of the life insurance business was ascertained, and the surplus so found, if any, of assets over liabilities shall, for the purpose of determining the amount to be added to the liabilities of the insurer in respect of the life insurance business be deemed to be the *prima facie* surplus.

Winding up of secondary companies.

57. (1) Where the insurance business or any part of the insurance business of an insurance company has been transferred to another insurance company under an arrangement in pursuance of which the first mentioned company (in this section referred to as the secondary company) or the creditors thereof has or have claims against the company to which such transfer was made (in this section referred to as the principal company) then, if the principal company is being wound up by or under the supervision of the Court, the Court shall (subject as hereinafter mentioned) order the secondary company to be wound up in conjunction with the principal company and may by the same or any subsequent order appoint the same person to be liquidator for the two companies and make provision for such other matters as may seem to the Court necessary with a view to the companies being wound up as if they were one company.

(2) The commencement of the winding up of the principal company shall, save as otherwise ordered by the Court, be the commencement of the winding up of the secondary company.

(3) In adjusting the rights and liabilities of the members of the several companies among themselves the Court shall have regard to the constitution of the companies and to the arrangements entered into between the companies in the same manner as the Court has regard to the rights and liabilities of different classes of contributories in the case of the winding up of a single company or as near thereto as circumstances admit.

(4) Where any company alleged to be secondary is not in process of being wound up at the same time as the principal company to which it is alleged to be secondary, the Court shall not direct the secondary company to be wound up, unless, after hearing all objections (if any) that may be urged by or on behalf of the company against its being wound up, the Court is of opinion that the company is secondary to the principal company and that the winding up of the company in conjunction with the principal company is just and equitable.

(5) An application may be made in relation to the winding up of any secondary company in conjunction with the principal company by any creditor of, or person interested in, the principal or secondary company.

(6) Where a company stands in the relation of a principal company to one insurance company and in the relation of a secondary company to some other insurance company or where there are several insurance companies standing in the relation of secondary companies to one principal company, the Court may deal with any number of such companies together or in separate groups as it thinks most expedient upon the principles laid down in this section.

Schemes for partial winding up of insurance companies.

58. (1) If at any time it appears expedient that the affairs of an insurance company in respect of any class of business comprised in the undertaking of the company should be wound up but that any other class of business comprised in the undertaking should continue to be carried on by the company or be transferred to another insurer, a scheme for such purposes may be prepared and submitted for confirmation of the Court in accordance with the provisions of this Act.

(2) Any scheme prepared under this section shall provide for the allocation and distribution of the assets and liabilities of the company between any classes of business affected (including the allocation of any surplus assets which may arise on the proposed winding up), for any future rights of every class of policy-holders in respect of their policies and for the manner of winding up any of the affairs of the company which are proposed to be wound up and may contain provisions for altering the memorandum of the company with respect to its objects and such further provisions as may be expedient for giving effect to the scheme.

(3) The provisions of this Act relating to the valuation of liabilities of insurers in liquidation and insolvency and to the application of surplus assets of the life insurance fund in liquidation or insolvency shall apply to the winding up of any part of the affairs of a company in accordance with the scheme under this section in like manner as they apply in the winding up of an insurance company, and any scheme under this section may apply with the necessary modifications any of the provisions of the Indian Companies Act, 1913, relating to the winding up of companies.

(4) An order of the Court confirming a scheme under this section whereby the memorandum of a company is altered with respect to its object shall as respects the alteration have effect as if it were an order confirmed under section 12 of the Indian Companies Act, 1913, and the provisions of sections 15 and 16 of that Act shall apply accordingly.

Return of deposits.

59. In the winding up of an insurance company and in the insolvency of any other insurer the liquidator or assignee as the case may be shall apply to the Court for an order for the return of the deposit made by the company under section 7 and the Court shall on such application order a return of the deposit subject to such terms and conditions as it shall direct.

Notice of policy values.

60. In the winding up of an insurance company for the purposes of a cash distribution of the assets and in the insolvency of any other insurer the liquidator or assignee as the case may be in the case of all persons appearing by the books of the company or other insurer to be entitled to or interested in the policies granted by the company or other insurer shall ascertain the value of the liability of the company or other insurer to each such person and shall give notice of such value to those persons in such manner as the Court may direct and any person to whom notice is so given shall be bound by the value so ascertained unless he gives notice of his intention to dispute such value in such manner and within such time as may be specified by a rule or order of the Court.

Power of Court to reduce contracts of insurance.

61. (1) Where an insurance company is in liquidation or any other insurer is insolvent the Court may make an order reducing the amount of the insurance contracts of the company or other insurer upon such terms and subject to such conditions as the Court thinks just.

(2) Where a company carrying on the business of life insurance has been proved to be insolvent, the Court may if it thinks fit in place of making a wind-

ing up order reduce the amount of the insurance contracts of the company upon such terms and subject to such conditions as the Court thinks fit.

(3) Application for an order under this section may be made either by the liquidator or by or on behalf of the company or by a policy-holder, or by the Superintendent of Insurance and the Superintendent of Insurance and any person whom the Court thinks likely to be affected shall be entitled to be heard on any such application.

SPECIAL PROVISIONS RELATING TO EXTERNAL COMPANIES.

Power of Central Government to impose reciprocal disabilities on non-Indian companies.

62. Where, by the law or practice of any country outside India in which an insurer carrying on insurance business in British India is constituted, incorporated or domiciled, insurance companies incorporated in British India are required as a condition of carrying on insurance business in that country to comply with any special requirement whether as to the keeping of deposits or assets in that country or otherwise which is not imposed upon insurers of that country under this Act, the Central Government shall, if satisfied of the existence of such special requirement, by notification in the official Gazette, direct that the same requirement, or requirements as similar thereto as may be, shall be imposed upon insurers of that country as a condition of carrying on the business of insurance in British India.

Particulars to be filed by insurers established outside British India.

63. Every insurer, having his principal place of business or domicile outside British India, who establishes a place of business within British India, or appoints a representative in British India with the object of obtaining insurance business, shall, within three months from the establishment of such place of business or the appointment of such agent, file with the Superintendent of Insurance—

(*a*) a certified copy of the charter, statutes, deed of settlement or memorandum and articles or other instrument constituting or defining the constitution of the insurer, and, if the instrument is not written in the English language, a certified translation thereof,

(*b*) a list of the directors, if the insurer is a company,

(*c*) the name and address of some one or more persons resident in British India authorised to accept on behalf of the insurer service of process and any notice required to be served on the insurer, together with a copy of the power of attorney granted to him,

(*d*) the full address of the principal office of the insurer in British India,

(*e*) a statement of the classes of insurance business to be carried on by the insurer, and

(*f*) a statement verified by an affidavit setting forth the special requirements, if any, of the nature specified in section 62 imposed in the country of origin of the insurer on Indian nationals,

and, in the event of any alteration being made in the address of the principal office or in the classes of business to be carried on, or in any instrument here referred to, or in the name of any of the persons here referred to, or in the matters specified in clause (*f*) above, the company shall forthwith furnish to the Superintendent of Insurance particulars of such alteration.

Books to be kept by insurers established outside British India.

64. Every insurer having his principal place of business or domicile outside British India shall keep at his principal office in British India such books of account, registers and documents as will enable the accounts, statements and abstracts which he is required under this Act to furnish to the

Superintendent of Insurance in respect of the insurance business transacted by him in India to be compiled and, if necessary, checked by the Superintendent of Insurance.

## PART III.

### PROVIDENT SOCIETIES.

Definition of "provident society".

65. In this Part "provident society" means a person who, or a body of persons whether corporate or incorporate which, receives premiums or contributions for securing annuities on human life or receives premiums or contributions for insuring money to be paid on the happening of any of the following contingencies, namely:—

(*a*) the birth, marriage, death of any person or the survival by a person of a stated age or contingency;

(*b*) failure of issue;

(*c*) the occurrence of a social, religious or other ceremonial occasion;

(*d*) loss of or retirement from employment;

(*e*) disablement in consequence of sickness or accident; and

(*f*) the necessity of providing for the education of a dependent; and

(*g*) any other contingency which may be prescribed or which may be authorised by the Provincial Government with the approval of the Central Government.

Application of this Part.

66. Nothing in this Part shall apply to a provident society which pays or undertakes to pay on any policy of insurance an annuity exceeding fifty rupees or a gross sum exceeding five hundred rupees exclusive of any profit or bonus:

Provided that for the purposes of this section contracts entered into before the commencement of this Act shall not be taken into consideration and provided further that "policy" includes a series of policies covering one or more of the contingencies specified in section 65.

Name.

67. No provident society established after the commencement of this Act shall adopt as its name, and no provident society established before the commencement of this Act shall continue after the expiry of six months from the commencement thereof to use as its name, any combination of words which fails to include the word "provident" or which include the words "life".

Insurable interest.

68. No provident society shall receive any premium or contribution for insuring money to be paid to any person other than the person paying such premium or contribution or the wife, husband, child, grand-child, parent, brother or sister, nephew or niece of such a person.

Dividing business.

69. (1) No provident society shall carry on any business upon the dividing principle, that is to say, on the principle that the benefit secured by a policy is not fixed but depends either wholly or partly on the results of a distribution, amongst policies maturing for payment within certain time limits, of certain sums.

(2) The Superintendent of Insurance shall, as soon as possible, take steps to have any provident society which carries on business on the dividing principle wound up:

Provided that, where any such provident society in existence at the commencement of this Act applies within three months of such commencement to

the Superintendent of Insurance for permission to continue carrying on its business with a view meanwhile to re-organise its business in accordance with the provisions of this Act, the Superintendent of Insurance may at his discretion, with due regard to the past history of the society, permit the society to continue business for a period not exceeding two years from the date of receipt of such permission, so however that no new business on the dividing principle is undertaken by the society.

Registration.

**70.** (1) No provident society except a provident society registered under the provisions of the Provident Insurance Societies Act, 1912, shall receive any premium or contribution until it has obtained from the Suprintendent of Insurance a certificate of registration.

(2) Every application for registration shall be accompanied by—

(*a*) a certified copy of the rules of the society, and when the society is a company incorporated under the Indian Companies Act, 1913, a certified copy of the Memorandum and Articles of Association or where the society is not such a company a certified copy of the deed of constitution of the society;

(*b*) the names and addresses of the proprietors or directors, and the managers of the society;

(*c*) a certificate from the Reserve Bank of India that the initial deposit referred to in section 73 has been made; and

(*d*) a declaration verified by an affidavit that the minimum working capital required by section 72 is available.

(3) The Superintendent of Insurance may refuse to issuea certificate of registration until he is satisfied that the rules of the society comply with the provisions of this Act and that the minimum working capital required by section 72 is available, but if he is so satisfied he shall register the society and its rules.

(4) The Superintendent of Insurance may, after giving previous notice in writing in such manner as he thinks fit specifying the grounds for the proposed cancellation, and allowing the society concerned an opportunity of being heard, apply to the Court and obtain sanction for cancellation of the registration made under this section or made under the provisions of the Provident Insurance Soeieties Act, 1912,—

(*a*) if he is satisfied as the result of an inquiry made under section 87—

(*i*) that the society is insolvent or is likely to become so, or

(*ii*) that the business of the society is conducted fraudulently or not in accordance with the rules thereof, or that it is in the interests of the policy-holders that the society should cease to carry on business,

(*b*) if the initial deposit or any of the further deposits required by section 73 has not been made, or

(*c*) if the society, having failed to comply with any requirement of this Act, has continued such failure for a period of one month after notice of such failure has been conveyed to the society by the Superintendent of Insurance:

Provided that the Superintendent of Insurance may, if he thinks fit, instead of applying for cancellation of the registration under sub-clause (*i*) of clause (*a*) of this sub-section make a recommendation to the Court that the contracts of the society should be reduced in such manner and subject to such conditions as he may indicate.

Prohibition of managing agents.

**71.** The provisions of section 32 shall apply to provident societies as they apply to insurers.

Working capital.

72. No provident society established after the commencement of this Act shall be registered unless it has a paid up capital sufficient to provide as working capital a net sum of not less than five thousand rupees exclusive of deposits made under this Act and exclusive in the case of a company of any expenses incurred in connection with the formation of the company.

Deposits.

73. (1) Every provident society shall, if established before the commencement of this Act within one year from such commencement, or, if established after the commencement of this Act before the society applies for registration under section 70, deposit and keep deposited with the Reserve Bank of India in one of the offices in India of the Bank, for and on behalf of the Central Government, cash or approved securities amounting at the market value of the securities on the date of deposit to five thousand rupees, and shall thereafter make each year a further deposit amounting to not less than one-fifth of the gross premium income for the year (including admission fees and other fees received by the society) until the total amount so deposited and kept is fifty thousand rupees.

(2) The provisions of sub-sections (8), (9) and (10) of section 7 and of sub-section (1) of section 8 shall apply to the deposits made under this section as they apply to deposits made by an insurer.

Rules.

74. (1) Every provident society established after the commencement of this Act shall in its rules set forth—

(*a*) the name, the object and the location of the registered office of the society;

(*b*) the contingencies or classes of contingency on the happening of which money is to be paid;

(*c*) the conditions to be complied with before, and the payments to be made on, admission to the society;

(*d*) the rates of premium or contribution, and the periods for which or the times at which premiums or contributions are payable;

(*e*) the maximum amount payable to a subscriber or policy-holder;

(*f*) the nature and amounts of the benefits provided for by the society;

(*g*) the circumstances in which a bonus may be paid to a policy-holder;

(*h*) the nature of the evidence required for the proof of the happening of any contingency on which money is to be paid;

(*i*) the circumstances in which policies may be forfeited or renewed or the whole or a part of the premiums paid on a policy may be returned, or a surrender value of a policy may be granted;

(*j*) the penalties for delay in paying or failure to pay premiums or contributions;

(*k*) the proportion of the annual income of the society which may be disbursed on and the provisions to be made for meeting the expenses of the management of the society;

(*l*) the person or persons who or the authority which shall have power to invest the funds of the society;

(*m*) the provisions for appointment of auditors and their remuneration;

(*n*) the procedure to be adopted in altering the rules of the society;

(*o*) unless these are provided for in the articies of association of a society which is a company incorporated under the Indian Companies Act, 1913,—

(*i*) the mode of appointment and removal, the qualification and the powers of a director, manager, secretary or other officer of the society;

(*ii*) the manner of raising additional capital; and

(*iii*) the provisions for the holding of general meetings of the members and policy-holders and for the powers to be exercised and the procedure to be followed thereat; and

(*p*) such other matters as may be prescribed.

(2) Where the rules of any provident society registered under the Provident Insurance Societies Act, 1912, fail to comply with the provisions of this section the society shall, before the expiry of twelve months from the commencement of this Act, amend the rules so as to comply with these provisions.

Amendment of rules.

75. (1) No amendment of any rule of a provident society shall be valid until it has been sent to the Superintendent of Insurance and has been registered by him.

(2) The Superintendent of Insurance on being satisfied that the proposed amendment is not contrary to the provisions of this Act shall, unless he is of opinion that the amendment unfairly affects the rights of existing members or policy-holders of the society, issue to the society an acknowledgment of the registration of the amended rule.

Supply of copy of rules.

76. Every provident society shall on demand deliver free of cost to any member of the society a copy of the rules of the society and to any person other than a member a copy of such rules on the payment of a sum not exceeding one rupee.

Registered office.

77. Every provident society shall have an office (on the outside of which it shall keep displayed its name in a conspicuous position in legible characters) to which all communications and notices may be addressed, and shall give notice to the Superintendent of Insurance of any change in the location thereof within twenty-eight days of its occurrence.

Publication of authorised capital to contain also subscribed and paid up capital.

78. Where any notice, advertisement or other official publication of a provident society contains a statement of the amount of the authorised capital of the society, the publication shall also contain a statement of the amount of the capital which has been subscribed and the amount paid up.

Registers and books.

79. Every provident society shall keep at its registered office—

(*a*) a register of members in which shall be entered the name, address and occupation, if any, of every proprietor, director, manager or secretary and of every member of the society;

(*b*) a register or record of policies in which shall be entered, in respect of every policy issued by the society, the name and address of the policy-holder, the date when the policy was effected and a record of any transfer, assignment or nomination of which the society has notice;

(*c*) a register of claims in which shall be entered every claim made, together with the date of the claim, the name and address of the claimant and the date on which the claim is discharged or in the case of a claim which is rejected the date of rejection and the grounds therefor;

(*d*) a register of agents in which shall be entered the name and address of every agent employed by the society;

(*e*) a cash book in which shall be entered separately for each class of contingency separately specified in section 65 all sums received and expended by the society and the matters in respect of which the receipt or expenditure takes place;

(*f*) a ledger; and

(*g*) a journal.

Revenue account, balance-sheet and annual statements.

80. (1) Every provident society shall at the expiry of the calendar year prepare a revenue account and balance-sheet in the prescribed form verified in the prescribed manner, together with a report on the general state of the society's affairs and shall cause the revenue account and balance-sheet to be audited by an auditor, and the auditor shall so far as may be in the audit of a provident society have the powers of, exercise the functions vested in, and discharge the duties and be subject to the liabilities imposed on, an auditor of companies by sction 145 of the Indian Companies Act, 1913.

(2) Every provident society shall at the expiry of the calendar year prepare with respect to that year—

(*a*) a statement showing separately for each class of contingency separately specified in section 65—

(*i*) the number of new policies effected, the total amount insured thereby and the total premium income received in respect thereof and the number of existing policies discontinued during the year with the total amount insured thereby, and

(*ii*) the total amount of claims made and the total amount paid in satisfaction thereof;

(*b*) a statement showing details of every insurance effected on a life other than the life of the person insuring, and

(*c*) a statement showing the total amount paid as allowances to agents and canvassers.

(3) Until the expiry of two years from the commencement of this Act this section shall apply to provident societies registered before the commencement of this Act under the Provident Insurance Societies Act, 1912, as if the reference to the calendar year were a reference to either the financial year or the calendar year.

Actuarial report and abstract.

81. (1) Every provident society shall once in every five years or at such shorter intervals as may be laid down by the rules of the society cause an investigation to be made into its financial condition including the valuation of its liabilities and assets by an actuary.

(2) The report of the actuary shall contain an abstract in which shall be stated—

(*a*) the general principles adopted in the valuation, including the method by which the valuation age of lives was ascertained,

(*b*) the rate at each age of the mortality and any other factor assumed and the annuity values used in valuation,

(*c*) the reserve values held against policies effected,

(*d*) the rate of interest assumed, and

(*e*) the provision made for expenses,

and shall have appended to it a certificate signed by a principal officer of the society that all material necessary for proper valuation has been placed at the disposal of the actuary and that full and accurate particulars of every policy under which there is a liability either actual or contingent have been furnished to the actuary for the purpose of the investigation.

(3) If the actuary finds that the financial condition of the society is such that no surplus exists for distribution as bonus to the policy-holders or as dividend to the shareholders, he shall state in his report whether in his opinion the society is insolvent and, if so, whether it should be wound up or not, and the extent to which in his opinion existing contracts should be modified or existing rates of premium should be adjusted to make good the deficiency in the assets.

Submission of returns to Superintendent of Insurance.

82. (1) The revenue account and balance-sheet with the auditor's report thereon and the report on the general state of the society's affairs referred to in sub-section (1) of section 80, and the statements referred to in sub-section (2) of section 80, shall be furnished as returns to the Superintendent of Insurance within three months from the end of the period to which they relate and copies of the revenue account and balance-sheet and the auditor's report thereon and of the report on the general state of the society's affairs shall, on the application of any member or policy-holder made within two years from the date on which the document was so furnished, be sent to him within fourteen days from the receipt of the application on payment of a fee of one rupee.

(2) All the material necessary for the proper valuation of the liabilities of the society under the provisions of section 81 shall be placed at the disposal of the actuary within three months from the end of the period to which such material relates, and the report and abstract referred to in section 81 shall be furnished as a return to the Superintendent of Insurance within a further period of three months.

(3) The provisions of section 17 shall apply to the accounts and balance-sheet of a provident society being a company incorporated under the Indian Companies Act, 1913, as they apply to the accounts and balance-sheet of an insurer.

Actuarial examination of schemes.

83. (1) Every provident society, established after the commencement of this Act, shall cause every scheme of insurance which it proposes to put into operation, and every provident society registered before the commencement of this Act under the provisions of the Provident Insurance Societies Act, 1912, shall cause any new scheme which it proposes to put into operation after such commencement to be examined by an actuary, and shall not receive any premium or contribution in connection with the scheme until the actuary has certified that the scheme is sound and such certificate has been forwarded to the Superintendent of Insurance.

(2) The provisions of sub-section (1) shall apply to any alteration of a scheme already in operation, but the Superintendent of Insurance may, if he is of opinion that the alteration unfairly affects the interests of existing policy-holders, prohibit the alteration, and, if he does so, the society shall not put the altered scheme into operation, unless it first discharges to the satisfaction of the Superintendent of Insurance all its liabilities to those of the existing policy-holders who dissent from the alteration.

(3) Every provident society registered before the commencement of this Act under the provisions of the Provident Insurance Societies Act, 1912, shall, as soon as may be and in any event before the expiry of six months from the commencement of this Act, submit all schemes of insurance which the society has in operation at the commencement of this Act to examination by an actuary and shall send the report of the actuary thereon to the Superintendent of Insurance.

(4) The report of the actuary shall state in respect of each scheme whether it is actuarially sound, and, where no actuarial report such as is referred

to in section 81 has been made within the two years preceding the examination, the report shall also state whether the assets of the society are sufficient to meet its liabilities under the existing schemes, and, if not, how in the opinion of the actuary the existing contracts should be modified.

(5) If any scheme is reported by the actuary to be actuarially unsound, the Superintendent of Insurance shall give notice to the society prohibiting the operation of the scheme; and the society shall not receive any premium or contribution or effect any policy in connection with the scheme after the expiry of one month from the receipt of such notice.

(6) Where a scheme is discontinued under the provisions of sub-section (5) the society shall, where its assets are sufficient to meet all existing liabilities, set apart out of its assets the sum sufficient in the opinion of the actuary to meet the liabilities incurred under the scheme so discontinued, and, where its assets are not so sufficient, within three months from the date of the discontinuance, apply to the Court for a modification of its existing contracts: or failing such modification for the winding up of the society.

Separation of accounts and funds.

84. Where a provident society effects policies of insurance in connection with more than one of the classes of contingency separately specified in section 65, the receipts and payments in respect of each such class shall be recorded in a separate account in the cash book kept in accordance with section 79.

Investment of funds.

85. (1) Every provident society shall, unless it already holds invested in Government securities or securities mentioned or referred to in clauses (*c*) and (*d*) of section 20 of the Indian Trusts Act, 1882, not less than fifty per cent. of the total assets of the society, invest all surplus assets in such securities until the total amount so invested amounts to not less than fifty per cent. of the total assets of the society, and shall thereafter keep invested in such securities not less than fifty per cent. of the total assets of the society.

(2) No funds or investments of a provident society except a deposit made under section 73 shall be kept otherwise than in the name of the society.

(3) No loan shall be made out of the assets of a provident society to any director or officer of the society except on the security of a policy of insurance held in the society and within its surrender value and no such loan shall be made to any concern of which a director or officer of the society is a director or partner.

(4) Any director or officer of a society which contravenes the provisions of sub-section (3), who is knowingly a party to the contravention, shall without prejudice to any other penalty which he may incur be jointly and severally liable to the society for the amount of the loan, and such amount, together with interest from the date of the loan at such rate not exceeding twelve per cent. per annum as the Superintendent of Insurance may fix, shall on application by the Superintendent of Insurance to any civil Court of competent jurisdiction be recoverable by execution as if a decree for such amount had been passed by that Court.

Inspection of books.

86. The books of every provident society shall at all reasonable times be open to inspection by the Superintendent of Insurance or any person appointed by him in this behalf or by any member or policy-holder of the society who has made an application in this behalf to the Superintendent of Insurance.

Inquiry by or on behalf of Superintendent of Insurance.

87. (1) The Superintendent of Insurance shall at least once in two years and may, if he thinks fit, at any time visit personally or depute a suitable person to visit the principal office of a provident society and inquire into the solvency of the society and the manner in which the business of

the society is conducted, or may, after giving notice to the society and giving it an opportunity to be heard, direct such an inquiry to be made by an auditor or actuary appointed by him.

(2) For the purposes of any such inquiry the Superintendent or the auditor or actuary, as the case may be, shall be entitled to examine all books and documents of the society and may demand from the society or any officer of the society such explanations as he may require on any matter relating to the affairs of the society.

(3) The results of any such inquiry shall be recorded in a report which shall be kept in the office of the Superintendent and a copy of the report shall be sent to the society concerned and shall be open to inspection by any member or policy-holder of the society.

Winding up by Court and voluntary winding up.

88. (1) The Court may order the winding up of a provident society being a company incorporated under the Indian Companies Act, 1913, and the provisions of that Act shall, subject to the provisions of this Part, apply accordingly.

(2) In addition to the grounds on which such an order may be based, the Court may order the winding up of a provident society, if the registration of the society is cancelled by the Superintendent of Insurance under sub-section (4) of section 70 and he applies for the winding up of the society.

(3) A provident society being a company incorporated under the Indian Companies Act, 1913, may be wound up voluntarily in accordance with the provisions of that Act, but shall not be so wound up except for the purpose of effecting an amalgamation or re-construction of the society or on the ground that by reason of its liabilities it cannot continue its business.

(4) A provident society not being a company incorporated under the Indian Companies Act, 1913, may be wound up voluntarily under this Act if a resolution is passed by the proprietors that the society should be wound up voluntarily for the purpose or on the ground specified in sub-section (3), and the Superintendent of Insurance may, in any case where he has ordered the cancellation of the registration of a society under sub-section (4) of section 70, order the winding up of the society under this Act.

Reduction of insurance contracts.

89. The Court may make an order reducing the amount of the insurance contracts of a provident society upon such terms and subject to such conditions as the Court thinks just—

(*a*) if the Superintendent of Insurance as an alternative to cancelling the registration of a society under sub-section (4) of section 70 applies to the Court in this behalf;

(*b*) if while a society is in liquidation the Court thinks fit;

(*c*) if when a society has been proved to be insolvent the Court thinks fit to do so in place of making an order for the winding up of the society; or

(*d*) if the Court is satisfied on an application made in this behalf by the society supported by the report of an actuary, and after giving the policy-holders an opportunity to be heard that it is desirable to do so.

Appointment of liquidator.

90. (1) Where a provident society is to be wound up whether under the Indian Companies Act, 1913, or under this Act, the society shall, within seven days from the date of the order of the Court ordering the winding up or the passing of the resolution authorising the winding up, as the case may be, give notice thereof to the Superintendent of Insurance, and, except where the winding up is done by an order of the Court, the Superintendent of Insurance shall appoint the liquidator and shall determine the remuneration to be paid to him.

(2) Any liquidator so appointed may be removed by the Superintendent of Insurance if satisfied that the duties entrusted to him are not being properly discharged.

Powers of liquidator.

91. (1) A liquidator appointed to wind up a society shall have power—

(*a*) to institute or defend any legal proceedings on behalf of the society by his name of office;

(*b*) to determine the contribution to be made by members of the society respectively to the assets of the society;

(*c*) to investigate all claims against the society and to decide questions of priority arising between claimants;

(*d*) to determine by what persons and in what proportion the costs of the liquidation are to be borne;

(*e*) to give such directions in regard to the collection and distribution of the assets of the society as may appear to him to be necessary for winding up the affairs of the society;

(*f*) to summon, and enforce the attendance of, witnesses and to compel the production of documents by the same means and as far as may be in the same manner as is provided in the case of a civil Court by the Code of Civil Procedure, 1908; and

(*g*) with the sanction of the Superintendent of Insurance, to employ such establishment and to obtain such assistance from an actuary or an auditor as may be necessary for the discharge of his duties.

(2) The liquidator shall, for settling the list of contributories and realising the amount of contributions, have the same powers as an official liquidator appointed by the Court for the winding up of a company under the Indian Companies Act, 1913.

Procedure at liquidation.

92. (1) As soon as a liquidator is appointed to wind up a society he shall take charge of all property movable or immovable of the society and of all its books and documents.

(2) If any proprietor or officer of the society or any other person retains any portion of the assets of the society or fails to deliver to the liquidator any book or document when so required by the liquidator, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five hundred rupees, or with both, and the Court may order the delivery of the assets or book or document to the liquidator.

(3) The liquidator shall within fifteen days of his appointment send notice by post to all persons who appear to him to be creditors of the society that a meeting of the creditors of the society will be held on a date not being less than twenty-one nor more than twenty-eight days after his appointment, and at a place and hour to be specified in the notice, and shall also advertise notice of the meeting once in the local official Gazette and once at least in two newspapers circulating in the province in which the society is situated.

(4) At the meeting so held the creditors shall determine whether an application shall be made for the appointment of any person as liquidator in the place of or jointly with the liquidator already appointed, or for the appointment of a committee of inspection, and, if they so resolve and an application accordingly is made at any time not later than fourteen days after the date of the meeting by any creditor appointed for the purpose at the meeting, the Superintendent of Insurance shall appoint a suitable person in place of or jointly with the liquidator already appointed, and, if so desired, a committee of inspection.

(5) The committee of inspection shall, subject to any prescribed conditions, have a general power of supervision over the acts of the liquidator and shall have the right to inspect his accounts at all reasonable times.

(6) The liquidator shall, with such assistance from an actuary as may be required, ascertain as soon as practicable the amount of the society's liability to every person appearing by the society's books to be entitled to or interested in any policy issued by the society, and shall give notice of the amount so found to each such person in the prescribed manner and each such person on receiving such notice shall be bound by the value so ascertained.

(7) The liquidator shall make a valuation of the assets of the society and an estimate of the costs of the winding up, and shall on the basis of these settle the list of contributories.

(8) The liquidator shall apply to the Superintendent of Insurance for an order for the return of the deposit made by the society under section 73 and the Superintendent of Insurance shall on such application order the return of the deposit subject to such terms and conditions as he may think fit.

(9) In administering and distributing the assets of the society the liquidator shall have regard to any directions that may be given by the creditors or contributories at a general meeting or by the Superintendent of Insurance.

(10) The liquidator shall keep books of account in which he shall record the proceedings at all meetings attended by him, all amounts received or expended by him and any other matter that may be prescribed, and these books, may, with the sanction of the Superintendent of Insurance, be inspected by any creditor or contributory.

(11) If the winding up continues for more than a year, the liquidator shall summon a meeting of the creditors and contributories at the end of the first year and of each succeeding year, and shall lay before them an account of his acts and dealings and of the conduct of the winding up, and that account together with any views expressed thereon by the meeting shall be forwarded by the liquidator to the Superintendent of Insurance.

(12) So far as is not otherwise provided herein or is not otherwise prescribed under this Act, the liquidator shall so far as practicable follow the procedure to be followed by an official liquidator appointed by the Court for the winding up of a company under the Indian Companies Act, 1913.

Dissolution of provident society.

93. (1) As soon as the affairs of a provident society are fully wound up the liquidator shall prepare an account of the winding up showing how the winding up has been conducted and the property of the society has been disposed of and shall call a meeting of the members, creditors and contributories for the purpose of laying before it the account and giving any explanation thereof.

(2) Notice of the meeting shall be sent to each person individually and shall be advertised in the local official Gazette and in at least two newspapers circulating in the province in which the society is situated.

(3) Within one week after the meeting the liquidator shall send to the Superintendent of Insurance a copy of the account and shall report to him the holding of the meeting and its date and shall forward to him a copy of the proceedings of the meeting.

(4) The Superintendent of Insurance may return the account to the liquidator if it is incomplete or unsatisfactory and may require the liquidator to carry out any further steps necessary to complete the winding up and the liquidator shall comply with such requirement and shall submit a further report to the Superintendent of Insurance within six months.

(5) If the Superintendent of Insurance is satisfied that the affairs of the society have been fully wound up he shall register the account of the liquidator who shall forthwith make over to the Superintendent of Insurance sums, if any, remaining undisposed of; and on the expiry of three months from the registering of the account the Superintendent of Insurance shall declare the society dissolved and cause the dissolution of the society to be notified in the local official Gazette, and the liquidator shall thereupon be discharged from further responsibility.

(6) If within a period of five years from the date on which any sums have been made over to the Superintendent of Insurance under sub-section (5) an order of a Court of competent jurisdiction has not been obtained at the instance of any claimant to such sums for their disposal, the said sums shall become the property of Government.

Nominations and assignments.

94. (1) The provisions of section 38 and section 39 relating to assignment, transfer and nomination in the case of life insurance policies shall, subject to the provisions of this section, apply to policies of insurance issued by any provident society covering any of the contingencies specified in clause (*a*) of section 65.

(2) No nomination shall be valid if the person nominated is not the husband, wife, father, mother, child, grand-child, brother, sister, nephew or niece of the holder of the policy.

## PART IV.

### MUTUAL INSURANCE COMPANIES AND CO-OPERATIVE LIFE INSURANCE SOCIETIES.

Definitions.

95. (1) In this Part—

(*a*) "Mutual Insurance Company" means an insurer, being a company incorporated under the provisions of the Indian Companies Act, 1913, which has no share capital and of which by its constitution only and all policy-holders are members; and

(*b*) "Co-operative Life Insurance Society" means an insurer being a society registered under the Co-operative Societies Act, 1912, or under an Act of a Provincial Legislature governing the registration of co-operative societies which carries on the business of life insurance and which has no share capital on which dividend or bonus is payable and of which by its constitution only original members on whose application the society is registered and all policy-holders are members:

Provided that any Co-operative Life Insurance Society in existence at the commencement of this Act shall be allowed a period of one year to comply with the provisions of this Act.

(2) Notwithstanding anything contained in sub-section (1), other co-operative societies may be admitted as members of a Co-operative Life Insurance Society, without being eligible to any dividend, profit or bonus.

(3) A Provincial Government may, subject to any rules made by the Central Government, empower the Registrar of Co-operative Societies of the province to register co-operative societies for the insurance of cattle or crops or both under the provisions of the Co-operative Societies Act in force in the province.

(4) A Provincial Government may make rules not inconsistent with any rules made by the Central Government to govern such societies, and the provisions of this Act, in so far as they are inconsistent with those rules, shall not apply to such societies.

Application of Act to Mutual Insurance Companies and Co-operative Life Insurance Societies.

96. The provisions of sections 6 and 7 and of sub-section (2) of section 20, so far as those provisions are inconsistent with the provisions of this Part, shall not apply, and the provisions of this Part shall apply, to Mutual Insurance Companies and Co-operative Life Insurance Societies.

Working capital of Mutual Insurance Companies and Co-operative Life Insurance Societies.

97. No Mutual Insurance Company incorporated after the 26th day of January, 1937, and no Co-operative Life Insurance Society registered after that date under the Co-operative Societies Act, 1912, or under an Act of Provincial Legislature governing the registration of co-operative societies shall be registered under this Act, unless it has as working capital a sum of fifteen thousand rupees, exclusive of the deposit to be made before or at the time of application for registration in accordance with sub-section (2) of section 98 of this Act and of the preliminary expenses, if any, incurred in the formation of the company or society.

Deposits to be made by Mutual Insurance Companies and Co-operative Life Insurance Societies.

98. (1) Every Mutual Insurance company and every Co-operative Life Insurance Society shall, in respect of the life insurance business carried on by it in British India, deposit and keep deposited with one of the offices in India of the Reserve Bank of India, for and on behalf of the Central Government, a sum of two hundred thousand rupees in cash or in approved securities estimated at the market value of the securities on the day of deposit.

(2) The deposit referred to in sub-section (1) may be made in instalments, of which the first shall be a payment, made before or at the time the application for registration under this Act is made, of twenty-five thousand rupees or such sum as with any deposit previously made by the insurer under the provisions of the Indian Life Assurance Companies Act, 1912, brings the amount deposited up to twenty-five thousand rupees, and the subsequent instalments shall be annual instalments made before the expiry of each subsequent year of an amount in cash or in approved securities estimated at the market value of the securities on the day of payment of the instalment, equal to one-third of the gross premium income received in the previous year.

Transferees and assignees of policies not to become members.

99. No transferee or assignee of a policy issued by an insurer to whom this Part applies shall become a member of a Mutual Insurance Company or a Co-operative Life Insurance Society merely by reason of any such transfer or assignment.

Publication of notices and documents of Mutual Insurance Companies and Co-operative Life Insurance Societies.

100. Notwithstanding the provisions of section 79 and section 131 of the Indian Companies Act, 1913, a Mutual Insurance Company or a Co-operative Life Insurance Society may, instead of sending the notices and the copies of the balance-sheet, revenue account and other documents which they are required to send to the members under those sections, publish such notices or documents once in a newspaper published in the English language and in a newspaper published in an Indian language circulating in the place where the principal office of the company is situated:

Provided that, where any members of the company are domiciled in a province other than that in which the principal office of the company is situated, publication of the balance-sheet, revenue account and notice of the meetings shall be made in a newspaper or newspapers published in the principal languages of that province and circulating therein.

Supply of documents to members.

101. Every Mutual Insurance Company and every Co-operative Life Insurance Society shall, on the application of any member made within two years from the date on which any such document is furnished to the Registrar of the Companies under the provisions of section 134 of the Indian Companies Act, 1913, or to the Registrar of Co-operative Societies of the province in which the Co-operative Life Insurance Society is registered, furnish a copy of the document free of cost to the member within fourteen days of the application.

## PART V.

### MISCELLANEOUS.

Penalty for default in complying with, or act in contravention of, this Act.

102. (1) Except as otherwise provided in this Act, any insurer who makes default in complying with or acts in contravention of any requirement of this Act and, where the insurer is a company, any director, managing agent, manager or other officer of the company, or where the insurer is a firm, any partner of the firm who is knowingly a party to the default, shall be punishable with fine which may extend to one thousand rupees and, in the case of a continuing default, with an additional fine which may extend to five hundred rupees for every day during which the default continues.

(2) Any provident society which makes default in complying with any of the requirements of Part III and any director, managing agent, manager, secretary or other officer of the society who is knowingly a party to the default, shall be punishable with fine which may extend to five hundred rupees or in the case of a continuing default with fine which may extend to two hundred and fifty rupees for every day during which the default continues.

Penalty for transacting insurance business in contravention of sections 3, 6, 7, 97 and 98.

103. (1) Any insurer or any person acting on behalf of an insurer, who transacts any class of insurance business in contravention of any of the provisions of section 3, section 6, section 7, section 97 or section 98, or does any one or more of the acts constituting the business of insurance in relation to any such class of insurance business shall be punishable with fine which may extend to two thousand rupees.

(2) Any person knowingly taking out a policy of insurance with any insurer or person guilty of an offence under sub-section (1) shall be punishable with fine which may extend to five hundred rupees:

Provided that nothing in this section shall apply to the business of re-insurance between the head office of an insurer in British India and the head office of an insurer not having an office in British India.

Penalty for false statement in document.

104. Whoever, in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to one thousand rupees, or with both.

Wrongfully obtaining or withholding property.

105. Any director, managing agent, manager or other officer or employee of an insurer who wrongfully obtains possession of any property of the insurer or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or authorised by this Act shall, on the complaint of the insurer or any member or any policy-holder thereof, be punishable with fine which may extend to one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrong-

fully with held or wilfully misapplied and in default to suffer imprisonment for a period not exceeding two years.

Wrongfully diminishing life insurance fund.

106. If on the application of an insurer or any member of an insurance company or any policy-holder or the liquidator of an insurance company (in the event of the insurer being in liquidation) the Court is satisfied that by reason of any contravention of the provisions of this Act the amount of the life insurance fund has been diminished, every person who was at the time of the contravention a director, manager, liquidator or an officer of the insurer shall be deemed in respect of the contravention to have been guilty of misfeasance in relation to the insurer unless he proves that the contravention occurred without his consent or connivance and was not facilitated by any neglect or omission on his part; and the Court shall have all the powers which a Court has under sections 235 and 237 of the Indian Companies Act, 1913, and shall also have the power to assess the sum by which the amount of the life insurance fund has been diminished by reason of the misfeasance and to order any person guilty thereof to contribute to that fund the whole or any part of that sum by way of compensation.

Previous sanction of Advocate General for institution of proceedings.

107. Except where proceedings are instituted by the Superintendent of Insurance, no proceedings under this Act against an insurer or any director, manager or other officer of an insurer or any person who is liable under sub-section (2) of section 41 shall be instituted by any person unless he has previous thereto obtained the sanction of the Advocate General of the province where the principal place of business in British India of such insurer is situate to the institution of such proceedings.

Power of Court to grant relief.

108. If in any proceedings, civil or criminal, it appears to the Court hearing the case that a person is or may be liable in respect of negligence, default, breach of duty or breach of trust but that he has acted honestly and reasonably and that having regard to all the circumstances of the case he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, the Court may relieve him either wholly or partly from his liability on such terms as it may think fit.

Cognizance of offences.

109. No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

Appeals.

110. (1) An appeal shall lie to the Court having jurisdiction from any of the following orders, namely:—

(*a*) an order under section 3 refusing to register, or cancelling the registration of, an insurer;

(*b*) an order under section 5 directing the insurer to change his name;

(*c*) an order under section 42 cancelling the licence issued to an agent;

(*d*) an order under section 75 refusing to register an amendment of rules;

(*e*) an order under section 87 directing an inquiry by an auditor or actuary; or

(*f*) an order made in the course of the winding up or insolvency of an insurer or a provident society.

(2) The Court having jurisdiction for the purposes of sub-section (1) shall be the principal Court of civil jurisdiction within whose local limits the principal place of business of the insurer concerned is situate.

(3) An appeal shall lie from any order made under sub-section (1) to the authority authorised to hear appeals from the decisions of the Court making the same and the decision on such appeal shall be final.

Service of notices.

111. (1) Any process or notice required to be served on an insurer or provident society shall be sufficiently served if addressed to any person registered with the Superintendent of Insurance as a person authorised to accept notices on behalf of the insurer or provident society and left at, or sent by registered post to, the address of such person as registered with the Superintendent of Insurance.

(2) Any notice or other document which is by this Act required to be sent to any policy-holder may be addressed and sent to the person to whom notices respecting such policy are usually sent and any notice so addressed and sent shall be deemed to be notice to the holder of such policy:

Provided that, where any person claiming to be interested in a policy as transferee, assignee or nominee has given to an insurer or to a provident society notice in writing of his interest, any notice which is by this Act required to be sent to policy-holders shall also be sent to such person at the address specified by him in his notice.

Declaration of interim bonuses.

112. Notwithstanding anything to the contrary contained in this Act an insurer carrying on the business of life insurance shall be at liberty to declare an *interim* bonus or bonuses to policy-holders whose policies mature for payment by reason of death or otherwise during the inter-valuation period on the recommendation of the investigating actuary made at the last preceding valuation.

Acquisition of surrender values by policy.

113. (1) Where a definite number of premiums is payable a policy of life insurance on which all premiums have been paid for three consecutive years shall acquire a guaranteed surrender value and notwithstanding any contract to the contrary shall not lapse by reason of non-payment of further premium but shall notwithstanding such non-payment be kept alive to the extent of its paid up value.

*Explanation.*—For the purposes of this sub-section the paid up value of a policy shall be an amount bearing to the total sum assured by the policy the same proportion as the total of the premiums already paid on the policy bears to the total of the premiums payable under the policy.

(2) A policy kept alive to the extent of its paid up value under sub-section (1) shall not participate in any profits of the insurer earned after the conversion of the policy into a paid up policy.

(3) This section shall not apply to.

(*a*) policies in respect of which the sum assured is payable only on the happening of a contingency which may not arise, or

(*b*) where the paid up value will be less than one hundred rupees, or

(*c*) where the parties after the default has occurred in the payment of the premium agree in writing to some other arrangement, or

(*d*) to policies in which the surrender value is automatically applied under the terms of the contract to maintaining the policy in force after its lapse through non-payment of premium.

Power of Central Government to make rules.

114. (1) The Central Government may, subject to the condition of previous publication by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe—

(*a*) the qualifications to be possessed by actuaries;

(*b*) the manner in which it shall be determined for the purposes of this Act what is insurance business transacted in British India;

(*c*) the procedure to be followed by the Reserve Bank of India in dealing with deposits made in pursuance of this Act, including the receipt of, custody of, withdrawal of, and payment of interest on securities lodged as such deposits, and their inspection and verification by the Superintendent of Insurance;

(*d*) the form referred to in clause (*d*) of sub-section (2) of section 16;

(*e*) the manner in which the prospectuses and tables referred to in sub-section (1) of section 41 shall be published and the form in which they shall be drawn up;

(*f*) the matters to be prescribed for the purposes of section 48;

(*g*) the manner in which licences to act as insurance agents may be issued or cancelled;

(*h*) the contingencies other than those specified in clauses (*a*) to (*f*) of section 65 on the happening of which money may be paid by provident societies;

(*i*) the matters other than those specified in clauses (*a*) to (*o*) of sub-section (1) of section 74 on which a provident society shall make rules;

(*j*) the form of any account, return or register required by Part III and the manner in which such account, return or register shall be verified;

(*k*) subject to the provisions of this Act, the fees payable thereunder and the manner in which they are to be collected; and

(*l*) the conditions and the matters which may be prescribed under sub-sections (5), (10) and (12) of section 92:

Provided that every rule made under this section shall be laid as soon as may be after it is made before both Chambers of the Central Legislature for one month while they are in session; and, if within one month from the later date on which the rule has so been laid both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or shall be of no effect, as the case may be.

(3) All rules made by a Local Government under the provisions of section 24 of the Provident Insurance Societies Act, 1912, and in force at the commencement of this Act shall so far as not inconsistent with the provisions of Part III continue in force and have effect as if duly made under this section until they are replaced by rules made under this section.

Alteration of forms.

115. The Central Government may, on the application or with the consent of an insurer, not being a company, alter the forms contained in the Schedules as respects that insurer, for the purpose of adapting them to the circumstances of that insurer:

Provided that nothing done under this section shall exempt the insurer from supplying all information required under this Act so far as it is possible for the insurer to do so.

Power to exempt from certain requirements.

116. The Central Government may, by notification in the official Gazette, exempt any insurer constituted, incorporated or domiciled in an Indian State from the provisions of section 6 relating to deposits or from the provisions of sub-section (2) of section 27 relating to the keeping of assets in India either absolutely or subject to such conditions or modifications as may be specified in the notification.

Saving of provisions of Indian Companies Act, 1913.

117. Nothing in this Act shall affect the liability of an insurer being a company to comply with the provisions of the Indian Companies Act, 1913, in matters not otherwise specifically provided for by this Act.

Exemptions.

118. Nothing in this Act shall apply to any Trade Union registered under the Indian Trade Unions Act, 1926, or to any insurance business carried on by the Central or by a Provincial Government, or to any provident fund to which the provision of the Provident Funds Act, 1925, apply, or, if the Superintendent of Insurance so orders in any case, and to such extent as he specifies in such order, to—

(*a*) any fund in existence and officially recognised by the Central Government before the 27th day of January, 1937, maintained by or on behalf of Government servants or Government pensioners for the mutual benefit of contributors to the fund and of their dependents, or

(*b*) any mutual or provident insurance society composed wholly of Government servants or of railway servants which has been exempted from any or all of the provisions of the Provident Insurance Societies Act, 1912.

Policy forms to be deposited with the Superintendent of Insurance.

119. Every insurer registered under this Act shall deposit and keep deposited with the Superintendent of Insurance copies of all standard forms of policy contracts issued by him in India.

Determination of market value of securities deposited under this Act.

120. The market value on the day of deposit of securities deposited in pursuance of any of the provisions of this Act with the Reserve Bank of India shall be determined by the Reserve Bank of India whose decision shall be final.

Amendment of section 130, Act IV of 1882.

121. To the *Exception* to section 130 of the Transfer of Property Act, 1882, the following words and figures shall be added, namely:—

"or affects the provisions of section 38 of the Insurance Act, 1938".

Amendment of Schedule I, Act IX of 1908.

122. In the First Schedule to the Indian Limitation Act, 1908, for the entry in the third column relating to article 86 the following entry shall be substituted, namely:—

"The date of the death of the deceased......."

Repeals.

123. The Provident Insurance Societies Act, 1912, the Indian Life Assurance Companies Act, 1912, and the Indian Insurance Companies Act, 1928, are hereby repealed.

# THE FIRST SCHEDULE.

(*See* section 11.)

*Regulations and Forms for the preparation of Balance-Sheet.*

## PART I.

*Regulations.*

1. The balance-sheet required to be prepared in respect of every class of business carried on by an insurer is, in the form in which it is set out in Part II of this Schedule (Form A), appropriate to a case where the insurer maintains a separate fund in respect of life insurance business.

2. The balance-sheet of life insurance business shall be prepared as a separate document. The balance-sheet of any class of business may be prepared as a separate document instead of being incorporated by the addition of columns and headings in the general balance-sheet, but the totals of each such separate balance-sheet (showing the total assets of the class of business, the balance at the credit of the life insurance fund or other separate fund or account, the amount of shareholders' undivided profits, and outstanding liabilities) must in any case be incorporated in the general balance-sheet.

3. If any combined balance-sheet is for any purpose issued by an insurer, it shall be in accordance with the Form set out in this Schedule, and there shall not be included among the assets shown in any such combined balance-sheet any amount in respect of any holding in or advance to any insurer whose assets and liabilities have been incorporated therein. Every combined balance-sheet must show clearly on the face thereof that it is a combined balance-sheet and must set out fully the name of every insurer whose assets and liabilities have been incorporated therein; if the assets and liabilities of any person not being an insurer are included in a combined balance-sheet the fact must be stated thereon.

4. Where any guarantee has been given by an insurer (otherwise than in the ordinary course of re-insurance business) in respect of the policies of any other insurer, the balance-sheet of the insurer by whom the guarantee was given must show clearly the name of every insurer whose policies have been so guaranteed and the extent of the guarantee:

Provided that this regulation shall not apply where a combined balance-sheet is issued incorporating the assets and liabilities of the insurer whose policies are guaranteed.

5. Where any part of the assets of an insurer is deposited in any place outside British India as security for the owner of policies issued in that place, the balance-sheet shall state that part of the assets has been so deposited, and, if any such part forms part of the life insurance fund, shall show the amount thereof and the place where it is deposited. Where any combined balance-sheet is issued by an insurer for any purpose, the information required by this regulation shall be shown in the aggregate in respect of all the insurers whose assets and liabilities have been incorporated in the balance-sheet.

6. There shall be appended to the balance-sheet a statement in Form AA as set out in Part II of this Schedule showing the market value and the book value of the assets in India.

7. Every balance-sheet shall contain the following certificates, namely:—

(*a*) a certificate signed by the same persons as are required by this Act to sign the balance sheet explaining how the values as shown in the balance-sheet of the Investments in Stocks and Shares have been arrived at, and how the market value thereof has been ascertained for the purpose of comparison with the values so shown;

(*b*) a certificate signed by the same persons as are required by this Act to sign the balance-sheet and signed also, so far as respects the value of any items shown in the balance-sheet under the heading of "Reversions and Life Interests", by an actuary, certifying that the values of all the assets have been reviewed as at the date of the balance-sheet, and that in their belief the assets set forth in the balance-sheet are shown in the aggregate at amounts not exceeding their realisable or market value under the several headings—"Loans", Reversions and Life Interests", "Investments", "Agent's Balances", "Outstanding Premiums", "Interest, Dividends and Rents outstanding", "Interest, Dividends and Rents accruing but not due", "Amounts due from other Persons or Bodies carrying on Insurance Business", "Sundry Debtors", "Bills Receivable", "Cash" and the several items specified under "Other Accounts":

Provided that if the persons signing the certificate are unable to certify that the assets set forth in the balance-sheet are so shown as aforesaid, a full explanation of the bases upon which the values shown in the balance-sheet have been assessed shall be given in the certificate;

(*c*) a certificate signed by the same persons as are required by this Act to sign the balance-sheet and by the auditor certifying that no parts of the assets of the life insurance

fund has been directly or indirectly applied in contravention of the provisions of this Act relating to the application and investment of life insurance funds; and

(*d*) certificates signed by the auditor (which shall be in addition to any other certificate or report which he is required by law to give with respect to the balance-sheet certifying—

(*i*) that he has verified the cash balances and the securities relating to the insurer's loans, reversions and life interests, and investments;

(*ii*) to what extent, if any, he has verified the investments and transactions relating to any trusts undertaken by the insurer as trustee; and

(*iii*) in the case of a combined balance-sheet, that he has audited the balance-sheet and accounts of every insurer whose assets and liabilities are incorporated therein, or that any such balance-sheet and accounts which have not been audited by him have been certified by independent auditors. The said certificate shall contain a reference to such reservations, if any, as may have been made by any auditor upon any report or certificate given by him with respect to the balance-sheet and accounts of any insurer whose assets and liabilities are incorporated in the combined balance-sheet.

8. If the values shown in the balance-sheet in respect of "Holdings in Subsidiary Companies" or "House property (*i*) in India (*ii*) out of India" have been increased since the last previous balance-sheet, the certificate required by paragraph (*b*) of the last foregoing regulation shall state the amount of every increase not solely due to the cost of subsequent additions or, as respects holdings in controlled companies, to increased profits, and shall contain an explanation of the reason therefor.

9. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely:—

(*a*) "combined balance-sheet" includes any combined statement made by an insurer of assets and liabilities in the form of a balance-sheet which includes the assets and liabilities of any other insurer; and

(*b*) "market value" means as respects any asset the market value thereof as ascertained from published market quotations, or, if there be no such value, its fair value as between a willing buyer and a willing seller.

# PART II.

## FORMS.

### FORM A.

*Form of Balance-Sheet.*

Balance-Sheet of 19 .

| — | Life and Annuity Business. (1) | Other Classes of Business. (2)* | Total. |
|---|---|---|---|
| | Rs. A. P. | Rs. A. P. | Rs. A. P. |
| Share-holders' Capital (each class to be stated separately). | | | |
| Authorised: | | | |
| ......Shares of Rs......each Rs. | | | |
| Subscribed: | | | |
| ......Shares of Rs......each Rs. | | | |
| Called up: | | | |
| ......Shares of Rs......each Rs. | | | |
| Less Unpaid calls. Rs. | | | |
| Reserve or Contingency Accounts (*a*): | | | |
| Investment Reserve Account .. | | | |
| Profit and Loss Appropriation Account Balance. | | | |
| Balance of Funds and Accounts: | | | |
| Life Insurance Fund .. | | | |
| Fire Insurance Business Account .. | | | |
| Marine Insurance Business Account .. | | | |
| Accident and Miscellaneous Insurance Business Account. | | | |
| Other accounts, if any (to be specified) (*l*) | | | |
| Pension or Superannuation Accounts (*b*) | | | |
| Debentures Stock per cent. .. | | | |
| Loans and Advances (*c*) .. | | | |
| Bills Payable (*c*) .. | | | |
| Estimated Liability in respect of outstanding claims, whether due or intimated (*d*) | | | |
| Annuities due and unpaid (*d*) .. | | | |

| — | Life and Annuity Business. (1) | Other Classes of Business. (2)* | Total. |
|---|---|---|---|
| | Rs. A. P. | Rs. A. P. | Rs. A. P. |
| Loans: | | | |
| On Mortgages of property within British India. | | | |
| On Mortgages of property outside British India. | | | |
| On security of municipal and other public rates. | | | |
| On Stocks and Shares .. | | | |
| On Insurer's policies within their surrender value. | | | |
| On Personal security .. | | | |
| To Subsidiary Companies (other than Reversionary) (*f*). | | | |
| Reversions and Life Interests: | | | |
| Reversions and Life Interests purchased | | | |
| Loans on Reversions and Life Interests.. | | | |
| Debentures and Debenture Stocks of Subsidiary Reversionary Companies (*f*). | | | |
| Ordinary Stocks and Shares of Subsidiary Reversionary Companies (*f*). | | | |
| Loans to Subsidiary Reversionary Companies (*f*). | | | |
| Investments: | | | |
| Deposit with the Reserve Bank of India (Securities to be specified). | | | |
| Indian Government Securities .. | | | |
| Provincial Government Securities .. | | | |
| British, British Colonial and British Dominion Government Securities. | | | |
| Foreign Government Securities .. | | | |
| Indian Municipal Securities .. | | | |
| British and Colonial Securities .. | | | |
| Foreign Securities .. | | | |

FORM A—*contd.*

| — | Life and Annuity Business. (1) | Other Classes of Business. (2)* | Total. | — | Life and Annuity Business. (1) | Other Classes of Business. (2)* | Total. |
|---|---|---|---|---|---|---|---|
| Outstanding Dividends .. | | | | Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by the Indian Government or a Provincial Government. | | | |
| Amounts due to Other Persons or Bodies carrying on Insurance Business (*c*). | | | | Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by the British or any Colonial Government. | | | |
| Sundry Creditors (including outstanding and accruing expenses and taxes) (*c*). | | | | Bonds, Debentures, Stocks and other Securities whereon Interest is guaranteed by any Foreign Government. | | | |
| Other sums owing by the insurer (particulars to be given) (*c*). | | | | Debentures of any railway in India .. | | | |
| Contingent Liabilities (to be specified) (*e*). | | | | Debentures of any railway out of India .. | | | |
| Rs.— | —— | —— | —— | Preference or guaranteed Shares of any railway in India. | | | |
| | | | | Preference or guaranteed Shares of any railway out of India. | | | |
| | | | | Railway Ordinary Stocks (*i*) in India (*ii*) out of India. | | | |
| | | | | Other Debentures and Debenture Stock of Companies incorporated (*i*) in India (*ii*) out of India. | | | |
| | | | | Other guaranteed and Preference Stocks and Shares of Companies incorporated (*i*) in India (*ii*) out of India. | | | |
| | | | | Other Ordinary Stocks and Shares of Companies incorporated (*i*) in India (*ii*) out of India. | | | |
| | | | | Holdings in Subsidiary Companies (*f*) .. | | | |
| | | | | House property (*i*) in India (*ii*) out of India. | | | |
| | | | | Freehold and Leasehold ground rents and rent charges. | | | |
| | | | | Agent's Balances .. | | | |
| | | | | Outstanding Premiums (*g*) .. | | | |
| | | | | Interest, Dividends and Rents outstanding (*d*) | | | |
| | | | | Carried over .. | | | |

| Rs. A. P. | Rs. A. P. | Rs. A. P. | | Rs. A. P. | Rs. A. P. | Rs. A. P. |
|---|---|---|---|---|---|---|
| | | | Brought forward .. | | | |
| | | | Interest Dividends and Rents accruing but not due (*d*), | | | |
| | | | Amounts due from Other Persons or Bodies carrying on Insurance Business (*h*), | | | |
| | | | Sundry Debtors (*i*) .. | | | |
| | | | Bills Receivable .. | | | |
| | | | Cash : | | | |
| | | | At Bankers on Deposit Account .. | | | |
| | | | At Bankers on Current Account and in hand .. | | | |
| | | | At call and Short Notice (*j*) .. | | | |
| | | | Other Accounts (to be specified) (*k*) .. | | | |

*Assets and Liabilities, Shareholders' Capital and Reserves, not allocated to any class of business specified in column (1) must be shown in column (2).

*Notes.*

(*a*) The Reserves or Contingency Accounts must be separately stated.

(*b*) If the insurer has not full and unrestricted control of the assets constituting the Pension or Superannuation Accounts, either those Accounts and the assets and liabilities relating thereto must be omitted from the balance-sheet or the assets of which the insurer has not such control must be clearly indicated on the face of the balance-sheet.

(*c*) If the insurer has deposited security as cover in respect of any of these items, the amount and nature of the securities so deposited must be clearly indicated on the face of the balance-sheet.

(*d*) These items are or have been included in the corresponding items in the Revenue or Profit and Loss Account. Outstanding and accruing interest, dividends and rents must be shown after deduction of income-tax or the income-tax must be provided for amongst the liabilities on the other side of the balance-sheet.

(*e*) Such items as amount of liability in respect of bills discounted, uncalled capital of subsidiary companies, uncalled capital of other investments, etc., must either be shown in their several categories under the heading "Contingent Liabilities" or the appropriate items on the assets side must be set out in such detail as will clearly indicate the amount of the uncalled capital.

(*f*) As respects life and annuity business full particulars of holdings in and loans to subsidiary companies must be stated, giving the name of each company, the number and description of each class of shares held, the amounts paid up thereon, and the value at which the holdings in each company stand in the balance-sheet.

(*g*) Either this item must be shown net or the commission must be provided for amongst the liabilities on the other side of the balance-sheet.

(*h*) The aggregate amount owing by a subsidiary company or subsidiary companies is to be shown separately from all other assets and the aggregate amount owing to a subsidiary company or subsidiary companies is to be shown separately from all other liabilities.

(*i*) Amounts due from directors and officers must be shown separately.

(*j*) No amounts must be entered under this heading unless fully secured. If not fully secured, the amounts must be included under the heading "Sunday debors".

(*k*) Under this heading must be included such items as the following, which must be shown under separate headings suitably described: office furniture, good will, preliminary, formation and organisation expenses, development expenditure account, discount on debentures issued, other expenditure carried forward to be written off in future years, balance being loss on Profit and Loss Appropriation Accounts, etc. The amounts included in the balance-sheet must not be in excess of cost.

(*l*) Under the head "Other accounts, if any (to be specified)" on the left hand side, fines realized from the staff and their contribution towards the provident fund, if any, should be shown under separate sub-heads.

FORM AA.

Classified Summary of the Indian Assets of the..................................................
Company on 19 .

| Class of Asset. | Book value as per (a) below. | Market-value as per (b) below. | Remarks as per (c) below. |
|---|---|---|---|
| | Rs. | Rs. | |
| (1) Government of India Securities .. | | | |
| (2) Indian Provincial Government Securities .. | | | |
| (3) Indian Municipal Port and Improvement Trust Securities including Debentures. | | | |
| (4) Debentures of Indian Railways .. | | | |
| (5) Guaranteed and Preference Shares of Indian Railways. | | | |
| (6) Annuities of Indian Railways .. | | | |
| (7) Ordinary Shares of Railways in India .. | | | |
| (8) Other Debentures of concerns in Indir .. | | | |
| (9) Other Guaranteed and Preference Shares of concerns in India. | | | |
| (10) Other Ordinary Shares of concerns in India .. | | | |
| (11) Loans on the Company's policies effected in India and within their surrender value. | | | |
| (12) Loans on Mortgage of property in India .. | | | |
| (13) Loans on Personal Security to persons domiciled and resident in India. | | | |
| (14) Other loans granted in India (particulars to be stated). | | | |
| (15) Land and House Property in India .. | | | |
| (16) Cash on Deposit in banks in India .. | | | |
| (17) Cash in Hand and on current account in banks in India. | | | |
| (18) Agents' balances and outstanding premiums. | | | |
| (19) Interest, dividends and rents either outstanding or accrued but not due. | | | |
| (20) Other assets in India (to be specified) .. | | | |

The statement shall show—

(*a*) the value for which credit is taken in the balance-sheet for each of the abovementioned classes of assets,

(*b*) the market value of such of the abovementioned classes as has been ascertained from published quotations after deduction of accrued interest included in market prices in those cases where accrued interest is included elsewhere in the balance-sheet,

(*c*) how the value of such of the abovementioned classes of assets as has not been ascertained from published quotations has been arrived at, and

(*d*) the rates of exchange at which the values of the assets other than in rupee currency have been converted into rupees.

The market values need not be shown separately where they are not less than the book values and a certificate to that effect is appended to the statement.

No amounts on account of any of the following items may be entered in the statement:—
Goodwill.

Preliminary, formation, organisation or development expenses.
Commission or discount on shares or debentures issued.

Commuted Commission.

Expenditure carried forward to be written off in future years.

## THE SECOND SCHEDULE.

(*See* section 11.)

*Regulations and Forms for the preparation of Profit and Loss Accounts.*

### PART I.

*Regulations.*

1. The items on the income side of the Profit and Loss Account and Profit and Loss Appropriation Account must relate to income whether actually received or not, and the items on the expenditure side must relate to expenditure whether actually paid or not.

2. Deductions from Interest, Dividends and Rents to be shown in respect of income-tax must include all amounts in respect of British Indian income-tax whether or not it has been or is to be deducted at source or paid direct.

3. The Interest, Dividends and Rents, *less* income-tax thereon shown in the Revenue Accounts for any classes of business other than life insurance business, including annuity business may, if the insurer so desires, be included with the corresponding items in the Profit and Loss Account.

## PART II.

## FORMS.

### FORM B.

*Form of Profit and Loss Account.*

Profit and Loss Account of for the year ended 19 .

| | Rs. A. P. | | Rs. A. P. |
|---|---|---|---|
| British Indian Taxes on the Insurer's Profits (not applicable to any particular Fund or Account) | | Interest, Dividends and Rents (not applicable to any particular Fund or Account). Rs.<br>Less—Income-tax thereon Rs. | |
| Expenses of Management (not applicable to any particular Fund or Account)*. | | Profit on realisation of Investments (not credited to Reserves or any particular Fund or Account). | |
| Loss on Realisation of Investments (not charged to Reserves or any particular Fund or Account). | | Appreciation of Investments (not credited to Reserves or any particular Fund or Account). | |
| Depreciation of Investments (not charged to Reserves or any particular Fund or Account). | | Profit transferred from Revenue Accounts (details to be given). | |
| Loss transferred from Revenue Accounts (details to be given). | | Transfer Fees. | |
| Other Expenditure (to be specified). | | Other Income (to be specified) | |
| Balance for the year carried to Appropriation Account. | | Balance being loss for the year carried to Appropriation Account. | |

*If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount must be shown separately.

### FORM C.

*Form of Profit and Loss Appropriation Account.*

Profit and Loss Appropriation Account of for the year ended 19 .

| | Rs. A. P. | | Rs. A. P. |
|---|---|---|---|
| Balance being loss brought forward from last year. | | Balance brought forward from last year. Rs.<br>*Less*—Dividends since paid in respect of last year (to be specified and if "free of tax" to be so stated).† Rs. | |
| Balance being loss for the year brought from Profit and Loss Account (as in Form B). | | | |
| Dividends paid during the year on account of the current year (to be specified and if "free of tax" to be so stated). | | | |
| Transfer to any particular funds or Accounts (details to be given) | | Balance for the year brought from Profit and Loss Account (as in Form B). | |
| Balance at end of the year as shown in the Balance-Sheet. | | Balance being loss at end of the year as shown in the Balance-Sheet. | |

†*Note.*—This item may be shown on the other side of the account if preferred.

# THE THIRD SCHEDULE.

(*See* section 11.)

*Regulations and Forms for the preparation of Revenue Accounts.*

## PART I.

*Regulations.*

1. Form D is, as set out in Part II of this Schedule, appropriate for life insurance business, but a separate revenue account must be prepared for every class of business in respect of which the insurer is required to maintain a separate account.

2. Form F is, as set out in Part II of this Schedule, appropriate for fire insurance business. A separate revenue account in the same form must be prepared for accident and miscellaneous insurance including workmen's compensation and motor car insurance. Form E is, as set out in Part II of this Schedule, appropriate for marine insurance business.

3. If any combined revenue account is for any purpose issued by an insurer it must be in accordance with the forms specified in this Schedule and must clearly show on the face thereof that it is a combined revenue account, and must set out fully the name of every insurer required to make separate returns under this Act whose revenue and expenditure have been included therein; if the revenue and expenditure of any person not being an insurer are included in a combined revenue account, the fact must be stated thereon.

4. The items on the income side of the revenue account must relate to income whether actually received or not, and the items on the expenditure side must relate to expenditure whether actually paid or not.

5. Re-insurance premiums, whether on business ceded or accepted, are to be brought into account gross (*i.e.*, before deducting commissions) under the head of premiums.

6. As respects life insurance business the following statements shall be furnished to the Superintendent of Insurance every year showing details provided for in a Form pertaining thereto:—

(A) A statement in form DD as set forth in Part II of this Schedule.

(B) A statement in form DDD as set forth in Part II of this Schedule.

(C) A statement in form DDDD as set forth in Part II of this Schedule.

7. The following information shall be supplied in addition to the revenue account, namely, the gross premium written in India for life, fire, marine and accident and miscellaneous insurance business.

8. Any office premises which form part of the assets of a life insurance fund must be treated as an interest earning investment, and accordingly, in the revenue account for life insurance business a fair rent for the premises must be included under the heading "Interest, Dividends and Rents" and in the revenue account for every class of business for which the premises are used proper charges for the use thereof must be included under the heading "Expenses of Management".

9. Where an insurer carries on the business of life insurance in conjunction with any other class of insurance business the expenses of management charged to the life insurance revenue account must not include more than a reasonable proportion of the common expenses and in particular, no such account must be charged with more than a fair sum for the use of any office premises having regard to the income from the various classes of business carried on and to the extent to which the premises are used for the purposes of each class of business.

10. Deductions from interest, Dividends and Rents in respect of income-tax must include all income-tax charged on such income whether or not it has been or is to be deducted at source or paid direct; the income-tax to be shown as so deducted in the life insurance Revenue Account is British Indian, United Kingdom, Foreign and Dominion income-tax, but the income-tax to be shown as deducted in Revenue Accounts of any other classes of business is British Indian income-tax only.

## PART II.

## FORMS.

### FORM D.

*Form of Revenue Account applicable to Life Insurance Business.*

Revenue Account of for the year ended 19

in respect of Business.

| — | Business within India. | Business out of India. (a) | Total. | — | Business within India. | Business out of India. (a) | Total. |
|---|---|---|---|---|---|---|---|
| | Rs. | Rs. | Rs. | | Rs. | Rs. | Rs. |
| Claims under Policies (including provision for claims due or intimated), less Reinsurances. | | | | Balance of Fund at the beginning of the year | | | |
| By death .. | | | | Premiums, less Re-insurances— | | | |
| By maturity .. | | | | (*i*) First year premiums .. | | | |
| Annuities, less Re-insurances. | | | | (*ii*) Renewal premiums .. | | | |
| Surrenders (including Surrenders of Bonus), less Re-insurances. | | | | (*iii*) Single premiums .. | | | |
| Bonuses in cash, less Re-insurances. | | | | Consideration for Annuities granted, less Re insurances (*c*). | | | |
| Bonuses in Reduction of Premiums, less Re-insurances. | | | | Interest, Dividends and Rents. | Rs. | | |
| Commission (less that on Re-insurances). | | | | Less—Income-tax thereon (*d*). | Rs. | | |
| | | | | Registration Fees .. | | | |
| Expenses of Management (*b*)— | | | | Other Income (to be specified (*e*) | | | |
| 1. Commission and allowances. | | | | Loss transferred to Profit and Loss Account. | | | |
| 2. Salaries, etc. (other than to agents and those contained in item No. 1). | | | | Transferred from Appropriation Account. | | | |

*Notes.*

(*a*) In the case of an insurer having his head office in British India, these columns apply only to business the premiums in respect of which are payable outside India.

(*b*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately. Under this item the salary paid to the managing agent or managing director shall be shown separately from the total amount paid as salaries to the remaining staff.

(*c*) All single premiums for annuities, whether immediate or deferred, must be included under this heading.

(*d*) British Indian, United Kingdom, Foreign and Dominion income-tax on Interest, Dividends and Rents must be shown under this heading, less any rebates if income-tax recovered from the revenue authorities in respect of expenses of management, The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominion taxes, other than those shown under this item.

(*e*) Under the head "Other Income" fines, if any, realised from the staff must be shown separately. All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside British India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

(*f*) In the case of an insurer having his principal place of business outside British India, the expenses of management for business out of India and total business need not be split up to the several sub-heads, if they are not so split up in his own country.

| — | Business within India. | Business out of India. (a) | Total. | — | Business within India. | Business out of India. (a) | Total. |
|---|---|---|---|---|---|---|---|
| 3. Travelling expenses .. | | | | | | | |
| 4. Directors fees .. | | | | | | | |
| 5. Auditors fees .. | | | | | | | |
| 6. Law charges .. | | | | | | | |
| 7. Advertisements .. | | | | | | | |
| 8. Printing and Stationery. | | | | | | | |
| 9. Other expenses of management (accounts to be specified). | | | | | | | |
| 10. Other payments (accounts to be specified). | | | | | | | |
| 11. Rents for offices belonging to and occupied by the insurer. | | | | | | | |
| 12. Rents of other offices occupied by the insurer. | | | | | | | |
| Bad Debts. | | | | | | | |
| United Kingdom, British Indian, Dominion and Foreign Taxes. | | | | | | | |
| Other Expenditure (to be specified). | | | | | | | |
| Profit transferred to Profit and Loss Account. | | | | | | | |
| Balance of Fund at the end of the year as shown in the Balance-Sheet. | — | | | | | | |

# FORM DD.

*Classified statement of life insurance policies of the* ............ *Company, for the year ending* ............ 19 .

| | New life insurance business in respect of which a premium has been paid in the year. | | | | Total life insurance business in force at end of the year. | | Premium income for which credit has been taken in the revenue account. |
|---|---|---|---|---|---|---|---|
| | Number of policies. | Sums insured and annuities per annum. | Single premiums (including consideration for immediate annuities and all other premiums paid at the outset where no subsequent premium is payable). | Yearly renewal premium income. | Number of policies. | Sums insured with bonuses and annuities per annum. | |
| | | Rs. | Rs. | Rs. | | Rs. | Rs. |
| *Ordinary policies.* | | | | | | | |
| In India .. .. .. .. .. .. .. | | | | | | | |
| Out of India .. .. .. .. .. .. .. | | | | | | | |
| Total .. | | | | | | | |
| *Annuity contracts, etc.* | | | | | | | |
| In India .. .. .. .. .. .. .. | | | | | | | |
| Out of India .. .. .. .. .. .. .. | | | | | | | |
| Total .. | | | | | | | |
| *Group insurance policies.* | | | | | | | |
| In India .. .. .. .. .. .. .. | | | | | | | |
| Out of India .. .. .. .. .. .. .. | | | | | | | |
| Total .. | | | | | | | |

The amounts should be stated to the nearest rupees and after deduction of re-insurances.

## FORM DDD.

*Additions to and deductions from policies of the Company for the year ending 19 .*

| | Ordinary life insurance policies insuring money to be paid on death or survivance. | | | Annuities. | |
|---|---|---|---|---|---|
| | No. | Sum assured. | Reversionary bonus additions. | No. | Annuity per annum. |
| | | Rs. | Rs. | | Rs. |
| (1) Policies at beginning of year .. | | | | | |
| (2) New policies issued .. | | | | | |
| (3) Old policies revived .. | | | | | |
| (4) Old policies changed and increased .. | | | | | |
| (5) Bonus additions allotted .. | | | | | |
| Total .. | | | | | |
| *Discontinued during year.* | | | | | |
| (6) By death .. | | | | | |
| (7) By survivance or the happening of the contingencies insured against other than death. | | | | | |
| (8) By expiry of term under temporary insurances. | | | | | |
| (9) By surrender of policy .. | | | | | |
| (10) By surrender of bonus .. | | | | | |
| (11) By forfeiture or lapse .. | | | | | |
| (12) By change and decrease .. | | | | | |
| (13) By being not taken up .. | | | | | |
| Total discontinued .. | | | | | |
| Total existing at end of year .. | | | | | |

## FORM DDDD.

*Particulars of the policies forfeited or lapsed in the last financial year under review, less those revised and reinstated for full benefits, classified according to the year in which they were issued.*

| Financial year in which the policies were issued. | Number of policies forfeited or lapsed. | Sum insured under policies forfeited or lapsed. |
|---|---|---|
| | | Rs. |
| Year ending 19 , being the year under review. | | |
| Year ending 19 , being the year previous to that under review. | | |

And so on, the number of and sum insured under policies forfeited or lapsed in the last financial year under review being stated after classification according to each of the preceding years in which they were issued.

A separate statement must be given in respect of each class of life insurance business for which a separate revenue account is submitted.

Insurers having their principal place of business in British India shall give the information required in the form separately for business transacted in India and business transacted outside India and insurers having their principal place of business outside British India will furnish information regarding business transacted in India only.

## FORM E.

*Form of Revenue Account applicable to Marine Insurance Business.*

Revenue Account of for the year ended 19 ,
in respect of Marine Insurance Business.

| — | Current year. | Last preceding year. | Previous years. | Total. | — | Current year. | Last preceding year. | Previous years. | Total. |
|---|---|---|---|---|---|---|---|---|---|
| | Rs. | Rs. | Rs. | Rs. | | Rs. | Rs. | Rs. | Rs. |
| *Claims paid (less Salvages and Re-insurances) (a) (c). | | | | | Balance of Marine Insurance Business Account at beginning of the year. | | | | |
| *Commission .. | | | | | Balances .. | | | | |
| *Expenses of Management (b). | | | | | Additional Reserve (if any). | | | | |
| *Bad Debts .. | | | | | *Premiums (less Returns, Re-insurances, Brokerages and Discount) (c). | | | | |
| United Kingdom, British Indian, Dominian and Foreign Taxes. | | | | | Interest, Dividends and Rents .. Rs. Less—Income-tax thereon .. Rs. | | | | |
| *Other Expenditure (to be specified). | | | | | *Other Income (to be specified) (d). | | | | |
| Profit transferred to Profit and Loss Account. | | | | | Loss transferred to Profit and Loss Account. | | | | |
| Balance of Marine Insurance Business Account at end of year as shown in the Balance Sheet. | | | | | Transferred from Appropriation Account. | | | | |
| Balances .. | | | | | | | | | |
| Additional Reserve (if any). | | | | | | | | | |

*Notes.*

(a) This heading must include all expenses directly incurred in settling claims.

(b) If any sum has been deducted from this item and entered on the assets side of the balance-sheet the amount so deducted must be shown separately.

(c) Where the account is furnished under the provisions of section 11 of the Insurance Act, 1938, separate figures for claims paid to claimants in British India and claimants outside British India, and for premiums derived from business effected in British India and effected outside British India must be given.

(d) All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside British India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

*Where the account is furnished under the provisions of clause (b) of sub-section (2) of section 16 of the Insurance Act, 1938, by an insurer to whom that section applies, separate figures for business within British India and business out of British India must be given against the items marked with an asterick. Against all other items the total amount for the business as a whole may be given.

## FORM F.

*Form of Revenue Account applicable to Fire Insurance Business and to Accident and Miscellaneous Insurance Business including Workmen's Compensation and Motor Car Insurance Business.*

Revenue Account of for the year ended 19 .
in respect of Business.

| | Rs. | | Rs. |
|---|---|---|---|
| *Claims under Policies, less Re-insurances (*a*) (*d*):<br>Paid during the year ..Rs.<br>Total estimated liability in respect of outstanding claims at end of the year whether due or intimated. Rs. | | Balance of Account at beginning of the year:<br>Reserve for Unexpired Risks Rs.<br>Additional Reserve (if any) Rs. | |
| Total ..<br>Less—Outstanding at end of previous year (*b*) ..Rs. | | *Premiums, less Re-insurances (*d*).<br>Interest, Dividends and Rents Rs.<br>Less—Income-tax thereon. Rs. | |
| *Commission .. .. .. .. | | *Other Income (to be specified) (*e*). | |
| *Expenses of Management (*c*) .. | | Loss transferred to Profit and Loss Account. | |
| *Bad Debts .. .. .. .. | | Transferred from Appropriation Account. | |
| United Kingdom, Foreign and Dominion Taxes. | | | |
| *Other Expenditure (to be specified). | | | |
| Profit transferred to Profit and Loss Account. | | | |
| Balance of Account at the end of the year as shown in the Balance-Sheet:<br>Reserve for Unexpired Risks, being per cent. of premium income of year. Rs.<br>Additional Reserve (if any) Rs. | | | |
| Rs. | | Rs. | |

*Notes.*

(*a*) This heading must include all expenses directly incurred in settling claims.

(*b*) If in any year the claims actually paid and those still unpaid at the end of that year in respect of the previous year or years are in excess of the amount included in the previous year's Revenue Account as provision for outstanding claims, then the amount of such excess must be shown in the Revenue Account.

(*c*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet the amount so deducted must be shown separately.

(*d*) Where the account is furnished under the provisions of section 11 of the Insurance Act, 1938, separate figures for claims paid to claimants in British India and claimants outside British India, and for premiums derived from business effected in British India and effected outside British India must be given.

(*e*) All the amounts received by the insurer directly or indirectly whether from his head office or from any other source outside British India shall also be shown separately in the revenue account except such sums as properly appertain to the capital account.

*Where the account is furnished under the provisions of clause (*b*) of sub-section (2) of section 16 of the Insurance Act, 1938, by an insurer to whom that section applies, separate figures for business within British India and business out of British India must be given against the items marked with an asterisk. Against all other items the total amount for the business as a whole may be given.

## THE FOURTH SCHEDULE.

(*See* section 13.)

*Regulations for the preparation of Abstracts of Actuaries' Reports and Requirements applicable to such Abstracts.*

### PART I.

*Regulations.*

1. Abstracts and Statements must be so arranged that the numbers and letters of the paragraphs correspond with those of the paragraphs of Part II of this Schedule.

2. In showing the proportion which that part of the annual premiums reserved as a provision for future expenses and profits bears to the total of the annual premiums, in accordance with the requirements of paragraph 3 of Part II of this Schedule, no credit is to be taken for any adjustments made in order to secure that no policy is treated as an asset.

3. (1) The average rate of interest yielded in any year by the assets constituting a life insurance fund shall, for the purposes of paragraph 4 of Part II of this Schedule, be calculated by dividing the interest of the year by the mean fund of the year; and for the purposes of any such calculation the interest of the year shall be taken to be the whole of the interest credited to the life insurance fund during the year after deduction of income-tax charged thereon (any refund of income-tax in respect of expenses of management made during the year being taken into account), and the mean fund of the year shall be ascertained by adding a sum equal to one-half of the amount of the life insurance fund at the beginning of the year to a sum equal to one-half of that fund at the end of the year, and deducting from the aggregate of those two sums an amount equal to one-half of the interest of the year.

(2) For the purposes of the calculation aforesaid either—

(*a*) all profits and income arising during the year from sums invested in reversions shall be included in the interest credited to the life insurance fund during the year; or

(*b*) such portion of the life insurance fund as is invested in the purchase of reversions, and the profits and income arising therefrom, shall be excluded from the calculation; but in that case a statement must be added to the information required under the said paragraph 4, showing, in respect of the portion of the fund so excluded as aforesaid, the average rate of annual profit and income for which credit has been taken during the five years last preceding the valuation date, and explaining the manner in which the said average rate has been calculated.

(3) The information given in accordance with the requirements of the said paragraph 4 shall show clearly by which of the methods hereinbefore in this regulation mentioned the sums invested in reversions and the profits and income arising therefrom have been dealt with.

4. Every abstract prepared in accordance with the requirements of Part II of this Schedule shall be signed by an actuary and shall contain a certificate by him to the effect that he has satisfied himself as to the accuracy of the valuations made for the purposes thereof and of the valuation data:

Provided that in the case of an abstract prepared on behalf of an insurance company, if the actuary who signs the abstract is not a permanent officer of the company, the certificate as to the accuracy of the valuation data shall be given and signed by the principal officer of the company and the actuary shall include in the abstract a statement signed by him showing what precautions he has taken to ensure the accuracy of the data.

5. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely :—

"extra premium" means a charge for any risk not provided for in the minimum contract premium;

"inter-valuation period" means, as respects any valuation, the period to the valuation date of that valuation from the valuation date of the last preceding valuation in connection with which an abstract was prepared under this Act or under the enactments repealed by this Act, or, in a case where no such valuation has been made in respect of the class of business in question, from the date on which the insurer began to carry on that class of business;

"maturity date" means the fixed date on which any benefit will become payable either absolutely or contingently;

"net premiums" means as respects any valuation the premiums taken credit for in the valuation;

"premium term" means the period during which premiums are payable;

"valuation date" means as respects any valuation the date as at which the valuation is made.

PART II.

*Requirements applicable to an Abstract in respect of Life Insurance Business.*

The following tabular statements shall be annexed to every abstract prepared in accordance with the requirements of this Part of this Schedule, namely:—

(*a*) a Consolidated Revenue Account, in the Form G annexed to this Part of this Schedule, for the inter-valuation period (except that it shall not be necessary to prepare such an account in respect of any class of business so long as the insurer deposits annually with the Superintendent of Insurance an abstract in respect of that class of business); and

(*b*) a Summary and Valuation in the Form H annexed to this Part of this Schedule of the policies included at the valuation date in the class of business to which the abstract relates; and

(*c*) a Valuation Balance-Sheet in the Form I annexed to this Part of this Schedule; and

(*d*) a statement in Form DDD as set forth in Part II of the Third Schedule of the additions to and deductions from the number of policies and the sums insured thereunder for each class of life insurance; and

(*e*) a statement in Form DDDD as set forth in Part II of the Third Schedule of particulars of policies forfeited or lapsed under each class of life insurance;

and every such abstract shall show—

1. The valuation date,

2. The general principles and full details of the methods adopted in the valuation of each of the various classes of insurances and annuities shown in the said Form H, including statements on the following points:—

(*a*) whether the principles were determined by the instruments constituting the company or by its regulations or byelaws or how otherwise;

(*b*) the method by which the net premiums have been arrived at and how the ages at entry, premium terms and maturity dates have been treated for the purpose of the valuation;

(*c*) the methods by which the valuation age, period from the valuation date to the maturity date, and the future premium terms, have been treated for the purpose of the valuation;

(*d*) the rate of bonus taken into account where by the method of valuation definite provision is made for the maintenance of a specific rate of bonus;

(*e*) the method of allowing for—

(*i*) the incidence of the premium income; and

(*ii*) premiums payable otherwise than annually;

(*f*) the methods by which provision has been made for the following matters, namely:—

(*i*) the immediate payment of claims;

(*ii*) future expenses and profits in the case of limited payment and paid-up policies;

(*iii*) the reserve in respect of lapsed policies, not included in the valuation, but under which a liability exists or may arise; and whether any reserves have been made for the matters aforesaid;

(*g*) whether under the valuation method adopted any policy would be treated as an asset, and, if so, what steps, if any, have been taken to eliminate such asset;

(*h*) a statement of the manner in which policies on under-average lives and policies subject to premiums which include a charge for climatic, military or other extra risks have been dealt with; and

(*i*) the rates of exchange at which liabilities in respect of policies issued in foreign currencies have been converted into rupees and what provision has been made for possible increase of liability arising from future variations in the rates of exchange.

3. The table of mortality used, and the rate of interest assumed, in the valuation.

4. The proportion which that part of the annual premiums reserved as a provision for future expenses and profits bears to the total of the annual premiums, separately specified in respect of insurances with immediate profits, with deferred profits, with profits under discounted bonus systems, and without profits.

5. The average rates of interest yielded by the assets, whether invested or uninvested, constituting the life insurance fund for each of the years covered by the valuation date.

6. The basis adopted in the distribution of profits as between the insurer and policy-holders, and whether such basis was determined by the instruments constituting the company, or by its regulations or byelaws, or how otherwise.

7. The general principles adopted in the distribution of profits among policy-holders, including statements on the following points, namely:—

(a) whether the principles were determined by the instruments constituting the company, or by its regulations or byelaws, or how otherwise;

(b) the number of years' premiums to be paid, period to elapse and other conditions to be fulfilled before a bonus is allotted;

(c) whether the bonus is allotted in respect of each year's premium paid, or in respect of each completed calendar year or year of assurance or how otherwise; and

(d) whether the bonus vests immediately on allocation, or, if not, the conditions of vesting.

8. (1) The total amount of profits arising during the inter-valuation period, including profits paid away and sums transferred to reserve funds or other accounts during that period, and the amount brought forward from the preceding valuation (to be stated separately) and the allocation of such profits—

(a) to interim bonus paid;

(b) among policy-holders with immediate participation, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses);

(c) among policy-holders with deferred participation, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses);

(d) among policy-holders in the discounted bonus class, giving the number of the policies which participated and the sums assured thereunder (excluding bonuses);

(e) to the insurer or, in the case of an insurance company, among shareholders or to shareholders' accounts (any such sums passed through the accounts during the inter-valuation period to be separately stated);

(f) to every reserve fund or other fund or account (any such sums passed through the accounts during the inter-valuation period to be separately stated);

(g) as carried forward unappropriated.

(2) Specimens of bonuses allotted as at the valuation date to policies for one thousand rupees—

(a) for the whole term of life effected at the respective ages of 20, 30 and 40, and having been in force respectively for five years, ten years and upwards at intervals of ten years; and

(b) for endowment insurances effected at the respective ages of 20, 30 and 40, for endowment terms of fifteen, twenty and thirty years, and having been in force respectively for five years ten years, and upwards at intervals of ten years;

together with the amounts apportioned under the various manners in which the bonus is receivable.

9. A statement in Form J annexed to this Part of this Schedule of specimen policy reserve values held or required to be held according to the methods adopted in the valuation, and specimen minimum surrender values in respect of whole life insurance policies for Rs. 1,000 with premiums payable throughout life effected at the respective ages of 20, 30, 40 and 50, and immediately on payment of the first, second, third, fourth, sixth, seventh, eighth, ninth, tenth, fifteenth and twentieth annual premium; with similar specimen policy reserve values and specimen surrender values in respect of whole life insurance policies subject to premiums payable for 20 years and of endowment insurance policies maturing at age 55.

10. A statement showing how the liability under any disability clause in a policy has been determined in the valuation with full information of the tables of sickness or accident used for the purpose.

FORM G.

Consolidated Revenue Account of for years commencing and ending

| | Business within India. | Total. | | Business within India. | Total. |
|---|---|---|---|---|---|
| | Rs. | Rs. | | Rs. | Rs. |
| Claims under policies (including provision for claims due or intimated) less Re-insurances—By death .. | | | Balance of Life Insurance Fund at the beginning of the period. | | |
| By maturity .. | | | Premiums, less Re-insurances.. | | |
| Annuities, less Re-insurances .. | | | Consideration for Annuities Granted, less Re-insurances (*b*). | | |
| Surrenders (including Surrenders of Bonuses), less Re-insurances. | | | Interest, Dividends and Rents .. Rs. Less—Income-tax thereon (*c*) .. Rs. | | |
| Bonuses in Cash, less Re-insurances. | | | | | |
| Bonuses in Reduction of Premiums, less Re-insurances. | | | Registration Fees .. | | |
| Commission (less that on Re-insurances). | | | Other Income (to be specified). | | |
| Expenses of Management (*a*)—Agents' and Canvassers' allowance. | | | Loss transferred to Profit and Loss Account. | | |
| Salaries, &c. (other than to Agents and Canvassers). | | | Transferred from Appropriation Account. | | |
| Travelling expenses .. | | | | | |
| Directors' fees .. | | | | | |
| Auditors' fees .. | | | | | |
| Medical fees .. | | | | | |
| Law charges .. | | | | | |
| Advertising .. | | | | | |
| Printing and Stationery .. | | | | | |
| Other expenses of management (accounts to be specified). | | | | | |
| Other payments (accounts to be specified). | | | | | |
| Rents for offices belonging to and occupied by the company. | | | | | |
| Rents of other offices occupied by the company. | | | | | |
| United Kingdom, British Indian, Dominion and Foreign Taxes. | | | | | |
| Bad Debts .. | | | | | |
| Other Expenditure (to be specified). | | | | | |
| Profit transferred to Profit and Loss Account. | | | | | |
| Balance of Life Insurance Fund at end of the period as shown in the Balance-Sheet. | | | | | |
| Rs. .. | | | Rs. .. | | |

*Notes.*

(*a*) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately.

(*b*) All single premiums for annuities, whether immediate or deferred, must be included under this heading.

(*c*) British Indian, United Kingdom, Foreign and Dominion income-tax on Interest, Dividends and Rents must be shown under this heading, less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominion taxes, other than those shown under this item.

(*d*) In the case of an insurer having his principal place of business outside British India, the expenses of management for the total business need not be split up into the several sub-heads, if they are not so split up in his own country.

FORM H.

Summary and Valuation of the Policies of as at 19 .

| Description of Transactions. | Particulars of the Policies for Valuation. | | | | | Valuation. | | | |
|---|---|---|---|---|---|---|---|---|---|
| | Number of policies. | Sums Assured. | Bonuses. | Office Yearly Premiums. | Net Yearly Premiums. | Sums Assured and Bonuses. | Office Yearly Premiums. | Net Yearly Premiums. | Net Liabilities. |
| DIVISION I. *Insurances.* | | | | | | | | | |
| Group A,— | | | | | | | | | |
| With immediate participation in profits .. | | | | | | | | | |
| For whole term of life .. | | | | | | | | | |
| Other classes (to be specified) .. | | | | | | | | | |
| Extra premiums .. | | | | | | | | | |
| Total Insurances .. | | | | | | | | | |
| *Deduct*—Re-insurances .. | | | | | | | | | |
| Net insurances .. | | | | | | | | | |
| Group B.— .. | | | | | | | | | |
| With deferred participation in profits .. | | | | | | | | | |
| For whole term of life .. | | | | | | | | | |
| Other classes (to be specified) .. | | | | | | | | | |
| Extra premiums .. | | | | | | | | | |
| Total Insurances .. | | | | | | | | | |
| *Deduct*—Re-Insurances .. | | | | | | | | | |
| Net insurances .. | | | | | | | | | |
| Group C.— .. | | | | | | | | | |
| Under discounted bonus systems .. | | | | | | | | | |
| For whole term of life .. | | | | | | | | | |
| Other classes (to be specified) .. | | | | | | | | | |
| Extra premiums .. | | | | | | | | | |
| Total insurances .. | | | | | | | | | |
| *Deduct*—Re-insurances .. | | | | | | | | | |
| Net insurances .. | | | | | | | | | |
| Total insurances with profits .. | | | | | | | | | |

FORM H—*contd*

Summary and Valuation of Policies of as at 19 .

| Description of Transactions. | Particulars of the Policies for Valuation. | | | | | Valuation. | | | |
|---|---|---|---|---|---|---|---|---|---|
| | Number of policies. | Sums Assured. | Bonuses. | Office Yearly Premiums. | Net Yearly Premiums. | Sums Assured and Bonuses. | Office Yearly Premiums. | Net Yearly Premiums. | Net Liabilities. |
| Group D.— .. | | | | | | | | | |
| Without participation in profits .. | | | | | | | | | |
| For whole term of life .. | | | | | | | | | |
| Other classes (to be specified) .. | | | | | | | | | |
| Extra premiums ... | | | | | | | | | |
| Total insurances .. | | | | | | | | | |
| *Deduct*—Re-insurances .. | | | | | | | | | |
| Net insurances .. | | | | | | | | | |
| Total insurances without profits .. | | | | | | | | | |
| Total of the insurances shown in all groups .. | | | | | | | | | |
| *Deduct*—Re-insurances .. | | | | | | | | | |
| Net amount of insurances .. | | | | | | | | | |
| Adjustments, if any (to be separately specified) .. | | | | | | | | | |

DIVISION II.

*Annuities on Lives.*

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| Immediate Annuities .. | | | | | | | | | |
| Deferred Annuities with return of premiums .. | | | | | | | | | |
| Deferred Annuities without return of premiums .. | | | | | | | | | |
| Other classes (to be specified) .. | | | | | | | | | |
| Total Annuities .. | | | | | | | | | |
| *Deduct*—Re-insurances .. | | | | | | | | | |
| Net Annuities on Lives .. | | | | | | | | | |
| Total of the results (after deduction of Re-insurances) .. | | | | | | | | | |

*Notes.*

1. Items in this Summary are to be stated to the nearest rupee.

2. No policy of insurance upon the lives of a group of persons, whereby sums assured are payable in respect of the several persons included in the group, is to be included in Groups A, B, C or D of this Form: any such policies must be shown in a separate Group which must be added to the Form.

3. If policies without participation in profits but with a guaranteed rate of bonus are issued they must be separately specified in Group D of this Form.

4. Policies under which there is a waiver of premiums during disability must be shown as a separate class.

5. Separate forms must be prepared in respect of classes of policies valued by different tables of mortality or at different rates of interest or involving the valuation of net premiums on different bases.

6. In cases where separate valuations of any portion of the business are required under local laws in places outside British India and reserves based on such valuations are deposited in such places, a statement must be furnished in respect of the business so valued in each such place showing the total number of policies, the total sums assured and bonuses, the total office yearly premiums, and the total net liability on the bases as to mortality and interest adopted in each such place with a statement as to such bases respectively.

7. Office and net premiums and the values thereof must be shown after deduction of abatements made by the application of bonus.

## FORM I.

Valuation Balance-Sheet of as at 19 .

| | Rs. | | Rs. |
|---|---|---|---|
| Net liability under business as shown in the Summary and Valuation of Policies. | | Balance of Life Insurance Fund as shown in the Balance-Sheet. | |
| Surplus, if any .. | | Deficiency, if any .. | |

*Note.*—If the proportion of surplus allocated to the insurer, or in the case of an insurance company to share-holders, is not uniform in respect of all classes of insurances, the surplus must be shown separately for the classes to which the different proportions relate.

## FORM J.

*Specimen policy reserve values and minimum surrender values under a policy for Rs. 1,000.*

| Number of premiums paid. | Age at entry 20. | | Age at entry 30. | | Age at entry 40. | | Age at entry 50. | |
|---|---|---|---|---|---|---|---|---|
| | Reserve value. | Minimum surrender value. | Reserve value. | Minimum surrender value. | Reserve value. | Minimum surrender value. | Reserve value. | Minimum surrender value. |
| 1. | | | | | | | | |
| 2. | | | | | | | | |
| 3. | | | | | | | | |
| 4. | | | | | | | | |
| 5. | | | | | | | | |
| 6. | | | | | | | | |
| 7. | | | | | | | | |
| 8. | | | | | | | | |
| 9. | | | | | | | | |
| 10. | | | | | | | | |
| 15. | | | | | | | | |
| 20. | | | | | | | | |

NOTE.—Items in this Form to be stated to the nearest rupee.

# THE FIFTH SCHEDULE.

(*See* section 13.)

*Regulations for preparing statements of business in force and requirements applicable to such statements.*

## PART I.

*Regulations.*

1. Statements prepared under this Schedule must be prepared, so far as practicable, in tabular form and must be identified by numbers and letters corresponding with those of the paragraphs of Part II of this Schedule.

2. Except with respect to rates of premium or contribution, items in statements prepared under this Schedule are to be shown to the nearest rupee.

3. Extra premium shown in the forms of Summary and Valuation prepared under the Fourth Schedule to this Act must not be included in statements prepared under this Schedule.

4. Every statement prepared under this Schedule shall be signed by the actuary making the investigation in connection with which it is prepared.

5. For the purposes of this Schedule the following expressions have the meanings hereby respectively assigned to them, namely:—

(*a*) "annual loading" means the provision made for future expenses and profits;

(*b*) "extra premiums" means a charge for any risk not provided for in the minimum contract premium;

(*c*) "net premiums" means the premiums taken credit for in the valuation in connection with which any statement is prepared; and

(*d*) "valuation date" means as respects any valuation the date as at which the valuation is made.

## PART II.

*Requirements for statements applicable to Life Insurance Business.*

The statements required to be prepared under this Part of this Schedule are as follows, namely:—

1. Statements, separately prepared in respect of policies with and without participation in profits, showing—

(*a*) as respects policies for the whole term of life, the rates of office premiums charged, in accordance with the published tables in use, for new policies giving the rates for decennial ages at entry from 20 to 70 inclusive; and

(*b*) as respects endowment insurance policies, the rates of office premiums charged, in accordance with the published tables in use, for new policies with original terms of ten, fifteen, twenty, thirty and forty years, giving the rates for decennial ages at entry from 20 to 40 inclusive, but excluding policies under which the age at maturity exceeds 60.

2. Statements, separately prepared in respect of policies with immediate profits, with deferred profits, with profits under discounted bonus systems, and without profits, showing in quinquennial groups—

(*a*) as respects policies for the whole term of life—

(*i*) the total amount assured (specifying sums assured and reversionary bonuses separately), grouped according to ages attained;

(*ii*) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable throughout life, and of the corresponding net premiums, grouped according to ages attained; and

(*iii*) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable for a limited number of years, and, either, the corresponding net premiums grouped in accordance with the grouping adopted for the purposes of the valuation, or, the annual loading reserved for the remaining duration of the policies, grouped according to ages attained;

(*b*) as respects endowment insurance policies—

(*i*) the total amount assured (specifying sums assured and reversionary bonuses separately), grouped in accordance with the grouping adopted for the purposes of the valuation; and

(*ii*) the amount per annum, after deducting abatements made by application of bonus, of office premiums payable, and of the corresponding net premiums, grouped in accordance with the grouping adopted for the purposes of the valuation:

Provided that—

(*a*) as respects endowment insurance policies which will reach maturity in less than five years, the information required by sub-paragraph (*b*) (*i*) of this paragraph must be given for each year instead of in quinquennial groups; and

(*b*) where the office premiums payable under policies for the whole term of life for a limited number of years, or the office premiums payable under endowment insurance policies or the corresponding net premiums, are grouped for the purposes of the valuation otherwise than according to the number of years' payments remaining to be made, or, where the sums assured under endowment insurance policies are grouped for the purposes of the valuation otherwise than according to the years in which the policies will mature for payment or in which they are assumed to mature if earlier than the true year, then, in any such case the valuation constants and an explanation of the method by which they are calculated must be given for each group, and in the case of the sums assured under endowment insurance policies a statement must also be given of the amount assured maturing for payment in each of the two years following the valuation date.

3. Statements as respects any policies in force under which premiums cease to be payable, whether permanently or temporarily, during disability arising from sickness or accident, showing the total amount of the office premiums payable.

4. Statements as respects immediate annuities on single lives for the whole term of life, separately prepared in respect of annuities on male and female lives, showing in quinquennial age groups the total amount of such annuities.

5. Statement as respects deferred annuities, separately prepared in respect of annuities on male and female lives, showing the specimen reserve values for annuities of one hundred rupees which will be produced on maturity on the basis of valuation adopted at ages in the case of male lives, 60 and 65, and in the case of female lives, 55 and 60, the said statements must show the specimen reserve values which will be produced under the table of annual premiums in use for new policies, and if under any other table of annual premiums in use for any other deferred annuity policies in force smaller reserve values will be produced, the like specimens of these must also be given.

6. Statements as respects any policies of insurance upon the lives of a group of persons, whereby sums assured are payable in respect of the several persons included in the group, showing the total claims paid since the date as at which the last statements were prepared under this Part of this Schedule or, where no such statements have been prepared, since the date on which the insurer began to carry on the class of business to which the statement relate, and the reserve for unexpired risks and outstanding claims.

## THE SIXTH SCHEDULE.

(*See* section 55.)

### *Rule as to the valuation of the Liabilities of an Insurer in Insolvency or Liquidation.*

The liabilities of an insurer in respect of current contracts effected in the course of life insurance business including annuity business, shall be calculated by the method and upon the basis to be determined by an actuary approved by the Court, and the actuary so approved shall, in determining as aforesaid, take into account—

(*a*) the purpose for which such valuation is to be made,

(*b*) the rate of interest and the rates of mortality and sickness to be used in valuation, and

(*c*) any special directions which may be given by the Court.

The liabilities of an insurer in respect of current policies other than life policies shall be such portion of the last premium paid as is proportionate to the unexpired portion of the policy in respect of which the premium was paid.

# THE MANOEUVRES FIELD FIRING AND ARTILLERY PRACTICE ACT, 1938.

## ACT NO. V OF 1938.

[*12th March, 1938*,

*An Act to provide facilities for military manoeuvres and for field firing and artillery practice.*

WHEREAS it is expedient to provide facilities for military manoeuvres and for field firing and artillery practice; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE MANOEUVRES, FIELD FIRING AND ARTILLERY PRACTICE ACT, 1938.

(2) It extends to the whole of British India.

## CHAPTER I.

### MANOEUVRES.

Power of Provincial Government to authorise manoeuvres.

2. (1) The Provincial Government may, by notification in the local official Gazette, authorise the execution of military manoeuvres over any area specified in the notification during a specified period not exceeding three months:

Provided that the same area or any part thereof shall not ordinarily be so specified more than once in any period of three years.

(2) The Provincial Government shall publish notice of its intention to issue a notification under sub-section (1) as early as possible in advance of the issue of the notification, and no such notification shall be issued until the expiry of three months from the date of the first publication of such notice in the local official Gazette.

(3) The notice required by sub-section (2) shall be given by publication in the local official Gazette and shall also be given throughout the area which it is proposed to specify in the notification by publication in the manner prescribed by rules made under section 13, and shall be repeated by like publication one month and one week as nearly as may be before the commencement of the manoeuvres.

Powers exercisable for purposes of manoeuvres.

3. (1) Where a notification under sub-section (1) of section 2 has been issued, such persons as are included in the military forces engaged in the manoeuvres may, within the specified limits and during the specified periods,—

(*a*) pass over, or encamp, construct military works of a temporary character, or execute military manoeuvres on, the area specified in the notification, and

(*b*) supply themselves with water from any source of water in such area:

Provided that nothing herein contained shall authorise the taking of water from any source of supply, whether belonging to a private owner or a public authority, of an amount in excess of the reasonable requirements of the military forces or of such amount as to curtail the supply ordinarily required by those entitled to the use of such water supply.

(2) The provisions of sub-section (1) shall not authorise entry on or interference with any well or tank held sacred by any religious community or any place of worship or ground attached thereto except for the legitimate purpose of offering prayers or any place or building reserved or used for the disposal of the dead, or any dwelling house or premises attached thereto or any

educational institution, factory, workshop or store or any premises used for the carrying on of any trade, business or manufacture or any garden or pleasure ground, or any ancient monument as defined in section 2 of the Ancient Monuments Preservation Act, 1904.

Duty of Officer Commanding to repair damage.

4. The Officer in Command of the military forces engaged in the manoeuvers shall cause all lands used under the powers conferred by this Chapter to be restored, as soon and as far as practicable, to their previous condition.

Right to compensation for damage caused by manoeuvres.

5. Where a notification issued under section 2 authorises the execution of military manoeuvres compensation shall be payable from the Defence Estimates for any damage to person or property or interference with rights or privileges arising from such manoeuvres including expenses reasonably incurred in protecting person, property, rights and privileges.

Method of assessing compensation.

6. (1) The Collector of the district in which any area utilised for the purpose of manoeuvres is situated shall depute one or more Revenue Officers to accompany the forces engaged in the manoeuvres for the purpose of determining the amount of any compensation payable under section 5.

(2) The Revenue Officer shall consider all claims for compensation under section 5 and determine, on local investigation and where possible after hearing the claimant, the amount of compensation, if any, which shall be awarded in each case; and shall disburse on the spot to the claimant the compensation so determined as payable.

(3) Any claimant, dissatisfied with a refusal of the Revenue Officer to award him compensation or with the amount of compensation awarded to him by the Revenue Officer, may, at any time within fifteen days from the communication to him of the decision of the Revenue Officer, give notice to the Revenue Officer of his intention to appeal against the decision.

(4) Where any such notice has been given, the Collecor of the district shall constitute a commission consisting of himself as chairman, a person nominated by the Officer Commanding the forces engaged in the manoeuvres and two persons nominated by the District Board, and the commission shall decide all appeals of which notice has been given,

(5) The commission may exercise its powers notwithstanding the absence of any member of the commission, and the chairman of the commission shall have a casting vote in the case of an equal division of opinion.

(6) The decision of the commission shall be final and no suit shall lie in any Civil Court in respect of any matter decided by the commission.

(7) No fee shall be charged in connection with any claim, notice, appeal, application or document filed before the Revenue Officer, Collector or the commission under this section.

Offences.

7. If within the area and during the period specified in a notification under sub-section (1) of section 2, any person—

(*a*) wilfully obstructs or interferes with the execution of the manoeuvres, or

(*b*) without due authority enters or remains in any camp, or

(*c*) without due authority interferes with any flag or mark or any apparatus used for the purposes of the manoeuvres,

he shall be punishable with fine which may extend to ten rupees.

## CHAPTER II.

### Field Firing and Artillery Practice.

Definitions.

8. In this Chapter—

(*a*) "field firing" includes air armament practice;

(*b*) "notified area" means an area defined in a notification issued under sub-section (1) of section 9.

Power of Provincial Government to authorise field firing and artillery practice.

9. (1) The Provincial Government may, by notification in the local official Gazette, define any area as an area within which for a specified term of years the carrying out periodically of field firing and artillery practice may be authorised.

(2) The Provincial Government may, by notification in the local official Gazette, authorise the carrying out of field firing and artillery practice throughout a notified area or any specified part thereof during any period or periods specified in the notification.

(3) Before any notification under sub-section (2) is issued, the Provincial Government shall publish notice of its intention to issue such notification as early as possible in advance of the issue of the notification, and no such notification shall be issued until the expiry of two months from the date of the first publication of the notice in the local official Gazette.

(4) The notice required by sub-section (3) shall be given by publication in the local official Gazette and shall also be given throughout the notified area by publication in some newspaper circulating in and in the language commonly understood in that area and by beat of drum and by affixation in all prominent places of copies of the said notice in the language of the locality and in such other manner as may be prescribed by rules made under section 13 and shall be repeated by like publication one week as nearly as may be before the commencement of the period or of each period specified in the notification:

Provided that the fact of the said beat of drum and affixation shall be verified in writing by one headman and two other literate inhabitants of the locality and provided further that such notice by the beat of drum shall be given seven and two days as nearly as may be before the commencement of such field firing and artillery practice.

Powers exercisable for purposes of field firing and artillery practice.

10. (1) Where a notification under sub-section (2) of section 9 has been issued, such persons as are included in the forces engaged in field firing or artillery practice may, within the notified area or specified part thereof during the specified period or periods,—

(*a*) carry out field firing and artillery practice with lethal missiles, and

(*b*) exercise, subject to the provisions of sections 3 and 4, any of the rights conferred by section 3 on forces engaged in military manoeuvres:

Provided that the provisions of sub-section (2) of section 3 shall not debar entry into, or interference with, any place specified in that sub-section, if it is situated in an area declared to be a danger zone under sub-section (2) of this section, to the extent that may be necessary to ensure the exclusion from it of persons and domestic animals:

Provided further that in the case of a dwelling house occupied by women adequate warning shall be given through a a local inhabitant and entry shall be effected after such warning in the presence of two respectable inhabitants of the locality.

(2) The Officer Commanding the forces engaged in any such practice may, within the notified area or specified part thereof, declare any area to be a danger zone, and thereupon the Collector shall, on application made to him by the Officer Commanding the forces engaged in the practice, prohibit the entry

into and secure the removal from such danger zone of all persons and domestic animals during the times when the discharge of lethal missiles is taking place or there is danger to life or health.

Compensation.

11. The provisions of sections 5 and 6 shall apply in the case of field firing and artillery practice as they apply in the case of military manoeuvres:

Provided that the compensation payable under this section shall include compensation for exclusion or removal from any place declared to be a danger zone of persons or domestic animals, such compensation to be disbursed at not less than the minimum rates prescribed by rules made under section 13 before the exclusion or removal is enforced, and shall also include compensation for any loss of employment or deterioration of crops resulting from any such exclusion or removal.

Offences.

12. If, during any period specified in a notification issued under sub-section (2) of section 9, any person within a notified area—

(*a*) wilfully obstructs or interferes with the carrying out of field firing or artillery practice, or

(*b*) without due authority enters or remains in any camp, or

(*c*) without due authority enters or remains in any area declared to be a danger zone at a time when entry thereto is prohibited, or

(*d*) without due authority interferes with any flag or mark or target or any apparatus used for the purposes of the practice,

he shall be punishable with fine which may extend to ten rupees.

## CHAPTER III.

### GENERAL.

Power to make rules.

13. The Provincial Government may, by notification in the local official Gazette, make rules—

(*a*) prescribing the manner in which the notices required by sub-section (2) of section 2 and sub-section (3) of section 9 shall be published in the areas concerned;

(*b*) regulating the use under this Act of land for manoeuvres or field firing and artillery practice in such manner as to secure the public against danger and to enable the manoeuvres or practice to be carried out without interference and with the minimum inconvenience to the inhabitants of the areas affected;

(*c*) regulating the procedure of the Revenue Officers and commissions referred to in section 6 in such manner as to secure due publicity regarding the method of making claims for compensation and preferring appeals from original awards of compensation, the expeditious settlement of claims and of appeals and the payment of compensation so far as possible direct to the claimants; and

(*d*) defining the principles to be followed by the Revenue Officers and commissions referred to in section 6 in assessing the amount of compensation to be awarded.

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## THE DESTRUCTIVE INSECTS AND PESTS (AMENDMENT) ACT, 1938.

### ACT NO. VI OF 1938.

[*12th March, 1938.*

*An Act further to amend the Destructive Insects and Pests Act, 1914, for certain purposes.*

WHEREAS it is expedient further to amend the Destructive Insects and Pests Act, 1914, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE DESTRUCTIVE INSECTS AND PESTS (AMENDMENT) ACT, 1938.

Amendment of long title and preamble, Act II of 1914.

2. In the long title and preamble of the Destructive Insects and Pests Act, 1914 (hereinafter referred to as the said Act), after the word "into" the words "and the transport from one province to another in" shall be inserted.

Amendment of section 2, Act II of 1914.

3. In clause (*a*) of section 2 of the said Act, for the words "and trees or bushes" the words "and all trees, bushes or plants" shall be substituted.

Amendment of section 3, Act II of 1914.

4. In section 3 of the said Act,—

(*a*) to sub-section (1) the words "or of insects generally or any class of insects" shall be added; and

(*b*) in sub-section (2), after the word "articles" the words "or any insect or class of insects" shall be inserted.

Insertion of new sections 4-A, 4-B, 4-C and 4-D in Act II of 1914.

5. After section 4 of the said Act the following sections shall be inserted, namely:—

Power of Central Government to regulate or prohibit transport from province to province of insects or articles likely to infect.

"4-A. The Central Government may, by notification in the Official Gazette, prohibit or regulate, subject to such conditions as the Central Government may impose, the export from a province or the transport from one province to another province in British India of any article or class of articles likely to cause infection to any crop or of insects generally or any class of insects.

Refusal to carry article of which transport is prohibited.

4-B. When a notification has been issued under section 4-A, then, notwithstanding any other law for the time being in force, the person responsible for the booking of goods or parcels at any railway station or inland steam vessel station,—

(*a*) where the notification prohibits export or transport, shall refuse to receive for carriage at, or to forward or knowingly allow to be carried on, the railway or inland steam vessel from that station anything, of which import or transport is prohibited, consigned to any place in British India outside the province in which such station is situate; and

(*b*) where the notification imposes conditions upon export or transport, shall so refuse, unless the consignor produces, or the thing consigned is accompanied by, a document or documents of the prescribed nature showing that those conditions are satisfied.

Application of section 4-B to articles exported to Indian States.

4-C. Where, by or under any law in force in the territories of any Indian State, the import into that State of any article likely to cause infection to any crop or of any insect has been prohibited, the Central Government may, by notification in the Official Gazette, declare that the provisions of section 4-B shall apply in respect of any such article or insect consigned from any place in British India to any place in that State:

Provided that such Indian State prohibits the export to British India of any article or insect or class of insects the import of which into British India has been prohibited by the Central Government.

Power of Central Government to make rules.

4-D. The Central Government may, by notification in the Official Gazette, make rules prescribing the nature of the documents which shall accompany any article or insect the export or transport whereof is subject to conditions imposed under section 4-A, or which shall be held by the consignor

or consignee thereof, the authorities which may issue such documents and the manner in which the documents shall be employed:

Provided that the said notification shall be placed, as soon as may be, on the table of both chambers of the Central Legislature."

Amendment of section 5, Act II of 1914.

6. In sub-section (1) of section 5 of the said Act, after the word "destruction" the words "of any insect or class of insects or" shall be inserted and after the word and figure "section 3" the words, figure and letter "or under section 4-A" shall be inserted.

Insertion of new section 5-A in Act II of 1914.

7. After section 5 of said Act the following section shall be inserted, namely:—

Penalties.

"5-A. Any person who knowingly exports any article or insect from a province or transports any article or insect from one province to another in British India in contravention of a notification issued under S. 4-A, or attempts so to export or transport any article or insect, or exports or attempts to export from British India to an Indian State any article or insect in respect of which a notification under section 4-C has been issued, and any person responsible for the booking of goods or parcels at a railway or inland steam vessel station who knowingly contravenes the provisions of section 4-B shall be punishable with fine which may extend to two hundred and fifty rupees and, upon any subsequent conviction, with fine which may extend to two thousand rupees."

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## THE CHILD MARRIAGE RESTRAINT (AMENDMENT) ACT, 1938.

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ACT NO. VII OF 1938.

[12th March, 1938.

*An Act to amend the Child Marriage Restraint Act, 1929.*

WHEREAS it is expedient to amend the Child Marriage Restraint Act, 1929; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CHILD MARRIAGE RESTRAINT (AMENDMENT) ACT, 1938.

Amendment of section 1, Act XIX of 1929.

2. To sub-section (2) of section 1 of the Child Marriage Restraint Act, 1929, the following shall be added, namely:—

"and applies also to—

(*a*) all British subjects and servants of the Crown in any part of India; and

(*b*) all British subjects who are domiciled in any part of India wherever they may be."

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## THE INDIAN FINANCE ACT, 1938.

[26th March, 1938.

*An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax.*

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of

postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1938.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Salt duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Governor-General in Council to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India be construed as if, for the year beginning on the 1st day of April, 1938, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

Inland postage rates.

3. For the year beginning on the 1st day of April, 1938, the Schedule contained in the Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income tax and super-tax.

4. (1) Income-tax for the year beginning on the 1st day of April, 1938, shall be charged at rates applicable to the total income of each assessee the same, and increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1937.

(2) The rates of super-tax for the year beginning on the 1st day of April, 1938, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the same rates, increased in each case by the same fraction of the amount of the rate, as for the year beginning on the 1st day of April, 1937.

(3) For the purposes of sub-section (1) "total income" means total income as determined in accordance with the provisions of the Indian Income-tax Act, 1922.

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## THE SCHEDULE.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 3.]

### "THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

[*See* section 7.]

| | |
|---|---|
| ***Letters.*** | |
| For a weight not exceeding one tola .. | One anna. |
| For every tola, or fraction thereof, exceeding one tola .. | Half an anna. |
| ***Postcards.*** | |
| Single .. .. .. | Nine pies. |
| Reply .. .. .. | One and a half annas. |
| ***Book, Pattern and Sample Packets.*** | |
| For the first two and a half tolas or fraction thereof .. | Six pies. |
| For every additional two and a half tolas, or fraction thereof, in excess of two and a half tolas .. .. | Three pies. |
| ***Registered Newspapers.*** | |
| For a weight not exceeding ten tolas .. | Quarter of an anna. |
| For a weight exceeding ten tolas and not exceeding twenty tolas .. | Half an anna. |
| For every twenty tolas, or fraction thereof, exceeding twenty tolas. | Half an anna. |
| ***Parcels.*** | |
| For a weight not exceeding forty tolas .. | Four annas. |
| For every forty tolas, or fraction thereof, exceeding forty tolas .. | Four annas." |

# THE INDIAN TEA CONTROL ACT, 1938.

## ACT NO. VIII OF 1938.

[*28th March, 1938.*

*An act to provide for the control of the export of tea from, and for the control of the extension of the cultivation of tea in, British India.*

WHEREAS it is expedient, for the purpose of implementing the agreement which the Central Government has entered into with the Governments of Ceylon and the Netherlands India to give effect to the provisions of the International Agreement made between associations representing the tea growers of India, Ceylon and the Netherlands India, to provide for the control of the export of tea from, and for the control of the extension of the cultivation of tea in, British India; It is hereby enacted as follows:—

Short title, extent, commencement and duration.

1. (1) This Act may be called THE INDIAN TEA CONTROL ACT, 1938.

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of April, 1938.

(4) It shall remain in force only up to the 31st day of March, 1943.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "Committee" means the Indian Tea Licensing Committee constituted under this Act;

(*b*) "Customs-collector" means a Customs-collector as defined in clause (*c*) of section 3 of the Sea Customs Act, 1878, for the purposes of that Act, or of that Act, as applied to the import and export of goods by air, or a Collector of Land Customs as defined in clause (*c*) of section 2 of the Land Customs Act, 1924, as the case may be;

(*c*) "export" means to take out of British India by land, sea or air to any place outside India other than the French and Portuguese Settlements bounded by India or a country notified in this behalf by the Central Government by notification in the official Gazette;

(*d*) "Indian export allotment" means the total quantity of tea which may be exported during any one financial year;

(*e*) "owner" includes any agent of an owner;

(*f*) "prescribed" means prescribed by rules made under this Act;

(*g*) "standard export figure" means a quantity of 383,242,916 pounds *avoirdupois* of tea;

(*h*) "tea" means—

(i) in Chapter III and Chapter IV, the plant *Camellia Thea* (Linn.), and

(ii) elsewhere, the commodity known as tea made from the leaves of the plant *Camellia Thea* (Linn.) including green tea but excluding tea waste; and

(*i*) "tea seed" includes seeds, roots, stumps, cuttings, buds, and any living portion of the plant *Camellia Thea* (Linn.), which may be used to propagate that plant.

## CHAPTER I.

### THE INDIAN TEA LICENSING COMMITTEE.

Constitution of the Indian Tea Licensing Committee.

3. The Central Government shall constitute a Committee, to be called the Indian Tea Licensing Committee, consisting of the following members:—

(*a*) one member to be nominated by each of the following bodies, namely:—

(*i*) the Indian Tea Association, Calcutta,

(*ii*) the Assam Branch of that Association,

(*iii*) the Surma Valley Branch of that Association,

(*iv*) the Dooars Planters Association,

(*v*) the Indian Tea Planters Association, Jalpaiguri, and the Terai Indian Planters Association, Terai, acting together, and

(*vi*) the Darjeeling Planters Association and the Terai Planters Association, acting together;

(*b*) two members to be elected in the prescribed manner by and from among Indian owners of tea estates to which export quotas were allotted under the Indian Tea Control Act, 1933, for the financial year beginning on the 1st day of April, 1937, one to represent the Indian Tea Planters of the Assam Valley and one to represent the Indian Tea Planters of the Surma Valley, the Indian State of Tripura, the Chittagong Hill Tracts and the District of Chittagong;

(*c*) three members to be nominated by the United Planters Association of Southern India, one to represent tea estates in British India, and one to represent tea estates in Indian States;

(*d*) one member to be nominated by the Government of the Indian State of Travancore to represent the tea estates in that State;

(*e*) one member to be elected in the prescribed manner by and from among Indian owners of tea estates to represent tea estates in Southern India excluding Travancore owned by Indians; and

(*f*) one member to be elected by owners of tea gardens of Kangra, Dehra Dun, Kumaon, Behar and other unrepresented Tea Estates.

(2) Within three months after the commencement of this Act, the Central Government shall publish in the official Gazette the names of all members of the Committee, and thereupon the Committee shall be deemed to be constituted.

(3) Until the Committee is constituted as provided in sub-section (2), the Indian Tea Licensing Committee constituted under the Indian Tea Control Act, 1933, shall be deemed to be the Committee constituted under this section.

Vacancies.

4. (1) If any authority or body fails to make within two months any nomination or election which it is entitled to make under section 3, the Central Government may itself nominate a member to fill the vacancy.

(2) Where a member of the Committee dies, resigns, ceases to reside in India or becomes incapable of acting, the Central Government may, on the recommendation of the authority or body which is entitled to make the first nomination or election under section 3, or where such recommendation is not made within two months, then on its own initiative, nominate a person to fill the vacancy.

(3) No act done by the Committee shall be questioned on the ground merely of the existence of any vacancy in or any defect in the constitution of the Committee.

Sub-committees and executive officers.

5. The Committee shall elect a chairman from amongst its members, and may appoint such sub-committees and executive officers as may be necessary for the efficient performance of the duties imposed upon it by this Act.

Power to make bye-laws.

6. (1) The Committee may make by-laws consistent with this Act and with the rules made thereunder for all or any of the following matters, namely:—

(*a*) the regulation of the procedure to be followed at meetings of the Committee;

(*b*) the appointment of sub-committees;

(*c*) the delegation to sub-committees, members or officers of the Committee of any of the powers of the Committee under this Act;

(*d*) the determination of the travelling allowances of the members or officers of the Committee or of the members of a sub-committee;

(*e*) the appointment, promotion and dismissal of officers, assessors and servants of the Committee, and the creation and abolition of appointments of such officers, assessors and servants;

(*f*) the regulation of the grant of pay and leave to such officers, assessors and servants; and

(*g*) any other matter in respect of which by-laws may be made under this Act or the rules made thereunder.

(2) All by-laws made under this section shall be subject to the previous sanction of the Central Government.

Central Government's power of control.

7. (1) Save in respect of proceedings and orders under sections 28, 29 and 30, all acts of the Committee shall be subject to the control of the Central Government which may cancel, suspend or modify as it thinks fit any such act.

(2) Without prejudice to the generality of the foregoing provision, any person aggrieved by any order of the Committee under section 14 may appeal to either the Central Government or the High Court of the Province within which the tea estate is situated within sixty days from the date of such order:

Provided that an appeal preferred to the Central Government or the High Court shall bar an appeal against the same order to the other.

(3) The records of the Committee shall be open to inspection at all reasonable times by any officer authorised in this behalf by the Central Government.

(4) Subject to rules framed under the Act every owner of a tea estate to whom a quota is allotted shall be entitled to inspect the records of the Committee and on payment of the prescribed fee shall also be entitled to obtain copies of any proceedings or orders of the Committee.

Keeping and auditing of accounts.

8. (1) The Committee shall publish an annual report and shall keep accounts of all fees received by it under this Act and of the manner in which they are expended and shall also publish a summary of the accounts along with the annual report.

(2) Such accounts shall be examined and audited annually by auditors appointed in this behalf by the Central Government, and such auditors shall have power to disallow any item which has been, in their opinion, expended otherwise than in pursuance of the purposes of this Act.

(3) If any item is disallowed under sub-section (2), an appeal shall lie to the Central Government whose decision shall be final.

Dissolution of the Committee.

9. (1) The Central Government may, by notification in the official Gazette, declare the Committee to be dissolved, and on the date of the publication of any such notification the Committee shall stand dissolved and this Act shall be deemed to be repealed.

(2) When the Committee is dissolved either under this section or by the expiry of this Act, the unexpended balance of fees received by the Committee under this Act shall lapse to the Central Government.

Power to make rules.

10. The Central Government may, by notification in the official Gazette, make rules—

(*a*) providing for the conduct of the elections referred to in clauses (*b*) and (*e*) of sub-section (1) of section 3;

(*b*) providing for the establishment and maintenance of offices by the Committee;

(*c*) providing for the conduct of business by the Committee and determining the number of members which shall form a quorum at meetings;

(*d*) providing for the maintenance by the Committee of a record of all business transacted and for submission of copies thereof to the Central Government;

(*e*) regulating the preparation of annual estimates of receipts and expenditure;

(*f*) regulating the keeping of accounts of receipts and expenditure;

(*g*) determining the custody in which the current account of the Committee shall be kept, and the bank or banks at which surplus money at the credit of the Committee may be deposited at interest;

(*h*) regulating the term of office of members of the Committee and the circumstances in which and the authority by which members may be removed; and

(*i*) generally, to carry out the provisions of this Chapter.

## CHAPTER II.

### CONTROL OVER THE EXPORT OF TEA.

Limitation of application of Chapter.

11. Nothing in this Chapter shall apply to tea—

(*a*) proved to the satisfaction of the Customs-collector to have been imported into British India from any port outside India, or

(*b*) shipped as stores on board any vessel, in such quantity as the Customs-collector considers reasonable having regard to the number of the crew and passengers and the length of the voyage on which the vessel is about to depart, or

(*c*) exported by post in packages not exceeding one pound *avoirdupois* in weight.

Control of export of tea and tea seed.

12. (1) No tea shall be exported unless covered by a licence issued by or on behalf of the Committee.

(2) No tea shall be taken by land, sea or air out of British India to any of the French or Portuguese Settlements bounded by India unless covered by a permit issued by or on behalf of the Committee.

(3) No tea seed shall be exported unless covered by a permit issued by or on behalf of the Central Government.

Indian export allotment.

13. The Indian export allotment for each financial year during the operation of this Act shall be declared by the Central Government by notification in the official Gazette after consulting the Committee and paying due regard to all interests concerned and shall be expressed as a number of pounds *avoirdupois* equivalent to a stated percentage of the standard export figure.

Export quotas and crop basis.

14. (1) Any tea estate or any sub-division of a tea estate to which an export quota was allotted under the Indian Tea Control Act, 1933, and any tea estate which the Central Government may within one year from the commencement of this Act authorise to apply for the allotment of an export quota under this Act, shall on application made to the Committee for the allotment to the estate of an export quota have the right, subject to the provisions of this Act, to receive an export quota.

(2) The export quota of a tea estate, that is, the total quantity of tea which may be exported by the owner of the tea estate during the financial year, shall be an amount bearing to the crop basis of the estate as determined by the Committee in accordance with the principles set forth in the Schedule the same proportion as the Indian export allotment for the financial year in question bears to the total of the crop basis of all tea estates in India for that year.

(3) The crop basis of a tea estate may be re-determined by the Committee if—

(*a*) application is made by the owner of the estate in this behalf before the 30th day of September, 1938, and

(*b*) the Committee is satisfied that there exist grounds of special hardship arising out of circumstances not under the control of the owner or of any previous owner of the estate and relating to conditions existing prior to the 1st day of April, 1933.

(4) The total of all export quotas allotted to tea estates for any financial year shall not exceed the Indian export allotment for that year.

Right to export licences.

**15.** (1) The owner of a tea estate to which an export quota has been allotted for any financial year shall have a right to obtain at any time during that year export licences to cover the export of tea up to the amount of the unexhausted balance of the quota, that is, up to the amount of the quota less the amount for which export licences have already been issued against it.

(2) The right of the owner of a tea estate under this section may be transferred in whole or in part, and, subject to proof of the transfer to the satisfaction of the Committee and to the completion of the prescribed documents to enable the Committee to give effect to the transfer, the transferee shall have a right to obtain export licences up to the amount covered by the transfer or up to the amount of the unexhausted balance of the quota, whichever may be less.

(3) Subject to the conditions specified in sub-section (2), any transferee referred to in that sub-section may again transfer the whole or any part of his rights to the owner of a tea estate, but not to any other person.

(4) Nothing in sub-section (3) shall operate to restrict the issue of licences for the export of tea expressed to be sold with export rights.

Grant of export licences.

**16.** (1) The owner of any tea estate to which an export quota has been allotted or any person to whom he has transferred his rights may at any time before the 21st day of March of the financial year to which the quota relates apply in writing to the Committee for an export licence covering a stated quantity of tea.

(2) If the unexhausted balance of the quota is sufficient to cover the stated quantity, the Committee shall on receipt of the requisite fee issue an export licence covering the stated quantity.

(3) Every licence shall be in duplicate in the prescribed form, shall bear the date of its issue and shall be valid up to the end of the financial year in which it is issued:

Provided that save as provided in section 17 the Committee shall not date or issue any export licence after the end of the financial year in which the application for it was made.

Special export licences.

**17.** (1) Where the tea covered by an export licence issued under the Indian Tea Control Act, 1933, has not been exported before the 31st day of March, 1938, the person to whom the licence was granted may, before the 14th day of April, 1938, forward the licence to the Committee and submit therewith an application for a special export licence covering the same quantity of tea, and the Committee shall, on receipt of the requisite fee, if any, issue a special export licence accordingly.

(2) Where tea, in respect of which an export licence has been or could have been granted under this Act, has not been exported before the end of the financial year in which the licence was or could have been issued, the person to whom the licence was or could have been granted may, before the 14th day of April of the following financial year, forward an application to the Committee for a special export licence covering the same quantity of tea, and the Committee shall, on receipt of the requisite fee, if any, issue a special export licence accordingly.

(3) A special export licence shall be in duplicate in the prescribed form, shall bear the date of its issue, and shall be valid in the case of a special export licence issued in the year 1938 up to the 30th day of June of that year and in the case of a special export licence issued in any subsequent year up to the 31st day of May of the year in which it was issued.

(4) The quantity of tea covered by a special export licence shall be accounted for against the export quota of the year in which the original licence was or could have been issued under this Act or under the Indian Tea Control Act, 1933, as the case may be.

Committee to maintain accounts of quotas.

18. (1) The Committee shall maintain an account of every export quota showing, in addition to such other particulars as the Committee may think fit, the licences issued against it and the unexhausted balance.

(2) Any owner of a tea estate shall be entitled, on payment of the requisite fee, to a copy of the account relating to his quota, certified in the manner laid down in the by-laws.

Tea for export to be covered by licence or permit.

19. (1) No consignment of tea or tea seed shall be shipped or waterborne to be shipped for export or shall be exported until the owner has delivered to the Customs-collector a valid export licence or special export licence in duplicate or a permit issued by or on behalf of the Central Government covering the quantity to be shipped.

(2) No consignment of tea or tea seed shall be shipped or waterborne to be shipped for carriage to any of the French or Portuguese Settlements bounded by India until the owner has delivered to the Customs-collector a permit issued by or on behalf of the Committee or issued by or on behalf of the Central Government, as the case may be, covering the quantity to be shipped.

(3) No permit for the passage of any tea by land into any of the French or Portuguese Settlements bounded by India shall be granted under sub-section (1) of section 5 of the Land Customs Act, 1924, unless the application for such permit is accompanied by a permit granted in this behalf by the Committee covering the quantity to be passed.

Power of Committee to call for returns.

20. (1) The Committee may serve by post a notice upon the owner of any tea estate or upon his manager, requiring him to furnish, within such period not being less than thirty days as it may specify in the notice, such returns relating to the production, sale and export of tea produced on the estate, or to any other matter as it may deem necessary to enable it to discharge its duties under this Chapter.

(2) Where any return required under sub-section (1) in respect of any tea estate is not furnished within the period specified in the notice, the Committee may refuse to allot a quota to that estate under section 14, or, where a quota has already been allotted, may cancel the unexhausted balance of that quota and refuse to issue any further export licences under section 16 against that quota or to recognise or give effect to any transfer under section 15.

Power of Committee to require evidence of ownership.

21. (1) The Committee may serve by post a notice upon any person claiming to be the owner of any tea estate or upon his agent or manager or upon any person claiming to be the agent or the manager of the owner of any tea estate requiring him to furnish, within such period as may be specified in the notice or within such extended period as the Committee may allow, such documentary or other evidence as may be required to prove to the satisfaction of the Committee that such person is the owner of such tea estate or is the agent or manager of the owner of a tea estate, as the case may be.

(2) Where any person fails to comply with the requirements of a notice served on him under sub-section (1) or where the evidence furnished by such person is insufficient to prove to the satisfaction of the Committee that such person is the owner of the tea estate of which he claims to be the owner or is the agent or manager of the owner of a tea estate, as the case may be, the Committee may refuse to issue to such person or to his agent or manager any export licences against the quota allotted to such tea estate.

Fees.

22. (1) The Committee may charge and collect the following fees, namely:—

(*a*) a licence fee for every export licence or special export licence or permit issued by it, at such rates, not exceeding one rupee per thousand pounds of tea or part thereof covered by the licence or permit, as the Central Government may, on the recommendation of the Committee by notification in the official Gazette, fix in this behalf;

(*b*) a fee, not to exceed eight annas per acre of the area concerned, on any application under sub-section (3) of section 14 for re-determination of crop basis; and

(*c*) copying fees for certified copies of accounts of quotas, at the rate of one rupee per copy:

Provided that the owner of any tea estate to which a quota has been allotted under section 14 may make, or the Committee may require him to make, a consolidated payment of export licence fees at the rate fixed under clause (*a*) to cover the whole of the quota.

(2) The Committee shall apply the fees collected by it under this section to the meeting of expenses incurred by it in pursuance of the purposes of this Act, and, with the previous sanction of the Central Government, to the payment of a contribution towards the maintenance of any international committee established in furtherance of the said purposes in or by tea producing countries generally.

Power to make rules.

23. The Central Government may, by notification in the official Gazette, make rules—

(*a*) prescribing all matters requiring to be prescribed for the purposes of the Schedule;

(*b*) regulating the grant of permits for the carriage of tea to the French and Portuguese Settlements;

(*c*) prescribing the documents referred to in sub-section (2) of section 15;

(*d*) prescribing the form of export licences and special export licences and permits; and

(*e*) generally to carry out the purposes of this Chapter.

Bar of jurisdiction.

24. No quota fixed, no order granting or refusing to grant any licence or permit, and no other act done by the Committee under this Chapter shall be called in question in any Court except the High Court under the provisions of sub-section (2) of section 7 of this Act.

Export of tea produced in Indian States.

25. Where legislation enacted in any Indian State has made provision in pursuance of the agreement implemented by and in consonance with the provisions contained in this Act for the control of the export of tea from and for the control of the extension of the cultivation of tea in the State, the Committee shall issue export licences, special export licenses and permits for the export or carriage out of British India of tea produced in any such State in the same manner and subject to the same incidents as such licences or permits are issued in respect of tea produced in British India.

## CHAPTER III.

### CONTROL OVER THE EXTENSION OF TEA CULTIVATION.

Method of control of extension of tea cultivation.

26. So long as this Act remains in force, no one shall plant tea in any land which was not planted with tea on the 31st day of March, 1938, save in pursuance of a written permission granted by or on behalf of the Committee:

Provided that this section shall apply to the replacing of tea areas by planting new areas, but nothing in this section shall prohibit the infilling of or supplying of vacancies on land planted with tea at the 31st day of March, 1933, or the replanting of tea upon—

(*a*) land planted with tea at the 31st day of March, 1933, from which the original bushes have been uprooted, or

(*b*) land planted with tea at the 31st day of March, 1931, from which the original bushes have been uprooted.

Limitations to the extension of tea cultivation.

27. (1) Subject to the provisions of section 29 and section 30, the total area of land in British India, in respect of which the permissions referred to in section 26 may be granted, shall not exceed one-half of one per cent. of the total area of the land planted with tea in British India on the 31st day of March, 1938.

(2) Subject to the provisions of section 29 and section 30, the total area of land in any Province, in respect of which such permissions may be granted, shall be determined by the Committee and shall be as near as may be one-half of one per cent. of the total area in the Province which was planted with tea on the 31st day of March, 1938.

(3) The Committee shall publish the total areas so determined for the various Provinces by notification in the official Gazette of the Central Government as soon as may be after the commencement of this Act.

(4) The Committee shall grant permission for planting new areas to the tea estates in accordance with rules to be prescribed upto a total area in each province as may be determined under sub-clause (3), provided that permission shall be granted to extend an existing area planted with tea only to a tea estate of which the total existing area planted with tea does not exceed 300 acres where the estate is owned by a limited liability company, or 150 acres where it is owned by any individual proprietor or proprietors:

Provided that the Committee shall also be empowered to grant extensions for the Tocklai and Nellakotta experimental stations.

Grant of permission to plant tea.

28. (1) Applications for permission to plant tea on any land not planted with tea on the 31st day of March, 1938, shall be made to the Committee not later than six months from the commencement of this Act and shall contain a clear statement of all special circumstances justifying the application.

(2) Subject to the limits laid down in section 27, the Committee may grant or refuse the permission applied for or may grant it in part only, or may call for further information from the applicant.

(3) No order by the Committee under sub-section (2) shall be called in question by any Court.

Grant of permission to plant tea in special circumstances.

29. (1) Where any land which was on the 31st day of March, 1933, planted with tea—

(a) has since become wholly incapable of carrying tea through subsidence, flood, erosion, earth-quake or other irresistible superhuman cause, or

(b) has since been compulsorily acquired under the provisions of the Land Acquisition Act, 1894, or of any other law for the time being in force and no longer carries tea,

the owner of the tea estate in which such land was situated may apply to the Committee for permission to plant tea on land not planted with tea.

(2) Upon such application being made and upon proof to the satisfaction of the Committee that the applicant is entitled to the benefit of sub-section (1), the Committee may grant permission to plant tea on land not planted with tea:

Provided that the area of land, in respect of which such permission is granted, shall be within the area of the same tea estate and shall not exceed in extent the area of the land incapable of carrying tea or compulsorily acquired, as the case may be.

(3) All areas of land in respect of which permission to plant tea is granted under this section shall be excluded when computing for the purposes of section 27 the total area of land in respect of which the permissions referred to in section 26 may be granted.

Tea nurseries.

30. (1) Subject to the provisions of sub-section (4), the owner of a tea estate may establish nurseries on land not previously planted with tea for the growing of plants intended for in-filling or supplying vacancies or for replanting land planted with tea within the area of the estate or for any other purpose approved by the Committee:

Provided that the total area utilised for nurseries in British India shall not upon the 31st day of March, 1943, exceed the area so utilised in British India on the 31st day of March, 1933.

(2) All areas of land utilised for nurseries in accordance with this section shall be excluded when computing for the purposes of section 27 the total area of land in respect of which the permissions referred to in section 26 may be granted.

(3) The Committee may at any time serve by post a notice upon the owner of any tea estate or upon his manager requiring him to furnish within such period not being less than thirty days as may be specified in the notice such returns relating to the area of the land utilised for nurseries as it may deem necessary.

(4) If any return required under sub-section (3) is not furnished to the Committee within the period specified in the notice or if in the opinion of the Committee the total area of the land utilised for nurseries is excessive, the Committee may make such restrictive or other order as it deems necessary and in particular may order the uprooting of any bushes planted on any such land.

Appeal to Provincial Government.

31. (1) Any applicant aggrieved by an order of the Committee under section 28, section 29 or section 30 may appeal to the Provincial Government within sixty days from the date thereof and the Provincial Government may cancel, modify or suspend any such order.

(2) The records of the Committee relating to proceedings under this Chapter shall be open to inspection at all reasonable times by any officer authorised in this behalf by the Provincial Government.

Power of the Committee to call for returns and to inspect.

32. (1) The Committee may at any time serve by post a notice upon the owner of any tea estate or upon his manager requiring him to furnish within such period not being less than thirty days as may be specified in the notice such returns relating to the cultivation of tea on the estate as it may deem necessary.

(2) Any member of the Committee and any officer of the Committee or person authorised by it in this behalf may at any reasonable time enter upon and inspect the lands of any tea estate and may require the owner of the estate to produce for inspection any records of the estate in his control or custody relating to the cultivation of tea on the estate.

(3) Where any return required under sub-section (1) in respect of any tea estate is not furnished to the Committee within the period specified in the notice, the Committee may refuse to grant any permission under section 28 to plant tea on that estate.

## CHAPTER IV.

### PENALTIES AND PROCEDURE.

Penalty for illicit export.

33. A breach of the provisions of sub-section (1) or sub-section (2) of section 19 shall be punishable as if it were an offence under Item No. 8 of section 167 of the Sea Customs Act, 1878, and the provisions of section 168 and of Chapter XVII of that Act shall apply accordingly.

Penalty for making false return.

34. Any owner of a tea estate, or his agent or manager who has furnished any return under sub-section (1) of section 20, or under sub-section (3) of section 30, or under sub-section (1) of section 32, containing any particular which is false and which he knew to be false or did not believe to be true, shall be punishable with fine which may extend to one thousand rupees.

Penalty for obstructing inspection of tea estate.

35. Whoever obstructs any member or officer of the Committee or any person authorised by the Committee, while such member, officer or person is entering upon or inspecting the lands of any tea estate under sub-section (2) of section 32, and whoever, having control over or custody of any records of a tea estate relating to the cultivation of tea on that estate, refuses or fails to produce such records when required by a member or officer of the Committee or by a person authorised by the Committee under that sub-section, shall be punishable with fine which may extend to one thousand rupees.

Penalty for illicit cultivation.

36. (1) Whoever knowingly plants tea or causes tea to be planted in any land in contravention of section 26 shall be punishable with fine which may extend to one thousand rupees for the first offence, and with fine which may extend to five thousand rupees for any subsequent offence.

(2) Whoever uses any land in contravention of any order made by the Committee under section 30, or fails to comply with any order made by the Committee under sub-section (4) of section 30, shall be punishable with fine which may extend to one thousand rupees.

Removal of tea planted without permission.

37. Where any person has been convicted of any offence under section 36, the convicting Court may direct that the tea in respect of which the offence was committed shall be removed from the land within a specified time, and, in the event of the order not being duly complied with, may cause the tea to be removed and may recover the cost from the person convicted as if it were arrears of land revenue due on the tea estate on which the offence was committed.

38. (1) No Magistrate other than a Magistrate of the first class shall take cognisance of an offence under section 34, section 35 or section 36, and such Magistrate may take cognisance of an offence only upon complaint made by a person authorised by the Committee and with the previous sanction of the Central Government, where the offence is that of furnishing a false return under sub-section (1) of section 20, and of the Provincial Government in any other case.

Trial of offences under sections 34, 35 and 36.

(2) The Committee shall be responsible for the conduct of all prosecutions of offences under section 34, section 35 and section 36.

## CHAPTER V.

### SAVINGS.

39. Notwithstanding the expiry of the Indian Tea Control Act, 1933, and nothwithstanding the provisions of sub-section (2) of section 9 of that Act,—

Savings.

(*a*) the unexpended balance of fees received by the Indian Tea Licensing Committee constituted under that Act shall not lapse to Government but shall he transferred to the Indian Tea Licensing Committee as constituted under section 3 of this Act,

(*b*) until provision is otherwise made under the corresponding provisions of this Act, all fees fixed, all licences and permits issued and all quotas allotted under the Indian Tea Control Act, 1933, shall, unless inconsistent with the provisions of this Act, be deemed to have been fixed, issued or allotted under this Act; and

(*c*) any offence punishable under the Indian Tea Control Act, 1933, shall be punishable and may be dealt with as if it were an offence punishable under the corresponding provision of this Act,

and anything done before the 31st day of March, 1938, by the Indian Tea Licensing Committee constituted under the Indian Tea Control Act, 1933, with a view to the allotment to tea estates of export quotas under and in accordance with this Act, shall, so long as it is not inconsistent with any of the provisions of this Act, be as valid as if it had been done after this Act came into force.

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## THE SCHEDULE.

(*See* section 14.)

Crop Basis mentioned in section 14 (2) of the Act will include the following:—

(1) The Crop Basis of a tea estate for each financial year shall on and from the 1st April, 1938, be the crop basis which was ascertained for such tea estate for the financial year 1937-38, or the highest figure fixed for any year after investigation by the Committee, whichever be higher, in accordance with the rules under the Indian Tea Control Act, 1933, with the addition of allowances for special hardship determined under rules 4 and 5 framed under section 23 of the Indian Tea Control Act, 1933.

(2) Allowances for Young areas, *i.e.*, tea planted from 1st January, 1926, onwards to be added automatically in accordance with scales that may be fixed for different localities in the prescribed manner.

(3) Allowances for low producing areas as may be determined in the prescribed manner.

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## THE WORKMEN'S COMPENSATION (AMENDMENT) ACT, 1938.

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### ACT No. IX OF 1938.

[*5th April*, 1938.

*An Act further to amend the Workmen's Compensation Act, 1923, for certain purposes.*

WHEREAS it is expedient further to amend the Workmen's Compensation Act, 1923, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE WORKMEN'S COMPENSATION (AMENDMENT) ACT, 1938.

Amendment of section 2, Act VIII of 1923.

2. In clause (*d*) of sub-section (1) of section 2 of the Workmen's Compensation Act, 1923 (hereinafter referred to as the said Act),—

(*a*) in sub-clause (*i*), for the word "wife" the word "widow" shall be substituted;

(*b*) in sub-clause (*ii*), for the word "husband" the word "widower' shall be substituted; and

(*c*) in sub-clause (*ii*), after the words "a minor child of a deceased son," the words and comma "a minor child of a deceased daughter where no parent of the child is alive," shall be inserted.

Amendment of section 3, Act VIII of 1923.

3. In sub-section (2) of section 3 of the said Act,—

(*a*) for the words beginning "If a workman" and ending "disease of anthrax" the following words shall be substituted, namely:—

"If a workman employed in any employment specified in Part A of Schedule III contracts any disease specified therein as an occupational disease peculiar to that employment";

(*b*) after the words "any employment specified in" the words "Part B of" shall be inserted; and

(*c*) at the end of the *Explanation*, the words "in the same kind of employment" shall be added.

Amendment of section 5, Act VIII of 1923.

4. In section 5 of the said Act, the brackets and figure "(1)" shall be omitted; and in the *Explanation* for the word "sub-section" the word "section" shall be substituted.

Amendment of section 10, Act VIII of 1923.

5. In section 10 of the said Act,—

(*a*) in sub-section (1)—

(1) for the words beginning "No proceedings for the recovery of compensation" and ending "within six months from the date of death" the following shall be substituted, namely:—

"No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within one year of the occurrence of the accident or, in case of death, within one year from the date of death";

(2) in the second proviso—

(*i*) for the words "maintenance of proceedings" the words "entertainment of a claim" shall be substituted;

(*ii*) in clause (*a*), for the word "made" the word "preferred" shall be substituted; and

(*iii*) in clause (*b*), after the word "employer" the words "or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed" shall be inserted;

and

(3) in the third proviso, for the word "admit" the word "entertain" shall be substituted and for the words "instituted" and "institute" respectively the words "preferred" and "prefer" shall be substituted;

and

(*b*) in sub-section (2) the word "directly" shall be omitted.

Amendment of section 11, Act VIII of 1923.

6. In sub-section (6) of section 11 of the said Act,—

(*a*) for the words "if it is thereafter proved that the workman has not been regularly attended by a qualified medical practitioner and that such refusal, failure or disregard was unreasonable" the following shall be substituted, namely:—

"if it is proved that the workman has not thereafter been regularly attended by a qualified medical practitioner or having been so attended has deliberately failed to follow his instructions and that such refusal, disregard or failure was unreasonable";

and

(*b*) after the words "qualified medical practitioner", where they occur for the last time, the words "whose instructions he had followed" shall be inserted.

Amendment of section 15, Act VIII of 1923.

7. Sub-section (4) of section 15 of the said Act shall be omitted and sub-section (5) of that section shall be re-numbered as sub-section (4).

Amendment of section 18, Act VIII of 1923.

8. In section 18 of the said Act, for the words and figures "a certificate granted in respect of such person under section 7 or section 8 of the Indian Factories Act, 1911" the words and figures "a valid certificate granted in respect of such person under section 12 or section 52 of the Factories Act, 1934" shall be substituted.

Amendment of section 21, Act VIII of 1923.

9. In sub-section (2) of section 21 of the said Act,—

(*a*) for the words "by any party to any proceedings pending before him that such matter" the words "that any matter arising out of any proceedings pending before him" shall be substituted; and

(*b*) before the proviso the following proviso shall be inserted, namely:—

"Provided that the Commissioner shall not where any party to the proceedings has appeared before him, make any order of transfer relating to the distribution among dependants of a lump sum without giving such party an opportunity of being heard:",

and in the existing proviso, after the word "Provided" the word "further" shall be inserted.

Amendment of section 24, Act VIII of 1923.

10. In section 24 of the said Act, for the words "other person authorised in writing by such person" the following shall be substituted, namely:—

" by an official of an Insurance Company or registered Trade Union authorised in writing by such person or, with the permission of the Commissioner, by any other person so authorised".

Amendment of Schedule II, Act VIII of 1923.

11. In Schedule II to the said Act,—

(*a*) in clause (*i*), for the words "mechanically propelled vehicles" the words "a lift or a vehicle propelled by steam or other mechanical power or by electricity" shall be substituted;

(*b*) in clause (*ii*), for the words, brackets and figures "clause (4) of section 2 of the Indian Factories Act, 1911" the words, brackets, letter and figures "clause (*g*) of section 2 of the Factories Act, 1934" shall be substituted;

(*c*) after clause (*xxii*) the following clauses shall be inserted, namely:—

"(*xxiii*) employed in the tapping of palm-trees or the felling or logging of trees, or the transport of timber by inland waters, or the control or extinguishing of forest fires; or

(*xxiv*) employed in operations for the catching or hunting of elephants or other wild animals; or"; and

(*d*) the existing clause (*xxiii*) shall be re-numbered as clause (*xxv*) and after that clause as so re-numbered the following word and clauses shall be inserted, namely:—

"or

(*xxvi*) employed in the handling or transport of goods in, or within the precincts of,—

(*a*) any warehouse or other place in which goods are stored, and in which on any one day of the preceding twelve months ten or more persons have been so employed, or

(*b*) any market in which on any one day of the preceding twelve months one hundred or more persons have been so employed; or

(*xxvii*) employed in any occupation involving the handling and manipulation of radium or X-rays apparatus, or contact with radioactive substances."

Amendment of Schedule III; Act VIII of 1923.

**12.** In Schedule III to the said Act,—

(*a*) before the entry relating to lead poisoning or its sequelae, the following shall be inserted, namely:—

"PART A.

| | |
|---|---|
| Anthrax. | Any employment—<br>(*a*) involving the handling of wool, hair, bristles or animal carcases or parts of such carcases, including hides, hoofs and horns; or<br>(*b*) in connection with animals infected with arthrax; or<br>(*c*) involving the loading, unloading or transport of any merchandise. |
| Compressed air illness or its sequelae. | Any process carried on in compressed air. |
| Poisoning by lead tetra-ethyl. | Any process involving the use of lead tetra-ethyl. |
| Poisoning by nitrous fumes. | Any process involving exposure to nitrous fumes. |

PART B.";

(*b*) in the entry relating to lead poisoning or its sequelae, to the words in the first column the words "excluding poisoning by lead tetra-ethyl" shall be added, and for the words "or its preparations or compounds" in the second column the words "or any of its preparations or compounds except lead tetra-ethyl" shall be substituted; and

(*c*) for the existing entry relating to compressed air illness or its sequelae the following entries shall be substituted, namely:—

| | |
|---|---|
| "Arsenical poisoning or its sequelae. | Any process involving the production, liberation or utilisation of arsenic or its compounds. |
| Pathological manifestations due to—<br>(*a*) radium and other radio-active substances;<br>(*b*) X-rays. | Any process involving exposure to the action of radium, radio-active substances, or X-rays. |
| Primary epitheliomatous cancer of the skin. | Any process involving the handling or use of tar, pitch, bitumen, mineral oil, paraffin, or the compounds, products or residues of these substances." |

## THE CUTCHI MEMONS ACT, 1938.

ACT NO. X OF 1938.

[8th April, 1938.

*An Act to provide that all Cutchi Memons shall be governed in matters of succession and inheritance by the Muhammadan Law.*

WHEREAS it is expedient that all Cutchi Memons be governed in matters of succession and inheritance by the Muhammadan Law; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE CUTCHI MEMONS ACT, 1938.

(2) It shall come into force on the 1st day of November, 1938.

Cutchi Memons to be governed in certain matters by Muhammadan Law.

2. Subject to the provisions of section 3, all Cutchi Memons shall, in matters of succession and inheritance, be governed by the Muhammadan Law.

Savings.

3. Nothing in this Act shall affect any right or liability acquired or incurred before its commencement, or any legal proceeding or remedy in respect of any such right or liability; and any such legal proceeding or remedy may be continued or enforced as if this Act had not been passed.

Repeal.

4. The Cutchi Memons Act, 1920, is hereby repealed.

## THE HINDU WOMEN'S RIGHTS TO PROPERTY (AMENDMENT) ACT, 1938.

ACT NO. XI OF 1938.

[8th April, 1938.

*An Act to amend the Hindu Women's Rights to Property Act, 1937.*

WHEREAS it is expedient to amend the Hindu Women's Rights to Property Act, 1937, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title and effect.

1. (1) This Act may be called THE HINDU WOMEN'S RIGHTS TO PROPERTY (AMENDMENT) ACT, 1938.

(2) It shall have retrospective effect as if it had come into force on the 14th day of April, 1937.

Amendment of section 2, Act XVIII of 1937.

2. In section 2 of the Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as the said Act), the words "leaving a widow" shall be omitted.

Amendment of section 3, Act XVIII of 1937.

3. In section 3 of the said Act,—

(a) in sub-section (1), for the paragraph preceding the first proviso, the following shall be substituted, namely:—

"3. (1) When a Hindu governed by the Dayabhag School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son,";

(b) in sub-section (2) the word "intestate" shall be omitted; and

(c) in sub-section (4), after the words "rule of succession" the words "or by the terms of the grant applicable thereto" shall be inserted.

Insertion of new section 5 in Act XVIII of 1937.

4. After section 4 of the said Act the following section shall be inserted, namely:—

Meaning of expression "die intestate".

"5. For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect."

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## THE DURGAH KHAWAJA SAHEB (AMENDMENT) ACT, 1938.

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ACT NO. XII OF 1938.

[*8th April, 1938.*

*An Act to amend the Durgah Khawaja Saheb Act, 1936.*

WHEREAS it is expedient to amend the Durgah Khawaja Saheb Act, 1936, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE DURGAH KHAWAJA SAHEB (AMENDMENT) ACT, 1938.

Amendment of section 2, Act XXIII of 1936.

2. In sub-clause (*d*) of clause (4) of section 2 of the Durgah Khawaja Saheb Act, 1936 (hereinafter referred to as the said Act), the words "in India" shall be omitted.

Amendment of section 5, Act XXIII of 1936.

3. For section 5 of the said Act the following section shall be substituted, namely:—

Composition of Committee.

"5. (1) The Committee shall consist of twenty-five members, who shall be Hanafi Muslims, namely:—

(*a*) the Sajjadanashin for the time being, *ex officio*, or his nominee;

(*b*) the Mutwalli for the time being, *ex officio*, or his nominee;

(*c*) two elected from among their own number by members of the Khadim community who are recorded as voters in the register of voters for the Ajmer Municipal Committee;

(*d*) five elected from among their own number by Muslims (other than members of the Khadim community) who are recorded as voters in the register of voters for the Ajmer Municipal Committe;

(*e*) eleven, not being persons residing within the limits of the Ajmer Municipality, elected in the following manner, namely:—

(*i*) three by the Muslim members of the Central Legislature;

(*ii*) one by the Muslim members of the Provincial Legislature of Madras;

(*iii*) one by the Muslim members of the Provincial Legislature of Bombay;

(*iv*) one by the Muslim members of the Provincial Legislature of Bengal;

(*v*) one by the Muslim members of the Provincial Legislature of the United Provinces;

(*vi*) one by the Muslim members of the Legislative Assembly of the Punjab;

(*vii*) one by the Muslim members of the Provincial Legislature of Bihar;

(*viii*) one by the Muslim members of the Legislative Assembly of the North-West Frontier Province; and

(*ix*) one by the Muslim members of the Legislative Assembly of Sind;

(*f*) one nominated by His Exalted Highness the Nizam of Hyderabad and Berar; and

(*g*) four Sajjadanashins of the shrines of the Shishti order of Sufis co-opted by the members of the Committee referred to in clauses (*a*) to (*f*).

(2) No person shall be qualified to be a member of the Committee if—

(*a*) he cannot read and write Urdu; or

(*b*) he has been convicted by a Criminal Court of any offence involving moral turpitude, and sentenced to imprisonment for a period exceeding three months:

Provided that the Central Government may, by special order, declare that any person disqualified under this clause shall cease to be so disqualified.

(3) No person shall be disqualified for election to the Committee under clause (*e*) of sub-section (1) by reason only of the fact that he is not a member of the Legislature or Legislative Assembly concerned.

(4) If any authority or body entitled to elect, nominate or co-opt a member fails to do so within six months, the Central Government may nominate a member to fill the vacancy from among persons qualified to be elected, nominated or co-opted in respect of the vacancy."

Repeal of sections 6, 7 and 8, Act XXIII of 1936.

4. Sections 6, 7 and 8 of the said Act shall be omitted.

Amendment of section 9, Act XXIII of 1936.

5. For section 9 of the said Act the following section shall be substituted, namely:—

Term of office of members and casual vacancies.

"9. (1) Members of the Committee, other than those referred to in clauses (*a*) and (*b*) of sub-section (1) of section 5, shall hold office for five years from the date of their election, nomination or co-option; and casual vacancies among such members shall be filled by election, nomination or co-option, as the case may be, by the authority which elected, nominated or co-opted the member whose place is to be filled.

(2) The term of office of a member elected, nominated or co-opted to fill a casual vacancy shall continue for so long only as the member whose place has been filled would have been entitled to hold office if the vacancy had not occurred."

Amendment of section 10, Act XXIII of 1936.

6. In sub-section (1) of section 10 of the said Act, for the words, letters, brackets and figure "except those who are elected under items (*a*), (*b*) and (*c*) of section 5" the following shall be substituted, namely:—

"other than those referred to in clauses (*a*) to (*c*) of sub-section (1) of section 5."

Amendment of section 11, Act XXIII of 1936.

7. For sub-section (3) of section 11 of the said Act the following sub-section shall be substituted, namely:—

"(3) The Committee shall exercise its powers of administration, control and management of the Durgah Endowment through the Mutawalli who shall be the Manager of the Durgah Endowment."

Amendment of section 12, Act XXIII of 1936.

8. In section 12 of the said Act,—

(*a*) after the words "such duties as may" the words "subject to such conditions, if any, as the Committee may impose," shall be inserted; and

(*b*) the words "subject to the confirmation by the Committee" shall be omitted.

Amendment of section 14, Act XXIII of 1936.

9. For section 14 of the said Act the following section shall be substituted, namely:—

Rules.

"14. In the case of elections under clause (*c*) or clause (*d*) of sub-section (1) of section 5, the Chief Commissioner, and in the case of elections under clause (*e*) of the said sub-section, the Presidents of both Chambers of the Legislature concerned, acting together, or the President of the Legislative Assembly concerned, as the case may be, may make rules to provide for—

(*i*) the procedure for such elections; and

(*ii*) the decision of election disputes."

Amendment of section 16, Act XXIII of 1936.

10. For section 16 of the said Act the following section shall be substituted, namely:—

Board of Arbitration.

"16. (1) Any dispute arising between the Committee on the one part and the Sajjadanashin, the Mutawalli and any Khadim, or any of them, on the other part, relating to the privileges of the Sajjadanashin, the Mutawalli or such Khadim, shall, at the request of either party to the dispute, be referred to a Board of Arbitration consisting of—

(*i*) a nominee of the Committee;

(*ii*) a nominee of the other party to the dispute; and

(*iii*) a person who holds or has held the office of, or is acting or has acted as, a District Judge, to be appointed by the Chief Commissioner,

and the decision of the Board shall be final and shall not be questioned in any Court.

(2) No suit shall lie in any Court in respect of any matter which is required by sub-section (1) to be referred to a Board of Arbitration."

Amendment of section 18, Act XXIII of 1936.

11. In section 18 of the said Act, for the words "The Durgah Committee shall not be empowered to use the property, movable and immovable" the words "The Committee shall not use the property, movable or immovable" shall be substituted.

Amendment of section 19, Act XXIII of 1936.

12. In section 19 of the said Act, before the words "Durgah Endowment," where they occur the second time the word "the" shall be inserted.

Amendment of section 20, Act XXIII of 1936.

13. For section 20 of the said Act the following section shall be substituted, namely:—

Audit of accounts and annual report.

"20. (1) The accounts of the Durgah shall be audited every year by an auditor holding a certificate granted under sub-section (1) of section 144 of the Indian Companies Act, 1913.

(2) The Committee shall every year prepare a report on the administration of the Durgah, which, together with the accounts of the Durgah and the report of the auditor thereon, shall be published in the *Gazette of India*."

## SIND SALT LAW AMENDMENT ACT, 1938.

### ACT NO. XIII OF 1938.

[*8th April, 1938.*

*An Act to amend the law relating to salt as at present in force in Sind.*

WHEREAS, by the Government of India Act, 1935, salt has been classified as a matter to which the executive authority of the Central Government extends and it is, therefore, expedient to amend certain enactments in force in the Pro-

vince of Sind relating to salt so as to vest in the Central Government powers of control in respect of that matter; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE SIND SALT LAW AMENDMENT ACT, 1938.

Amendment of certain enactments.

2. With effect on the 1st day of April, 1938, the Transport of Salt Act, 16 of 1879, as in force in Sind, and the Bombay Salt Act, II of 1890, as in force in Sind, are hereby amended to the extent and in the manner stated in the Schedule.

Saving of rules, etc., made by previous authorities.

3. Any appointment, notification, rule, order, exemption, licence, pass, permit or power in force before the commencement of this Act and made, issued or conferred by an authority, for the making, issuing or conferring of which a new authority is substituted by or under this Act, shall, unless inconsistent with this Act, be deemed to have been made, issued or conferred by such new authority unless and until cancelled or withdrawn or superseded by an appointment, notification, rule or order made or issued by such new authority.

THE SCHEDULE.

(*See* section 2).

PART I.—*The Transport of Salt Act, 1879 (XVI of 1879), as in force in Sind.*

In sections 3 and 6, for the words "Provincial Government of Sind", wherever they occur, the words "Central Government" shall be substituted.

PART II.—*The Bombay Salt Act, 1890 (Bomby Act II of 1890), as in force in Sind.*

1. In sub-section (1) of section 4, for the words "Subject to such control of the Central Government, as may be prescribed by rules made under section 45-A of the Government of India Act, the Provincial Government of Sind" the words "The Central Government" shall be substituted.

2. In sub-sections (2), (3) and (5) of section 4, and in sections 5, 10, 14, 17, 24, 36, 37, 52, 58 and 59, for the words "Provincial Government of Sind", wherever they occur, the words "Central Government" shall be substituted.

3. In section 25, for the words "Provincial Government of Sind" the words "Central Government" shall be substituted, and for the words "it may proceed" the words "the Provincial Government shall at the request of the Central Government proceed" shall be substituted.

4. Clause (*a*) of section 36 shall be omitted.

5. In section 60, the words "and in Sind in the Official Gazette," shall be omitted.

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THE SUGAR INDUSTRY PROTECTION (TEMPORARY EXTENSION) ACT, 1938.

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ACT NO. XIV OF 1938.

*8th April, 1938.*

*An Act to provide for the temporary continuance of the existing protection conferred on the sugar industry in British India.*

WHEREAS it is expedient to provide for the continuance for a period of one year of the existing protection conferred on the sugar industry in British

India and to extend the date before which the Central Government is required under section 3 of the Sugar Industry (Protection) Act, 1932, to lay before the Indian Legislature the proposals referred to in the said section; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE SUGAR INDUSTRY PROTECTION (TEMPORARY EXTENSION) ACT, 1938.

Amendment of section 3, Act XIII of 1932.

2. In section 3 of the Sugar Industry (Protection) Act, 1932, for the figures "1938", where they occur for the second time, the figures "1939" shall be substituted.

Amendment of First Schedule, Act XXXII of 1934.

3. In the First Schedule to the Indian Tariff Act, 1934, for Item No. 17, the following shall be substituted, namely:—

| | | | | |
|---|---|---|---|---|
| "17 | SUGAR excluding confectionery. | Protective. | The rate at which excise duty is for the time being leviable on sugar, other than *khundsari* or palmyra sugar, produced in British India *plus* Rs. 7-4-0 per cwt. | March 31st 1939." |

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## THE INDIAN COFFEE CESS (AMENDMENT) ACT, 1938.

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### ACT NO. XV OF 1938.

[*8th April, 1938.*]

*An Act to amend the Indian Coffee Cess Act, 1935, for a certain purpose.*

WHEREAS it is expedient to amend the Indian Coffee Cess Act, 1935, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN COFFEE CESS (Amendment) ACT, 1938.

(2) It shall come into force on such date as the Central Government by notification in the official Gazette may appoint.

Amendment of section 4, Act XIV of 1935.

2. In clause (*ii*) of sub-section (1) of section 4 of the Indian Coffee Cess Act, 1935,—

(*a*) in sub-clause (*c*), the word "and" shall be omitted; and

(*b*) for sub-clause (*d*) the following sub-clauses shall be substituted, namely:—

"(*d*) one person nominated by the Coorg Planters' Association;

(*e*) one person nominated by the Mysore Planters' Association; and

(*f*) one person nominated by the Indian Planters' Association, Mysore;".

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## THE INDIAN TARIFF (AMENDMENT) ACT, 1938.

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### ACT NO. XVI OF 1938.

[*9th April, 1938.*]

*An Act further to amend the Indian Tariff Act, 1934 for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Tariff Act, 1934, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN TARIFF (AMENDMENT) ACT, 1938.

Amendment of First Schedule, Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act, 1934, for Item No. 10 (2) the following item shall be substituted, namely:—

| | | | |
|---|---|---|---|
| "10 (2) BROKEN RICE. | Protective. | Twelve annas per Indian maund of 82 2/7 lb. avoirdupois weight. | March 31st, 1939." |

## THE TRADE DISPUTES (AMENDMENT) ACT, 1938.

### ACT No. XVII OF 1938.

[*9th April. 1938.*

*An Act further to amend the Trade Disputes Act, 1929 for certain purposes.*

WHEREAS it is expedient further to amend the Trade Disputes Act, 1929, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE TRADE DISPUTES (AMENDMENT) ACT, 1938.

Amendment of section 2, Act VII of 1929.

2. In section 2 of the Trade Disputes Act, 1929 (hereinafter referred to as the said Act),—

(*a*) in clause (*g*),—

(*i*) after sub-clause (*i*) the following sub-clause shall be inserted, namely:—

"(*i-a*) any water transport service carrying passengers to whose vessels any of the provisions of the Inland Steam-vessels Act, 1917, apply or tramway service, if the Provincial Government by notification in the official Gazette, declares the water transport or tramway service, as the case may be, to be a public utility service for the purposes of this Act, or"; and

(*ii*) in sub-clause (*iii*), after the word "supplies" the word "power' shall be inserted;

(*b*) in clause (*j*), after the word "difference" the words "between employers and employers or" shall be inserted; and

(*c*) in clause (*k*), after the word "reward" the following words shall be inserted, namely:—

"and includes for the purposes of any proceedings under this Act in relation to a trade dispute a workman discharged during that dispute."

Amendment of section 3, Act VII of 1929.

3. In section 3 of the said Act,

(*a*) the words "between an employer and any of his workmen" shall be omitted; and

(*b*) for the words "the employer" the words "an employer concerned" shall be substituted.

Amendment of section 4, Act VII of 1929.

4. For sub-section (2) of section 4 of the said Act the following sub-section shall be substituted namely:—

"(2) A Court, having the prescribed quorum, may act notwithstanding the absence of the chairman or any of its members or any vacancy in its number:

Provided that if the appointing authority notifies the Court that the services of the chairman have ceased to be available the Court shall not act until a new chairman has been appointed."

Amendment of section 6, Act VII of 1929.

5. For sub-section (3) of section 6 of the said Act the following sub-section shall be substituted, namely:—

"(3) A Board, having the prescribed quorum, may act notwithstanding the absence of the chairman or any of its members or any vacancy in its number:

Provided that if the appointing authority notifies the Board that the services of the chairman or where the Board includes an equal number of persons representing the parties to the dispute the services of any such person have ceased to be available the Board shall not act until a new chairman or member, as the case may be, has been appointed."

Amendment of section 10, Act VII of 1929.

6. To section 10 of the said Act the following sub-section shall be added, namely:—

"(3) Where a Board includes an equal number of persons representing the parties to the dispute, and the services of any such person have ceased to be available as aforefaid, the appointing authority shall appoint in the manner specified in sub-section (2) of section 6 another person to take his place, and the proceedings shall be continued before the Board so reconstituted."

Amendment of section 15, Act VII of 1929.

7. In section 15 of the said Act,—

(*a*) in sub-section (2),—

(*i*) for the words "his workmen" the words "any of his workmen" shall be substituted;

(*ii*) for the words "liable to" the words "punishable with" shall be substituted; and

(*iii*) for the words "to a fine" the words "with fine" shall be substituted;

(*b*) after sub-section (2) the following sub-section shall be inserted namely:—

"(2-A) If on any day an employer receives from any persons employed by him any such notices as are referred to in sub-section (1) or gives to any person employed by him any such notices as are referred to in sub-section (2), he shall within five days report to the Provincial Government or such authority as the Provincial Government may prescribe the number of such notices received or given on that day, and, if he fails to do so, he shall be punishable with fine which may extend to five hundred rupees"; and

(*c*) in sub-section (3), for the words, brackets and figure "under sub-section (2)" the words, brackets and figures "under sub-section (2) or sub-section (2-A)" shall be substituted.

Amendment of section 16, Act VII of 1929.

8. In sub-section (1) of section 16 of the said Act,—

(*a*) after the words "other than" the words "or in addition to" shall be inserted;

(*b*) in clause (*b*) for the words "general and prolonged" the words "and general" shall be substituted.

Amendment of section 17, Act VII of 1929.

9. In sub-section (1) of section 17 of the said Act, for the word "declares" the words "commences, continues," shall be subst tuted.

Insertion of new heading and section 18-A in Act VII of 1929.

10. After section 18 of the said Act the following heading and section shall be inserted, namely:—

"*Conciliation Officers*.

Amendment of conciliation officers.

18-A. (1) The Central Government, in respect of industries, businesses and undertakings carried on by them or under their authority or by a railway company, and the Provincial Government, in respect of other businesses, industries or undertakings within their Province, may, by notification in the official Gazette, appoint officers, herein referred to as conciliation officers, charged with the duty of mediating in or promoting the settlement of trade disputes.

(2) A conciliation officer may be appointed for a specified area or for specified businesses, industries or undertakings in a specified area or for one or more specified businesses, industries or undertakings and either permanently or for a limited period.

(3) A conciliation officer, may for the purposes of inquiring into an existing or apprehended trade dispute after giving reasonable notice, enter the premises occupied by any industry, business or undertaking and may call for and inspect any document which he has ground for considering to be relevant to the trade dispute, and for the purposes of any such inquiry shall be deemed to be a public servant within the meaning of the Indian Penal Code.

(4) If any person supplying information or producing a document to a conciliation officer requests in writing that the information or the document or any part thereof shall be treated as confidential the conciliation officer shall not disclose such information or the contents of such document or part thereof except to—

(*a*) the authority which appointed him to be a conciliation officer; or

(*b*) the parties concerned in the dispute for the purpose of mediating therein or promoting the settlement thereof.

(5) If the conciliation officer contravenes the provisions of sub-section (4), he shall be punishable with fine which may extend to one hundred rupees.

(6) No Criminal Court shall take cognizance of an offence under this section except with the previous sanction of the authority appointing the conciliation officer; and no Civil Court shall without the like sanction entertain any suit against a conciliation officer in respect of the disclosure of any information or the contents of any document or part thereof of the nature referred to in sub-section (4)."

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## THE DELHI JOINT WATER BOARD (AMENDMENT) ACT, 1938.

### ACT NO. XVIII OF 1938.

[*9th April, 1938.*

*An Act further to amend the Delhi Joint Water Board Act, 1926.*

WHEREAS it is expedient to provide for the maintenance of the works established to dispose of sewage in bulk for the urban area of the City of Delhi and to improve the provisions relating to the supply of drinking water in bulk and for that purpose further to amend the Delhi Joint Water Board Act, XXIII of 1926; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE DELHI JOINT WATER BOARD (AMENDMENT) Act, 1938.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Amendment of long title and preamble, Act XXIII of 1926.

2. In the long title and preamble of the Delhi Joint Water Board Act, 1926 (hereinafter referred to as the said Act),—

(*a*) after the words "to supply drinking water" the words "and to dispose of sewage" shall be inserted, and

(*b*) for the words "a Joint Water Board" the words "a Joint Water and Sewage Board" shall be substituted.

Amendment of section 1, Act XXIII of 1926.

3. In sub-section (1) of section 1 of the said Act, for the words "Delhi Joint Water Board Act" the words "Delhi Joint Water and Sewage Board Act" shall be substituted.

Amendment of section 2, Act XXIII of 1926.

4. In section 2 of the said Act,—

(a) in clause (a), for the words "Delhi Joint Water Board" the words "Delhi Joint Water and Sewage Board" shall be substituteb, and

(b) in clause (c),—

(i) in sub-clause (iii), for the words and brackets "Delhi (New) Cantonments" the words "Delhi Cantonment" shall be subs tituted, and

(ii) for sub-clause (iv) the following sub-clause shall be substituted, namely:—

"(iv) the New Delhi Municipal Committee".

Amendment of section 3, Act XXIII of 1926.

5. In sub-section (1) of section 3 of the said Act, for the words "Joint Water Board", the words "Joint Water and Sewage Board" shall be substituted.

Amendment of section 4, Act, XXIII of 1926.

6. In sub-section (1) of section 4 of the said Act, for the words "Delhi Joint Water Board" the words "Delhi Joint Water and Sewage Board" shall be substituted;

Amendment of section 5, Act XXIII of 1926.

7. In section 5 of the said Act,—

(a) after the word and letter "Parts A" the letters, "AA" shall be inserted; and

(b) after the words "the Delhi Municipal Committee" the words "the New Delhi Municipal Committee" shall be inserted.

Amendment of section 6, Act XXIII of 1926.

8. In section 6 of the said Act,—

(a) after the words "for the purpose of the efficient supply of water" the words "or for the purpose of the efficient disposal of sewage" shall be inserted; and

(b) after the words "any constituent body" the words "or the public" shall be inserted.

Amendment of section 8, Act XXIII of 1926.

9. In section 6 of the said Act,—

(a) in sub-section (1), after the words "maintain a fund" the words "or funds" shall be inserted; and

(b) in clauses (a) and (b) of sub-section (2), for the words "the fund" the words "any such fund" shall be substituted.

Amendment of section 10, Act XXIII of 1926.

10. In section 10 of the said Act, for the words "specified in Part B of Schedule I", wherever they occur, the words specified in Division I of Part B of Schedule I" and for the words "specified in that Part" the words "specified in Division I of that Part" shall be substituted, respectively.

Amendment of section 11, Act XXIII of 1926.

11. After the proviso to section 11 of the said Act the following proviso shall be added, namely:

"Provided further that, if the Central Government, in consequence of the extension of the urban area of the city of Delhi, requires the Board to make additional provision for the supply of water in bulk at any place, the Board shall be bound to make such provision."

Amendment of section 13, Act XXIII of 1926.

12. To section 13 of the said Act the following sub-section shall be added, namely:—

"(5) Nothing in this section shall preclude the Board from arranging with the consent of the constituent bodies and in accordance with any order issued by the Chief Commissioner for advance payments by the constituent bodies of the cost (calculated at the collecting rate) of such quantities of water

as are likely to be supplied to the constituent bodies in each quarter or such other period as may be prescribed by the Chief Commissioner".

Insertion of new heading and new sections 14-A, 14-B and 14-C in Act XXIII of 1926.

**13.** After section 14 of the said Act, the following heading and sections shall be inserted, namely:—

*"Disposal of sewage and payment therefor.*

Disposal of sewage.

14-A. (1) The Board shall be bound to receive in bulk from each constituent body except the Military Engineer Services, Delhi Cantonment, all sewage delivered by such body and to dispose of such sewage:

Provided that no constituent body by which sewage is delivered may execute any major work calculated to increase the normal discharge of sewage without the concurrence of the Board.

(2) Sewage received in pursuance of the provisions of sub-section (1) shall be the property of the Board and any income derived from the sale of effluent or sludge shall be credited to the appropriate fund of the Board.

(3) If any disagreement arises between a constituent body and the Board as to the effect of the execution of any work or the doing of any thing, the matter shall be referred to the Central Government whose decision shall be final.

Constituent bodies to pay cost of disposal of sewage.

14-B. (1) Subject to the provisions of section 15, the total net cost of the disposal of all sewage shall be paid by the constituent bodies other than the Military Engineer Services, Delhi Cantonment, each body contributing such proportion thereof as the Central Government may from time to time determine:

Provided that any proportion so determined shall not be changed until the expiry of a period of five years.

(2) In determining the total net cost of the disposal of all sewage there shall be taken into account as expenditure of the Board:—

(*a*) all establishment charges, including all expenditure upon repairs and maintenance not debitable to the fund established under section 8;

(*b*) repayments of principal, and payments of interest, in respect of any loan taken by the Board under section 6; and

(*c*) payments into the fund established under section 8 exclusive of any such income from interest on the balance of the fund as is under rules made by the Central Government under that section to be deemed the current revenue of the Board.

Manner of payment by constituent body of proportion of costs of disposal of sewage.

14-C. (1) The estimated net costs of the disposal of sewage increased by five per cent. shall be payable on demand by each constituent body after the close of each quarter of each financial year in accordance with the proportions fixed under sub-section (1) of section 14-B.

(2) If the sum so paid by any constituent body in any financial year exceeds or is less than the sum payable by it on the basis of the actual cost as determined under section 14-B, the payments to be made by that body in the following financial year shall be adjusted accordingly.

(3) Nothing in this section shall preclude the Board from arranging with the consent of the constituent bodies and in accordance with any orders issued by the Chief Commissioner for advance payment by the constituent bodies of such portion of the cost of the disposal of sewage as is likely to be

borne by them in each quarter or such other period as may be prescribed by the Chief Commissioner."

Insertion of new heading after section 14-C, Act XXIII of 1926.

14. After section 14-C of the said Act, as inserted by section 13 the following heading shall be inserted, namely:—

"*Settlement of disputes, and recovery of sums due from constituent bodies.*"

Amendment of section 22, Act, XXIII of 1926.

15. In section 22 of the said Act,—

(*a*) in sub-section (1), after the words "or pipes" wherever they occur, the words "or sewers" shall be added; and

(*b*) in the proviso to sub-section (2), after the words "the supply of water" the words "or the disposal of sewage" shall be inserted.

Amendment of section 26, Act XXIII of 1926.

16. In section 26 of the said Act,—

(*a*) in clause (*b*), for the words "water work" the words "water or sewage work" shall be substituted;

(*b*) after clause (*c*) the following clause shall be inserted, namely:—

"(*cc*) unlawfully obstructs the flow of, or flushes, draws off, diverts or takes sewage from any sewage work belonging to the Board, or breaks or damages any electrical transmission line maintained by the Board, or";

and

(*c*) in clause (*d*), for the words "water work" the words "water or sewage work" shall be substituted.

Amendment of schedule I, Act XXIII of 1926.

17. In Schedule I to the said Act,—

(*a*) after Part A the following shall be inserted, namely:—

"PART AA.

LIST OF WORKS TAKEN OVER FROM THE NEW DELHI MUNICIPAL COMMITTEE.

The original 66 "outfall sewer from Q Point to Kilokri with ventilating shafts, manholes, and nullah crossings.",

(*b*) in Part B—

(*i*) after the heading "LIST OF WORKS TAKEN OVER FROM THE GOVERNMENT" the sub-heading "DIVISION I" shall be inserted;

(*ii*) in entry No. 6, for the words "*New Cantonments*" the words "*Delhi Cantonment*" shall be substituted;

(*iii*) after entry No. 7 the following sub-heading and entries shall be added, namely:—

"DIVISION II.

1. *Old works at Kilokri*—

(*a*) The original Detritus Chamber.

(*b*) Pumping Station comprising boiler room, chimney, pump room, coal store, workshop, office and store, and latrines, drains, and pipelines connected thereto.

(*c*) Pumping Plant comprising three boilers, three pumps, economiser, feed pumps, electric generating plant, circulating pipes, crane, two weighbridges, and other accessories. One electric pump with switchgear and rising main.

(*d*) Workshop Equipment comprising two Lathes, 24" drilling machine, blower shafting machine, and (partly worn out) motor shafting, bench and hand stools, forge.

(*e*) Switchboard and lighting equipment on and around original plant.

(*f*) Venturi meter.

(*g*) Rising main.

(*h*) Well, Regulators, Sedimentation Tank, Aeration Bed, and Storage Tanks for circulating water, and pipes, drains and sewers connected therewith.

(*i*) Residential Buildings comprising Superintendent's Bungalow and garden, 62 quarters with sanitary accommodation and 19 quarters with adjacent buildings converted from the old Railway Station Buildings.

(*j*) Roads, fencing, trenching area, storm drains and culverts in area being taken over. Regulators and materials of channels in Sewage Farm.

2. *Works included in the Delhi Sewerage Disposal Scheme to be completed in 1938*—

(1) *New Delhi to Kilokri*—

(*a*) Storm Overflow at Point "Q" with control penstock.

(*b*) 66" dia. Out-fall Sewer from Point "Q" to Kilokri.

(2) *At Kilokri*—

(*a*) Penstock Chamber and 66" penstocks.

(*b*) Detritus and screening plant with all ancillary works.

(*c*) New Pumping Station Building which also contains workshop, office and store rooms and suction pumps connecting with existing work.

(*d*) Pumping Plant comprising—

(i) Three electric pumping units of 12 m.g.d. capacity.

(ii) Two electrically operated exhausters.

(iii) Two electrically operated bilge pumps.

(iv) Two electrically operated gland sealing pumps.

(v) Necessary penstocks valves, suction and delivery piping for items (i) to (iv).

(*e*) Overhead travelling crane.

(*f*) Low tension switchgear.

(*g*) Two transformers.

(*h*) High tension switchgear.

(*i*) Two overhead travelling cranes in workshop.

(*j*) Workshop equipment.

(*k*) Electric lighting and fans for building.

(*l*) One 44" Venturimeter and recorder.

(*m*) Roads and pathways.

(*n*) Rising main 44" dia. 800' long with control valves and outlet chamber.

(3) *From Kilokri to Disposal Works*—

Gravity Duct in masonry, approximately 16,500' long.

(4) *At Disposal Works*—

(*a*) Bio-aeration plant consisting of 12 preliminary settling tanks, 108 aeration pockets and 48 final settling tanks, the whole with necessary valves, piping, motors, shafting and other operating gear.

(*b*) Sludge Pump House and four electrically operated sludge pumps and accessories.

(*c*) Two portable electrically operated dewatering pumps and accessories.

(*d*) Transformer House containing high tension switchgear, transformers, low tension switchgear, overhead crane and other accessories.

(*e*) Electric Cables supplying power and lighting circuits.

(*f*) Office building containing Assistant Superintendent's Office, laboratory and equipment, clerks' rooms, store, and laboratories and furniture.

(*g*) Assistant Superintendent's Bungalow with four rooms.

(*h*) Five Drivers' Quarters, each with two rooms.

(*i*) Fifteen single room quarters.

(*j*) Necessary water supply, sanitary and electrical services for items (*f*) to (*i*).

(*k*) Roads and pathways inside Disposal Works Compound, boundary fence and gates, trees and lawns.

(*l*) Electric lighting for whole installation.

(*m*) Sludge drying beds and Return Sludge pumping plant with necessary flow and return piping to main plant.

(*n*) Three Venturi flumes with electrical recording gear.

( ) *Disposal Works to River*—

Effluent channel with pitched bed and sides including aqueduct crossing over the Agra Canal.

(6) *New Delhi Power House to Disposal Works*—

6600 Volt transmission line to the Disposal Works with branch to New Pumping Station including railway and road crossings.

3. *General*—

(1) Any other work constructed as part of the Delhi Sewage disposal scheme that the Central Government may hand over to the Board.

(2) All land acquired for or occupied by the works mentioned in Part AA and in Division II of Part B of this Schedule, including the sites of the Kilokri and Muttra Road Plants."

Amendment of Schedule 2, Act XXIII of 1926.

18. In Schedule II to the said Act—

(*a*) in entry (*d*), for the words "Imperial Delhi Municipal Committee" the words "New Delhi Municipal Committee" shall be substituted; and

(*b*) in entry (*e*), for the words and brackets "Delhi (New) Cantonments" the words "Delhi Cantonment" shall be substituted.

## THE CHILD MARRIAGE RESTRAINT (SECOND AMENDMENT) ACT, 1938.

### ACT No XIX OF 1938.

[*9th April, 1938*.

*An Act further to amend the Child Marriage Restraint Act, 1929.*

WHEREAS it is expedient further to amend the Child Marriage Restraint Act, 1929; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CHILD MARRIAGE RESTRAINT (SECOND AMENDMENT) ACT, 1938.

Amendment of section 2, Act XIX of 1929.

2. In clause (*c*) of section 2 of the Child Marriage Restraint Act, 1929 (hereinafter referred to as the said Act), between the words "is" and "thereby" the words "or is about to be" shall be inserted.

Amendment of section 8, Act XIX of 1929.

3. In section 8 of the said Act for the words "District Magistrate" the words "Magistrate of the first class" shall be substituted.

Substitution of new section for section 9, Act XIX of 1929.

4. For section 9 of the said Act the following shall be substituted, namely:—

"9. No Court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence is alleged to have been committed."

I—16

Amendment of section 11, Act XIX of 1929.

5. For sub-section (1) of section 11 of the said Act the following shall be substituted, namely:—

"(1) When the Court takes cognizance of any offence under this Act upon a complaint made to it, it may for reasons to be recorded in writing, at any time after examining the complainant and before issuing process for compelling the attendance of the accused, require the complainant to execute a bond, with or without sureties, for a sum not exceeding one hundred rupees, as security for the payment of any compensation which the complainant may be directed to pay under section 250 of the Code of Criminal Procedure, 1898, and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed.";

Insertion of new section 12 in Act XIX of 1929.

6. The following section shall be added as section 12 of the said Act, namely:—

Power to issue injunction prohibiting marriage in contravention of this Act.

"12. (1) Notwithstanding anything to the contrary contained in this Act the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnized, issue an injunction against any of the persons mentioned in sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The Court may either on its own motion or on the application of any person aggrieved rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both:

Provided that no woman shall be punishable with imprisonment".

## THE CRIMINAL LAW AMENDMENT ACT, 1938.

### ACT NO. XX OF 1938.

[*14th September, 1938.*

*An Act to amend the criminal law.*

WHEREAS it is expedient to supplement the criminal law by providing for the punishment of certain acts prejudicial to the recruitment of persons to serve in, and to the discipline of, His Majesty's Forces; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE CRIMINAL LAW AMENDMENT ACT, 1938.

(2) It extends to the whole of British India.

(3) It shall come into force in a Province on such date as the Provincial Government may, by notification in the Official Gazette, appoint in this behalf for such province.

Dissuasion from enlistment and instigation to mutiny or insubordination after enlistment.

2. Whoever—

(*a*) with intent to affect adversely the recruitment of persons to serve in the Military, Naval or Air Forces of His Majesty, wilfully dissuades or attempts to dissuade the public or any person from entering any such Forces, or

(*b*) without dissuading or attempting to dissuade any person from entering such Forces, instigates the public or any person to do, after entering any such Force, any thing which is an offence punishable as mutiny or insubordination under section 27 of the Indian Army Act, 1911, or sections 10 to 12 and 14 to 17 inclusive of the Naval Discipline Act as applied to the Indian Navy (Discipline) Act, 1934, or sections 35 to 37 inclusive of the Indian Air Force Act, 1932, as the case may be,

shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

No person shall be prosecuted for any offence under this Act except with the previous sanction of the Provincial Government.

*Exception 1.*—The provisions of clause (*a*) of this section do not extend to comments on or criticism of the policy of Government in connection with the Military, Naval or Air Forces, made in good faith without any intention of dissuading from enlistment.

*Exception 2.*—The provisions of clause (*a*) of this section do not extend to the case in which advice is given in good faith for the benefit of the individual to whom it is given, or for the benefit of any member of his family or of any of his dependants.

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# THE INDIAN EMIGRATION (AMENDMENT) ACT, 1938.

## ACT No. XXI OF 1938.

[*22nd September, 1938.*

*An Act further to amend the Indian Emigration Act, 1922.*

WHEREAS it is expedient further to amend the Indian Emigration Act, 1922, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN EMIGRATION (AMENDMENT) ACT, 1938.

Amendment of section 24, Act VII of 1922.

2. In sub-section (2) of section 24 of the Indian Emigration Act, 1922 (hereinafter referred to as the said Act),—

(*a*) the word "and" at the end of clause (*j*) shall be omitted;

(*b*) after clause (*j*) the following clause shall be inserted, namely:—

(*k*) the issue of the permits referred to in sub-section (1) of section 30-A; and";

(*c*) the existing clause (*k*) shall be re-lettered clause (*l*).

Insertion of new section 30 A in Act VII of 1922.

3. After section 30 of the said Act the following section shall be inserted, namely:—

Power to prohibit departure by sea from British India for the purpose of unskilled work.

"30-A. (1) The Central Government may, by notification in the Official Gazette from a date and for reasons to be specified in the notification, prohibit all persons or any specified class of persons from departing by sea out of British India to any specified country beyond the limits of India for the purpose of unskilled work unless

dossessed of a prescribed permit or otherwise exempted by general or special order of the Central Government from the provisions of the notification.

(2) Every notification issued under this section shall be laid before both Chambers of the Central Legislature as soon as may be after it is made.

(3) Whoever departs or attempts to depart out of British India in contravention of a notification issued under sub-section (1) shall be punishable with the punishment provided for an offence under sub-section (1) of section 25.

(4) Whoever causes or assists or attempts to cause or assist any person to depart out of British India in contravention of a notification issued under sub-section (1) shall be punishable with the punishment provided for an offence under sub-section (1) of section 25."

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## THE INDIAN AIRCRAFT (AMENDMENT) ACT, 1938.

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### ACT No. XXII OF 1938.

[*24th September, 1938.*

*An Act further to amed the Indian Aircraft Act, 1934.*

WHEREAS it is expedient further to amend the Indian Aircraft Act 1934, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN AIRCRAFT (AMENDMENT) ACT, 1938.

Insertion of new section 8-B in Act XXII of 1934.

2. After section 8-A of the Indian Aircraft Act, 1934 (hereinafter referred to as the said Act), the following section shall be inserted, namely:—

Emergency powers for protecting the public health.

"8-B. (1) If the Central Government is satisfied that India or any part thereof is visited by or threatened with an outbreak of any dangerous epidemic disease, and that the ordinary provisions of the law for the time being in force are insufficient for the prevention of danger arising to the public health through the introduction or spread of the disease by the Agency of aircraft, the Central Government may take such measures as it deems necessary to prevent such danger.

(2) In any such case the Central Government may, without prejudice to the powers conferred by section 8-A, by notification in the Official Gazette, make such temporary rules with respect to aircraft and persons travelling or things carried thereinand aerodromes as it deems necessary in the circumstances.

(3) Notwithstanding anything contained in section 14, the power to make rules under sub-section (2) shall not be subject to the condition of the rules being made after previous publication, but such rules shall not remain in force for more than three months from the date of notification:

Provided that the Central Government may by special order continue them in force for a further period or periods of not more than three months in all."

Amendment of section 10, Act XXII of 1934.

3. In section 10 of the said Act, for the words, figure and letter "or section 8-A" the words, figures and letters "section 8-A or section 8-B" shall be substituted.

## THE INDIAN TEA CESS (AMENDMENT) ACT, 1938.

ACT No. XXIII OF 1938.

[*24th September, 1938.*

*An Act further to amend the Indian Tea Cess Act, 1903, for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Tea Cess Act, 1903, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN TEA CESS (AMENDMENT) ACT, 1938.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf.

Amendment of section 4, Act IX of 1903.

2. In sub-section (2) of section 4 of the Indian Tea Cess Act, 1903,—

(*a*) for the word "twenty-seven" the word "twenty-eight" shall be substituted;

(*b*) in clause (*c*), the word "and", where it occurs at the end of the clause, shall be omitted; and

(*c*) after clause (*d*) the following clause shall be added, namely:—

"(*e*) one on the recommendation of the Travancore Government to represent the tea planters of Travancore."

## THE EMPLOYERS' LIABILITY ACT, 1938.

ACT No. XXIV OF 1938.

[*24th September, 1938.*

*An Act to declare that certain defences shall not be raised in suits for damages in British India in respect of injuries sustained by workmen.*

WHEREAS it is expedient to declare that certain defences shall not be raised in suits for damages in British India in respect of injuries sustained by workmen; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE EMPLOYERS' LIABILITY ACT, 1938.

(2) It extends to the whole of British India.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) "workman" means any person who has entered into, or works under a contract of, service or apprenticeship with an employer whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, oral or in writing; and

(*b*) "employer" includes any body of persons whether incorporated or not, and any managing agent of an employer, and the legal representatives of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him.

Defence of common employment barred in certain cases.

3. Where personal injury is caused to a workman—

(*a*) by reason of the omission of the employer to maintain in good and safe condition any way, works, machinery or plant connected with or used in his trade or business, or by reason of any like omission on the part of any person in the service of the employer who has been entrusted by the employer with the duty of seeing that such way, works, machinery or plant are in good and safe condition; or

(*b*) by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him, whilst in the exercise of such superintendence; or

(*c*) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where the injury resulted from his having so conformed; or

(*d*) by reason of any act or omission of any person in the service of the employer done or made in obedience to any rule or bye-law of the employer (not being a rule or bye-law which is required by or under any law for the time being in force to be approved by any authority and which has been so approved) or in obedience to particular instructions given by any person to whom the employer has delegated authority in that behalf or in the normal performance of his duties;

a suit for damages in respect of the injury instituted by the workman or by any person entitled in case of his death shall not fail by reason only of the fact that the workman was at the time of the injury a workman of, or in the service of, or engaged in the work of, the employer.

Risk not to be deemed to have been assumed without full knowledge.

4. In any such suit for damages, the workman shall not be deemed to have undertaken any risk attaching to the employment unless the employer proves that the risk was fully explained to and understood by the workman and that the workman voluntarily undertook the same.

Saving.

5. Nothing in this Act shall affect the validity of any decree or order of a Civil Court passed before the commencement of this Act in any such suit for damages.

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## THE PREVENTION OF CRUELTY TO ANIMALS (AMENDMENT) ACT, 1938.

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ACT No. XXV OF 1938.

[*1st December, 1938.*

*An Act to amend the law relating to the prevention of cruelty to animals.*

WHEREAS it is expedient further to amend the Prevention of Cruelty to Animals Act, 1890, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE PREVENTION OF CRUELTY TO ANIMALS (AMENDMENT) ACT, 1938.

Amendment of section 2, Act XI of 1890.

2. In section 2 of the Prevention of Cruelty to Animals Act, 1890 (hereinafter referred to as the said Act), at the end of clause (1) the word "and" shall be omitted, and after clause (2) the following clause shall be added, namely:—

"(3) *phooka* or *doom dev* includes any process of introducing air or any substance into the female organ of a milch animal with the object of drawing off from the animal any secretion of milk,"

Substitution of new section for section 3, Act XI of 1890.

3. For section 3 of the said Act the following section shall be substituted, namely:—

Penalty for cruelty to animals, and for sale of animals killed with unnecessary cruelty.

"3. If any person—

(*a*) overdrives, beats, or otherwise treats any animals so as to subject it to unnecessary pain or suffering, or

(*b*) binds, keeps, carries or consigns for carriage any animal in such manner or position as to subject it to unnecessary pain or suffering, or

(*c*) offers for sale or without reasonable cause has in his possession any live animal which is suffering pain by reason of mutilation, starvation, thirst, over-crowding or other ill-treatment, or

(*d*) offers for sale any dead animal or part of a dead animal which he has reason to believe has been killed in an unnecessarily cruel manner, or

(*e*) without reasonable cause abandons any animal in circumstances which render it likely that it will suffer pain by reason of starvation or thirst,

he shall be punished, in the case of a first offence, with fine which may extend to fifty rupees, or with imprisonment for a term which may extend to one month and, in the case of a second or subsequent offence committed within three years of the previous offence, with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both."

Insertion of new section 3-A in Act XI of 1890

4. After section 3 of the said Act the following section shall be inserted, namely:—

Penalty for overloading animals.

"3-A. (1) If any person overloads any animal, he shall be punished with fine which may extend to fifty rupees, or with imprisonment for a term which may extend to one month.

(2) If the owner of any animal, or any person who, either as a trader, carrier or contractor or by virtue of his employment by a trader, carrier or contractor, is in possession of, or in control of the loading of, any animal, permits the overloading of such animal, he shall be punished with fine which may extend to one hundred rupees."

Substitution of new section for section 4, Act XI of 1890.

5. For section 4 of the said Act the following section shall be substituted, namely:—

Penalty for practising *phooka*.

"4. (1) If any person performs upon any cow or other milch animal the operation called *phooka* or *doom dev*, or permits such operation to be performed upon any such animal in his possession or under his control, he shall be punished with fine which may extend to five hundred rupees, or with imprisonment for a term which may extend to two years, or with both, and the animal on which the operation was performed shall be forfeited to Government:

Provided that in the case of a second or subsequent conviction of a person under this section he shall be punished with fine which may extend to five hundred rupees and with imprisonment for a term which may extend to two years.

(2) A Court may order payment out of any fine imposed under this section of an amount not exceeding one-tenth of the fine to any person other than a police officer or officer of a society or institution concerned with the

prevention of cruelty to animals who has given information leading to the conviction."

Amendment of section 6, Act XI of 1890.

6. In section 6 of the said Act, the brackets and figure "(1)" at the beginning of sub-section (1) shall be omitted, and sub-sections (2) to (6) shall be omitted.

Insertion of new sections 6-A, 6-B and 6-C in Act XI of 1890.

7. After section 6 of the said Act the following sections shall be inserted, namely:—

Interpretation.

"6-A. For the purposes of sections 3-A and 6, an owner or other person in possession or control of an animal shall be deemed to have permitted an offence if he has failed to exercise reasonable care and supervision with a view to the prevention of such offence, and, for the purposes of section 4, if he fails to prove that he has exercised such care and supervision.

Treatment and care of animals.

6-B. (1) The Provincial Government may, by general or special order, appoint infirmaries for the treatment and care of animals in respect of which offences against this Act have been committed, and may authorise the detention therein of any animal pending its production before a Magistrate.

(2) The Magistrate before whom a prosecution for an offence against this Act has been instituted may direct that the animal concerned shall be treated and cared for in an infirmary, until it is fit to perform its usual work or is otherwise fit for discharge, or that it shall be sent to a *pinjrapole*, or, if the Veterinary Officer in charge of the area in which the animal is found or such other Veterinary Officer as may be authorised in this behalf by rules made under section 15 certifies that it is incurable or cannot be removed without cruelty, that it shall be destroyed.

(3) An animal sent for care and treatment to an infirmary shall not, unless the Magistrate directs that it shall be sent to a *pinjrapole* or that it shall be destroyed, be released from such place except upon a certificate of its fitness for discharge issued by the Veterinary Officer in charge of the area in which the infirmary is situated or such other Veterinary Officer as may be authorised in this behalf by rules made under section 15.

(4) The cost of transporting an animal to an infirmary or *pinjrapole*, and of its maintenance and treatment in an infirmary, shall be payable by the owner of the animal in accordance with a scale of rates to be prescribed by the District Magistrate or, in Presidency-towns, by the Commissioner of Police:

Provided that when the Magistrate so orders, on account of the poverty of the owner of the animal, no charge shall be payable for the treatment of the animal.

(5) If the owner refuses or neglects to pay such cost or to remove the animal within such time as a Magistrate may prescribe, the Magistrate may direct that the animal be sold and that the proceeds of the sale be applied to the payment of such cost.

(6) The surplus, if any, of the proceeds of such sale shall, on application made by the owner within two months from the date of the sale, be paid to him.

Penalty for baiting or inciting animals to fight.

6-C. If any person—

(*a*) incites any animal to fight, or

(*b*) baits any animal, or

(*c*) aids or abets any such incitement or baiting,

he shall be punished with fine which may extend to fifty rupees.

*Exception.*—It shall not be an offence under this section to incite animals to fight if such fighting is not likely to cause injury or suffering to such animals, and all reasonable precautions are taken to prevent injury or suffering from being so caused."

Amendment of section 7, Act XI of 1890.

8. In section 7 of the said Act—

(*a*) after the word "owner", in both places where it occurs, the words "or is in charge" shall be inserted;

(*b*) after the word "rupees" the following words shall be added, namely:—

"where he is the owner of the animal, or to fifty rupees where he is in charge of but not the owner of the animal."

Amendment of section 7-A, Act XI of 1890.

9. Section 7-A of the said Act shall be renumbered as sub-section (1), and after the said sub-section the following sub-section shall be added, namely:—

"(2) If a police officer, not below the rank of sub-inspector, or any person specially authorised by the Provincial Government in this behalf has reason to believe that *phooka* or *doom dev* has just been or is being performed on any animal within the limits of his jurisdiction, he may enter any place in which he has reason to believe such animal to be, and may seize the animal and produce it for examination by the Veterinary Officer in charge of the area in which the animal is seized."

Amendment of section 8, Act XI of 1890.

10. In sub-section (1) of section 8 of the said Act,—

(*a*) for the word "class" the words "or second class, Presidency Magistrate," shall be substituted;

(*b*) for the words and figures "against section 4, section 5 or section 6" the words "against this Act" shall be substituted; and

(*c*) for the words "above the rank of a constable" the words "not below the rank of sub-inspector" shall be substituted.

Amendment of section 10, Act XI of 1890.

11. Section 10 of the said Act shall be renumbered as sub-section (1), and after the said sub-section the following sub-section shall be added, namely:—

"(2) Any police officer above the rank of a constable who finds any animal so diseased, or so severely injured, or in such a physical condition that it cannot, in his opinion, be removed without cruelty, may, if the owner is absent or refuses to consent to the destruction of the animal, forthwith summon the Veterinary Officer in charge of the area in which the animal is found and, if the Veterinary Officer certifies that the animal is mortally injured, or so severely injured or in such a physical condition that its destruction is desirable, the police officer may, after obtaining orders from a Magistrate, destroy the animal or cause it to be destroyed."

Amendment of section 12, Act XI of 1890.

12. In section 12 of the said Act, for the figures and word "9, 10 and 11" the following shall be substituted, namely:—

"4 and 13, sections 9 and 10, and sections 6-A, 7-A, 8 and 15 so far as they relate to offences under section 4."

Insertion of new sections 13, 14, 15, 16 and 17 in Act XI of 1890.

13. After section 12 of the said Act the following sections shall be added, namely:—

Offence under section 4 to be cognizable.

"13. Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence punishable under section 4 shall be a cognizable offence within the meaning of that Code.

14. Any police officer above the rank of a constable or any person authorised by the Provincial Government in this behalf, who has reason to believe that an offence against this Act has been or is being committed in respect of any animal, may, if in his opinion the circumstances so require, seize the animal and produce the same for examination by the nearest Magistrate or by such Veterinary Officer as may be designated in this behalf by rules made under section 15; and such police officer or authorised person may, when seizing the animal, require the person in charge thereof to accompany it to the place of examination.

General power of seizure for examination.

15. (1) The Provincial Government may, by notification in the official Gazette, and subject to the condition of previous publication, make rules to carry out the purposes of this Act.

Power to make rules.

(2) In particular, and without prejudice to the generality of the foregoing power, the Provincial Government may make rules—

(*a*) prescribing the maximum weight of loads to be carried or drawn by any animal;

(*b*) prescribing conditions to prevent the overcrowding of animals;

(*c*) prescribing the period during which, and the hours between which, buffaloes shall not be used for draught purposes;

(*d*) prescribing the purposes to which fines realized under this Act may be applied, including such purposes as the maintenance of infirmaries, *pinjrapoles*, and veterinary hospitals;

(*e*) prohibiting the use of any bit or harness involving cruelty;

(*f*) requiring persons carrying on the business of a farrier to be licensed and registered;

(*g*) requiring persons owning, or in charge of, premises in which animals are kept or milked to register such premises, to comply with prescribed conditions as to the boundary walls or surroundings of such premises, to permit their inspection for the purpose of ascertaining whether any offence against section 4 is being, or has been, committed therein, and to expose in such premises copies of section 4 of this Act in a language or languages commonly understood in the locality; and

(*h*) prescribing the manner in which cattle may be impounded in any place appointed for the purpose, so as to secure the provision of adequate space, food and water.

(3) If any person contravenes, or abets the contravention of, any rule made under this section, he shall be punished with fine which may extend to fifty rupees.

16. Every person authorised by the Provincial Government under section 14 shall be deemed to be a public servant within the meaning of section 21 of the Indian Penal Code.

Persons authorised under section 14 to be public servants.

17. No suit, prosecution or other legal proceeding shall lie against any person who is, or who is deemed to be, a public servant within the meaning of section 21 of the Indian Penal Code, in respect of anything in good faith done or intended to be done under this Act."

Indemnity.

# THE EMPLOYMENT OF CHILDREN ACT, 1938.

ACT NO. XXVI OF 1938.

[1st December, 1938.

*An Act to regulate the admission of children to certain industrial employments.*

WHEREAS it is expedient to regulate the admission of children to certain industrial employments; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE EMPLOYMENT OF CHILDREN ACT, 1938.

(2) It extends to the whole of British India.

Definition.

2. In this Act "competent authority", in respect of a major port, as defined in the Indian Ports Act, 1908, and in respect of a federal railway, as defined in the Indian Railways Act, 1890, means the Central Government, and in any other case means the Provincial Government.

Prohibition of employment of children in certain occupations.

3. (1) No child who has not completed his fifteenth year shall be employed or permitted to work in any occupation connected with the transport of passengers, goods or mails by railway.

(2) No child who has not completed his fifteenth year shall be employed or permitted to work in any occupation involving the handling of goods within the limits of any port to which for the time being any of the provisions of the Indian Ports Act, 1908, are applicable.

Penalty.

4. Whoever employs any child or permits any child to work in contravention of the provisions of section 3 shall be punishable with fine which may extend to five hundred rupees.

Procedure relating to offences.

5. (1) No prosecution under this Act shall be instituted except by or with the previous sanction of an inspector appointed under section 6.

(2) No prosecution under this Act shall be instituted in any case where at the time of employment a certificate had been obtained from an authority empowered under this Act to grant such certificate that the child has completed his fifteenth year.

(3) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

Appointment of Inspectors.

6. The competent authority may appoint persons to be inspectors for the purpose of securing compliance with the provisions of this Act, and any inspector so appointed shall be deemed to be a public servant within the meaning of the Indian Penal Code.

Power to make rules.

7. (1) The competent authority may by notification in the official Gazette and subject to the condition of previous publication make rules for carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) regulate the procedure of inspectors appointed under section 6, and

(*b*) make provision for the grant of certificates of age in respect of young persons in employment or seeking employment, the authorities which may issue such certificates, the form of such certificate, the charges which may be made therefor, and the manner in which such certificates may be issued:

Provided that no charge shall be made for the issue of any such certificate if the application is accompanied by evidence of age deemed satisfactory by the authority concerned.'

Amendment of section 6, Act XV of 1908.

8. Sub-section (1-*A*) of section 6 of the Indian Ports Act, 1908, and the words, brackets, figure and letter "and sub-section (1-*A*)" in sub-section (2) of the said section shall be omitted.

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# MADRAS ACTS, 1938.

## THE MADRAS CITY MUNICIPAL (AMENDMENT) ACT, 1938.

ACT No. I OF 1938.

[12th February, 1938.

*An Act further to amend the Madras City Municipal Act, 1919, for certain purposes.*

WHEREAS it is expedient further to amend the Madras City Municipal Act, 1919, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS CITY MUNICIPAL (AMENDMENT) ACT, 1938.

Amendment of section 85, Madras Act IV of 1919.

2. In sub-section (1) of section 85 of the Madras City Municipal Act, 1919—

(i) in the opening paragraph, after the words "who shall be heads of departments working under the Commissioner" the following sentence shall be added, namely:—

"The salary and allowances attaching to every such appointment shall be fixed by the Council subject to the sanction of the Provincial Government, and shall not be varied without the like sanction.";

(ii) in clause (*b*) of the proviso, the words "shall not be less than five hundred rupees and" shall be omitted;

(iii) in clause (*c*) of the proviso, the words "shall not be less than four hundred rupees and" shall be omitted; and

(iv) in clause (*d*) of the proviso, the words "shall not be less than two hundred and fifty rupees and" shall be omitted.

## THE MADRAS CITY MUNICIPAL, DISTRICT MUNICIPALITIES, AND LOCAL BOARDS (AMENDMENT) ACT, 1938.

[12th February, 1938.

ACT No. II OF 1938.

*An Act further to amend the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for certain purposes.*

WHEREAS it is expedient further to amend the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS CITY MUNICIPAL, DISTRICT MUNICIPALITIES, AND LOCAL BOARDS (AMENDMENT) ACT, 1938.

Amendment of Madras Act IV of 1919.

2. In the Madras City Municipal Act, 1919, following amendments shall be made, namely:—

(1) In section 3—

(i) clause (1) shall be omitted and clause (1-A) shall be renumbered as clause (1); and

(ii) after clause (25-A), the following clause shall be inserted, namely:—

'Scheduled castes'.

(25-B) 'Scheduled castes' shall have the same meaning as in the Government of India (Scheduled Castes) Order, 1936, as in force for the time being, in regard to the City of Madras."

(2) In section 5 (1) (*a*), 45 (2) (*a*) and (*b*) and 46 (1), for the word "Adi-Dravidas" wherever it occurs, the words "members of the scheduled castes" shall be substituted.

(3) In section 46 (2), for the words "an Adi-Dravida", the words "a member of the scheduled castes" shall be substituted.

(4) In section 46-A, for the word "Adi-Dravidas", the words "members of the scheduled castes", for the words "Adi-Dravida electors" in both the places where they occur, the words "electors of such castes", and for the words "an Adi-Dravida", the words "a member of any such caste" shall be substituted.

(5) For sections 46-B, 47, 48, 49 and 49-A, the following sections shall be substituted, namely:—

Mode of election of councillors to labour seats.

"46-B. One of the two seats specially reserved for labour under clause (*a*) of sub-section (1) of section 5 shall be filled by election by a labour electorate consisting of persons employed in a railway workshop or textile mill situated in the City, whose names are included in the electoral roll for any trade union labour constituency of the Madras Legislative Assembly, and the other seat by election by another labour electorate consisting of persons employed in the Madras Harbour or in a perennial factory (other than a railway workshop or textile mill) situated in the City, whose names are included in the electoral roll for the Madras City Dock and Factory Labour (excluding textile and railway labour) non-union labour constituency of the Madras Legislative Assembly.

Electoral rolls for divisional seats other than labour seats.

47. Every person whose name is included in that part of the electoral roll for any territorial constituency of the Madras Legislative Assembly, which relates to any of the divisions referred to in sub-section (1) of section 45 shall be entitled to be included in the electoral roll for that division prepared for the purposes of this Act, and no other person shall be entitled to be included in such roll.

*Explanation* (1).—Where in the case of any territorial constituency of the Madras Legislative Assembly there is no distinct part of the electoral roll relating to a division, the names of all persons who are entered in such roll under the registration area comprising that division and whose addresses as entered in such roll are situated in such division, shall be entitled to be included in the electoral roll for the division prepared for the purposes of this Act.

*Explanation* (2).—No person's name shall be included in the electoral roll for more than one division or in the electoral roll for any division in more than one place.

*Explanation* (3).—In this section and in section 48, "territorial constituency" shall have the same meaning as in the Sixth Schedule to the Government of India Act, 1935, that is to say, it shall mean one of the territorial constituencies mentioned in paragraphs five and eight of the Fifth Schedule to that Act.

Publication of electoral rolls, etc.

48. (1) As soon as may be after the electoral rolls for the territorial and labour constituencies of the Madras Legislative Assembly which consist of, or comprise, or which relate to, the City or any portion thereof, have been

published as provided in the Government of India Act, 1935, and the rules made thereunder, or as soon as may be after any revision of such electoral rolls has been completed and the alterations consequent on such revision have been published as aforesaid, as the case may be, the Commissioner shall, for the purposes of this Act, prepare and publish in such manner as the Provincial Government may direct, the portions of the said electoral rolls or of the alterations thereto which relate to each of the forty divisions referred to in sub-section (1) of section 45 and to each of the labour electorates referred to in section 46-B.

(2) Where after the electoral rolls for the forty divisions aforesaid or any alterations to such rolls have been published under sub-section (1), the boundaries of any such divisions are altered, the Commissioner shall, in order to give effect to such alteration of boundaries, re-arrange and republish in such manner as the Provincial Government may direct, the electoral rolls for each of the divisions concerned.

(3) The electoral roll for any division or for any labour electorate referred to in section 46-B published under sub-section (1), as revised by any alterations thereto subsequently published under that sub-section or under sub-section (2), shall remain in force until the publication under sub-section (1) of a fresh electoral roll for that division or labour electorate.

(4) Every person whose name appears in the electoral roll for any division or for any labour electorate referred to in section 46-B, as so revised, shall, so long as such roll remains in force, be entitled, subject to the provisions of this Act, to vote at an election for the division or by the labour electorate concerned, and no person whose name does not appear in such roll shall vote at such an election.

Names of electors belonging to the Scheduled castes to be distinguished from the rest.

49. In the electoral roll for each of the divisions notified by the Provincial Government under sub-section (2) of section 45 as the divisions in which seats shall be reserved for members of the scheduled castes, the names of the electors belonging to such castes shall be shown separately or be distinguished from the names of the other electors in such manner as the Provincial Government may direct."

(6) In section 51 (1) (*b*), for the word "Adi-Dravidas", the words "members of the scheduled castes" and for the words "an Adi-Dravida", the words "a member of any such caste" shall be substituted.

(7) In section 51 (1) (*c*), for the words "labour constituency", the words "labour electorate" and for the words "constituencies for labour", the words "labour electorates" shall be substituted.

(8) In section 51 (1) (*d*), for the words "constituencies for labour", the words "labour electorates" and for the words "member possessing the residential qualification under section 49-A of any of the bodies referred to in clauses (*b*), (*c*), (*d*) and (*g*) of sub-section (1) of section 5", the words "member of any of the bodies referred to in clauses (*b*), (*c*), (*d*) and (*g*) of sub-section (1) of section 5 who has resided in the City for ninety days in the aggregate in the year preceding that in which the election is held" shall be substituted.

(9) In section 59 (2), clause (*a*) and the words "relating to electoral rolls or" in clause (*b*) shall be omitted and for the word "Adi-Dravidas" in the second proviso to clause (*c*), the words "members of the scheduled castes" shall be substituted.

Amendment of Madras Act V of 1920.

3. In the Madras District Municipalities Act, 1920, the following amendments shall be made, namely :—

(1) In section 3—

(i) clause (1) shall be omitted and clause (1-A) shall be renumbered as clause (1); and

(ii) after clause (28), the following clause shall be inserted, namely:—

'Scheduled castes.'

"(28-A) 'Scheduled castes' shall have the same meaning as in the Government of India (Scheduled Castes) Order, 1936, as in force for the time being, in regard to the municipality concerned."

(2) In section 7 (3) (*c*), for the word "Adi-Dravidas", the words "Members of the scheduled castes" shall be substituted.

(3) For sections 44 and 45, the following section shall be substituted, namely:—

Qualifications for inclusion in electoral roll for municipality and publication thereof.

"44. (1) Every person whose name is included in that part of the electoral roll for any territorial constituency of the Madras Legislative Assembly, which relates to the municipality or any portion thereof, shall be entitled to be included in the electoral roll for the municipality prepared for the purposes of this Act, and no other person shall be entitled to be included in such roll.

*Explanation* (1).—Where in the case of any territorial constituency of the Madras Legislative Assembly, there is no distinct part of the electoral roll relating to the municipality, the names of all persons who are entered in such roll under the registration area comprising the municipality and whose addresses as entered in such roll are situated in the municipality shall be entitled to be included in the electoral roll for the municipality prepared for the purposes of this Act.

*Explanation* (2).—No person's name shall be included in the electoral roll for the municipality in more than one place.

(2) As soon as may be after the electoral rolls for the territorial constituencies of the Madras Legislative Assembly which consist of, or comprise, the municipality or any portion thereof, have been published as provided in the Government of India Act, 1935, and the rules made thereunder, or as soon as may be after any revision of such electoral rolls has been completed and the alterations consequent on such revision have been published as aforesaid, as the case may be, any person authorized by the election authority in this behalf shall publish in such manner as the Provincial Government may direct, the portions of the said electoral roll or of the alterations therein which relate to the municipality, as the electoral roll for the municipality or as alterations to such roll, as the case may be.

(3) When a municipality has been divided into wards, the electoral roll for the municipality shall be divided into separate lists for each ward.

(4) Where after the electoral roll for a municipality or any alterations thereto have been published under sub-section (2), the municipality is divided into wards for the first time or the division of the municipality into wards is altered, the election authority shall, as soon as may be after such division or alteration, as the case may be, in order to give effect to the division of the municipality into wards or to the alteration of the wards, as the case may be, authorize a re-arrangement and re-publication of the electoral roll for the municipality or any part of such roll, in such manner as the Provincial Government may direct.

(5) The electoral roll for the municipality published under sub-section (2), as revised by any alterations thereto subsequently published under that sub-section or under sub-section (4), shall remain in force until the publication of a fresh electoral roll for the municipality under sub-section (2).

(6) Every person whose name appears in the electoral roll for the municipality, as so revised, shall, so long as it remains in force, be entitled,

subject to the provisions of this Act, to vote at an election; and no person whose name does not appear in such roll shall vote at an election.

*Explanation.*—In this section, 'territorial constituency' shall have the same meaning as in the Sixth Schedule to the Government of India Act, 1935, that is to say, it shall mean one of the territorial constituencies mentioned in paragraphs five and eight of the Fifth Schedule to that Act."

(4) In section 47, for the expression "sub-section (5)" the expression "sub-section (6)" shall be substituted.

(5) In the second proviso to section 303 (2) (*b*), for the words "any Adi-Dravida candidate", the words "any candidate who is a member of the Scheduled castes" shall be substituted.

Amendment of Madras Act XIV of 1920.

4. In the Madras Local Boards Act, 1920, the following amendments shall be made, namely:—

(1) In section 3—

(i) clause (1) shall be omitted and clause (1-A) shall be re-numbered as clause (1); and

(ii) after clause 20, the following clause shall be inserted, namely:—

"(20-A) 'Scheduled castes' shall have the same meaning as in the Government of India (Scheduled Castes) Order, 1936, as in force for the time being, in regard to the local area concerned."

(2) In sections 9 (1) (*c*) and 9 (2) (*c*), for the word "Adi-Dravidas", the words "Members of the scheduled castes" shall be substituted.

(3) For sections 51 and 52, the following section shall be substituted, namely:—

Qualifications for inclusion in electoral roll for local board and publication thereof.

"51. (1) Every person whose name is included in that part of the electoral roll for any territorial constituency of the Madras Legislative Assembly, which relates to the area of the local board (hereinafter in this section referred to as 'local area') or any portion thereof, shall be entitled to be included in the electoral roll for the local board prepared for the purposes of this Act, and no other person shall be entitled to be included in such roll.

*Explanation* (1).—Where in the case of any territorial constituency of the Madras Legislative Assembly, there is no distinct part of the electoral roll relating to a local area, the names of all persons who are entered in such roll under the registration area comprising that local area and whose addresses as entered in such roll are situated in such local area shall be entitled to be included in the electoral roll for the local board prepared for the purposes of this Act.

*Explanation* (2).—No person's name shall be included in the electoral roll for a local board in more than one place.

(2) As soon as may be after the electoral rolls for the territorial constituencies of the Madras Legislative Assembly which consist of, or comprise, the local area or any portion thereof, have been published as provided in the Government of India Act, 1935, and the rules made thereunder, or as soon as may be after any revision of such electoral rolls has been completed and the alterations consequent on such revision have been published as aforesaid, as the case may be, any person authorized by the prescribed authority in this behalf shall publish in such manner as the Provincial Government may direct, the portions of the said electoral rolls or of the alterations therein which relate to the local area, as the electoral roll for the local board or as alterations to such roll, as the case may be.

(3) The electoral roll for a district board shall be divided into separate parts for each circle and when a village has been divided into wards, the electoral roll for the panchayat shall be divided into separate parts for each ward.

(4) (*a*) Where after the electoral roll for a district board or any alterations thereto have been published under sub-section (2), the division of the district into circles is altered, the prescribed authority shall, in order to give effect to the alteration of the circles, authorize a re-arrangement and re-publication of the electoral roll for the district board or any part of such roll in such manner as the Provincial Government may direct.

(*b*) Where after the electoral roll for a panchayat or any alterations thereto have been published under sub-section (2), the village is divided into wards for the first time or the division of the village into wards is altered, the prescribed authority shall, in order to give effect to the division of the village into wards or to the alteration of the wards, as the case may be, authorize a re-arrangement and re-publication of the electoral roll for the panchayat or any part of such roll, in such manner as the Provincial Government may direct.

(5) The electoral roll for the local board published under sub-section (2), as revised by any alterations thereto subsequently published under that sub-section or under sub-section (4), shall remain in force, until the publication of a fresh electoral roll for the local board under sub-section (2).

(6) Every person whose name appears in the electoral roll for the local board as so revised, shall, so long as it remains in force, be entitled, subject to the provisions of this Act, to vote at an election; and no person whose name does not appear in such roll shall vote at an election.

*Explanation.*—In this section, 'territorial constituency' shall have the same meaning as in the Sixth Schedule to the Government of India Act, 1935, that is to say, it shall mean one of the territorial constituencies mentioned in paragraphs five and eight of the Fifth Schedule to that Act".

(4) In section 53, for the expression "sub-section (5)," the expression "sub-section (6)" shall be substituted.

(5) To sub-section (1) of section 54, the following proviso shall be added, namely:—

"Provided that a person whose name appears in the electoral roll for a municipality (including the City of Madras) or a cantonment, situated within three miles of any district, which has been published under the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, or the Cantonments Act, 1924, and which is in force for the time being, shall be qualified for election to any seat on the district board for that district."

(6) In the second proviso to section 199 (2) (*b*), for the words "an Adi-Dravida candidate," the words "any candidate who is a member of the scheduled castes" shall be substituted.

(7) Schedule III shall be omitted.

Determination of labour electorates corresponding to existing labour constituencies.

5. As soon as may be after the commencement of this Act, the Provincial Government shall determine which of the labour electorates referred to in section 46-B of the Madras City Municipal Act, 1919, as amended by this Act, shall correspond to each of the labour constituencies referred to in that section as it stood before the commencement of this Act; and the provisions of the Madras City Municipal Act, 1919, and of this Act shall apply accordingly, and in particular, the divisional seat for labour included in the fifteen divisional seats in the City of Madras, elections to which were postponed by section 2 of the Madras City Municipal, District Municipalities and Local Boards (Amendment) Act, 1937, shall be filled by the corresponding labour electorate.

Tenure of office of members of local bodies holding office at commencement of Act not to be affected.

6. Save as otherwise provided in section 5, nothing contained in this Act shall be deemed to affect the tenure of officc of any person holding office at the commencement of this Act as a member of any municipality or local board constituted under the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, or the Madras Local Boards Act, 1920.

Term of office of certain members of the Corporation of Madras.

7. The term of office of the councillors elected at the first ordinary elections held after the commencement of this Act to the fifteen divisional seats in the Corporation of Madras, elections to which seats were postponed by section 2 of the Madras City Municipal, District Municipalities and Local Boards (Amendment) Act, 1937, shall—

(*a*) commence immediately on the expiry of the date up to which the term of office of their predecessors was extended under section 2 aforesaid or forthwith if the election in any case has been completed after that date; and

(*b*) subject to the provisions of the Madras City Municipal Act, 1919, expire at noon on the 1st day of November, 1940.

Term of office of councillors of certain municipalities.

8. The term of office of the councillors elected at the first ordinary elections held after the commencement of this Act to any municipality constituted under the Madras District Municipalities Act, 1920, elections to which were postponed under section 3 of the Madras City Municipal, District Municipalities and Local Boards (Amendment) Act, 1937, shall—

(*a*) commence immediately on the expiry of the date up to which the term of office of their predecessors was extended, or up to which the constitution or reconstitution of the municipality was postponed, as the case may be, under section 3 aforesaid, or forthwith if the election in any case has been completed after that date; and

(*b*) subject to the provisions of the Madras District Municipalities Act, 1920, and the Madras District Municipalities and Local Boards (Amendment) Act, 1921, expire at noon on the 1st day of November 1940.

Term of office of members of certain local boards.

9. The term of office of the members elected at the first ordinary elections held after the commencement of this Act to any local board constituted under the Madras Local Boards Act, 1920, elections to which were postponed under section 4 of the Madras City Municipal, District Municipalities and Local Boards (Amendment) Act, 1937, shall—

(*a*) commence immediately on the expiry of the date up to which the term of office of their predecessors was extended, or up to which the constitution or reconstitution of the local board was postponed, as the case may be, under section 4 aforesaid, or forthwith if the election in any case has been completed after that date; and

(*b*) subject to the provisions of the Madras Local Boards Act, 1920, and the Madras District Municipalities and Local Boards (Amendment) Act, 1921, expire at noon on such date not being later than the 31st December 1940 as the Provincial Government may fix.

Construction of references to 'Adi-Dravidas' in Notification, etc.

10. All notifications, rules and orders issued before the commencement of this Act under the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, or the Madras Local Boards Act, 1920, shall be construed as if references to 'Adi-Dravidas' therein were references to members of the scheduled castes.

Power to remove difficulties.

11. If any difficulty arises in giving effect to the provisions of this Act or of the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, or the Madras Local Boards Act, 1920, as amended by this Act, the Provincial Government may, as occasion may require, by order, do anything which appears to them to be necessary for the purpose of removing the difficulty.

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## THE MADRAS MOTOR VEHICLES TAXATION (AMENDMENT) ACT, 1938.

### ACT No. III OF 1938.

[*17th March, 1938.*

*An Act further to amend the Madras Motor Vehicles Taxation Act, 1931, for a certain purpose.*

WHEREAS it is expedient further to amend the Madras Motor Vehicles Taxation Act, 1931, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS MOTOR VEHICLES TAXATION (AMENDMENT) ACT, 1938.

Amendment of section 10, Madras Act III of 1931.

2. In section 10 of the Madras Motor Vehicles Taxation Act, 1931, after sub-section (3), the following sub-section shall be added, namely:—

"(4) All sums payable to local bodies under this section shall be expenditure charged on the revenues of the Province.'

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## THE MADRAS AGRICULTURISTS RELIEF ACT, 1938.

### ACT No. IV OF 1938.

[*11th March, 1938.*

*An Act to provide for the relief of indebted agriculturists in the Province of Madras.*

WHEREAS it is expedient to provide for the relief of indebted agriculturists in the Province of Madras; It is hereby enacted as follows:—

### CHAPTER I.

#### PRELIMINARY.

Short title.

1. This Act may be called THE MADRAS AGRICULTURISTS RELIEF ACT, 1938.

Extent.

2. It extends to the whole of the Province of Madras.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context,

(i) 'person' means an individual and includes an undivided Hindu family, a marumakkattayam or aliyasantana tarwad or tavazhi, but does not include a body corporate, a charitable or religious institution or an unincorporated company or association;

(ii) 'agriculturist' means a person who—

(a) has a saleable interest in any agricultural or horticultural land in the Province of Madras, not being land situated within a municipality or cantonment, which is assessed by the Provincial Government to land revenue (which shall be deemed to include peshkash and quit-rent), or which is held free of tax under a grant made, confirmed or recognized by Government; or

(*b*) holds an interest in such land under a landholder under the Madras Estates Land Act, 1908, as tenant, ryot or under-tenure holder; or

(*c*) holds an interest in such land, recognized in the Malabar Tenancy Act, 1929; or

(*d*) holds a lease of such land from any person specified in sub-clause (*a*), (*b*) or (*c*) or is a sub-lessee of such land:

Provided that a person shall not be deemed to be an 'agriculturist' if he—

(A) has in either of the two financial years ending 31st March 1938 been assessed to income-tax under the Indian Income-tax Act, 1922, or under the income-tax laws of any Indian State, or foreign government; or

(B) has within the two years immediately preceding the 1st October 1937 been assessed to profession-tax on a half-yearly income of more than three hundred rupees derived from a profession other than agriculture under the Madras District Municipalities Act, 1920, the Madras City Municipal Act, 1919, the Cantonments Act, 1924, or any law governing municipal or local bodies in any other Province in British India, any Indian State or any foreign State in India, or under the Madras Local Boards Act, 1920, in a panchayat which was a union before the 26th August 1930; or

(C) has within the two years immediately preceding the 1st October 1937, been assessed to property or house tax in respect of buildings or lands other than agricultural lands, under the Madras District Municipalities Act, 1920, the Madras City Municipal Act, 1919, the Cantonments Act, 1924, or any law governing municipal or local bodies in any other province in British India or any Indian State, or under the Madras Local Boards Act, 1920, in a panchayat which was a union before the 26th August 1930, provided that the aggregate annual rental value of such buildings and lands, whether let out or in the occupation of the owner, is not less than Rs. 600; or

(D) is a landholder of an estate under the Madras Estates Land Act, 1908, or of a share or portion thereof in respect of which estate, share or portion any sum exceeding Rs. 500 is paid as peshkash or any sum exceeding Rs. 100 is paid as quit-rent, jodi, kattubadi, poruppu or the like, or is a janmi under the Malabar Tenancy Act, 1929, who pays any sum exceeding Rs. 500 as land revenue to the Provincial Government.

*Explanation.*—The annual rental value of any building or land for the purposes of proviso (C) shall—

(1) where the assessment is based on the annual rental value, be deemed to be such value;

(2) where the assessment is based on the capital value, be deemed to be five per cent of the capital value; and

(3) in any other case, be deemed to be the value ascertained in the prescribed manner;

(iii) 'debt' means any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue court or otherwise; but does not include rent as defined in clause (iv), or 'kanartham' as defined in section 3 (*l*) (1) of the Malabar Tenancy Act, 1929;

(iv) 'rent' means rent as defined by the Madras Estates Land Act, 1908, or rent or michavaram as defined by the Malabar Tenancy Act, 1929, or quit-rent, jodi, kattubadi, poruppu or the like, payable to the landholder of an estate as defined by the Madras Estates Land Act, 1908, whether a decree or order of a civil or revenue court has been obtained therefor or not, and includes interest payable thereon but does not include costs incurred in respect of the recovery thereof through a civil or revenue court or the share of the land cess recoverable by the landholder under section 88 of the Madras Local Boards Act, 1920; and

(v) 'creditor' includes his heirs, legal representatives and assigns.

Certain debts and liabilities not to be affected.

4. Nothing in this Act shall affect debts and liabilities of an agriculturist falling under the following heads:—

(*a*) any revenue, tax or cess payable to the Provincial Government or any other sum due to them, by way of loan or otherwise;

(*b*) any revenue, tax or cess payable to the Central Government or any other sum due to them, by way of loan or otherwise;

(*c*) any tax or cess payable to any local authority or any other sum due to them, by way of loan or otherwise;

(*d*) any debt contracted on the security of house property alone in a municipality, a cantonment, or a panchayat which was a union before the 26th August 1930;

(*e*) any liability in respect of any sum due to any co-operative society, including a land mortgage bank, registered or deemed to be registered under the Madras Co-operative Societies Act, 1932, or any debt due to any corporation formed in pursuance of an Act of Parliament or of any special Indian law or Royal Charter or Letters Patent;

(*f*) any liability arising out of a breach of trust;

(*g*) any liability in respect of maintenance whether under decree of court or otherwise;

(*h*) any debt or debts due to a woman on the 1st October 1937 who on that date did not own any other property, provided that the principal amount of the debt or debts did not exceed rupees three thousand.

*Explanation.*—For the purpose of this clause, the house in which the creditor woman lived, or any furniture therein, or her household utensils, wearing apparel, jewellery, or such like personal belongings shall not be regarded as property.

(*i*) any wages due to an agricultural or other rural labourer.

Provided that where the liabilities mentioned in clause (*e*) arise by reason of an assignment to the co-operative society, such assignment has taken place before the 1st October 1937 or is an assignment to such society of a loan granted by a co-operative society.

Special provision for undivided Hindu families, etc.

5. Where an undivided Hindu family other than a marumakkattayam or aliyasantana tarwad or tavazhi is assessed to the taxes specified in provisos (A), (B) and (C) to section 3 (ii), or falls within the category of persons specified in proviso (D) to the same seetion, no person who was a member of the family on the 1st October 1937 shall be deemed to be an agriculturist for the purposes of this Act except section 13.

Sons and descendants of non-agriculturist members of Hindu families to be non-agriculturists.

6. Where in an undivided Hindu family other than a marumakkattayam or aliyasantana tarwad or tavazhi which is an "agriculturist" within the meaning of section 3 (ii), any member of the family is not an agriculturist, then, notwithstanding anything contained in section 3 (ii), none of his sons and descendants in the male line shall be deemed to be an agriculturist for the purposes of sections 7 to 12 and 19 to 27 of this Act.

## CHAPTER II.

### SCALING DOWN OF DEBTS AND FUTURE RATE OF INTEREST.

Debts payable by agriculturists to be scaled down.

7. Notwithstanding any law, custom, contract or decree of court to the contrary, all debts payable by an agriculturist at the commencement of this Act, shall be scaled down in accordance with the provisions of this Chapter.

No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him; nor shall his property be liable to be attached and sold or proceeded against in any manner in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under this Chapter.

Provision for debts incurred before 1st October 1932.

8. Debts incurred before the 1st October 1932, shall be scaled down in the manner mentioned hereunder, namely:—

(1) All interest outstanding on the 1st October, 1937, in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date.

(2) Where an agriculturist has paid to any creditor twice the amount of the principal whether by way of principal or interest or both, such debt including the principal, shall be deemed to be wholly discharged.

(3) Where the sums repaid by way of principal or interest or both fall short of twice the amount of the principal, such amount only as would make up this shortage, or the principal amount or such portion of the principal amount as is outstanding, whichever is smaller, shall be repayable.

(4) Subjeet to the provisions of sections 22 to 25, nothing contained in sub-sections (1), (2) and (3) shall be deemed to require the creditor to refund any sum which has been paid to him, or to increase the liability of a debtor to pay any sum in excess of the amount which would have been payable by him if this Act had not been passed.

*Explanation.*—Where a debt has been renewed or included in a fresh document in favour of the same creditor, the principal originally advanced by the creditor together with such sums, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable by the agriculturist under this section.

Provision for debts incurred on or after 1st October 1932.

9. Debts incurred on or after the 1st October, 1932, shall be scaled down in the manner mentioned hereunder, namely:—

(1) Interest shall be calculated up to the commencement of this Act at the rate applicable to the debt under the law, custom, contract or decree of Court under which it arises or at five per cent per annum simple interest, whichever is less and credit shall be given for all sums paid towards interest, and only such amount as is found outstanding, if any, for interest thus calculated shall be deemed payable together with the principal amount or such portion of it as is due:

Provided that any part of the debt which is found to be a renewal of a prior debt shall be deemed to be a debt contracted on the date on which such prior debt was incurred, and if such debt has been contracted prior to the 1st October 1932, shall be dealt with under the provisions of section 8.

(2) Subject to the provisions of sections 22 to 25, nothing herein contained shall be deemed to require the creditor to refund any sum which has been paid to him or to increase the liability of the debtor to pay any sum in excess of the amount which would have been payable by him if this Act had not been passed.

Exceptions.

10. (1) The provisions of sections 8 and 9 shall not apply to any person who, though an agriculturist as defined in section 3 (ii), did not on the 1st October 1937, hold an interest in, or a lease or sub-lease of, any land as specified in that section.

(2) Nothing contained in sections 8 and 9 shall affect—

(i) any mortgage by virtue of which the mortgagee is in possession of the property mortgaged, where no rate of interest is stipulated as due to the mortgagee, or

(ii) any liability for which a charge is provided under section 55, clause 4, sub-clause (*b*) of the Transfer of Property Act, or

(iii) any liability in respect of any sum due to any public company as defined in the Indian Companies Act, 1913, or to any scheduled bank as defined by section 2 (*e*) of the Reserve Bank of India Act, 1934, if the interest payable in respect of the liability is not more than nine per cent per annum.

Provision as to costs, etc, in certain cases.

11. Where a debt payable by an agriculturist includes any sum decreed as costs by any Court, or sums lawfully expended by a mortgagee or other person in order to preserve the property mortgaged, such sum or sums shall be recoverable in addition to the sum recoverable under the provisions of sections 8 and 9.

Rate of interest payable by agriculturists on old loans.

12. All debts which have been scaled down under the provisions of this Act shall, so far as any sum remains payable thereunder, carry from the date up to which they have been scaled down interest on the principal amount due on that date at the rate previously applicable under law, custom, contract or otherwise:

Provided that it shall not in any case exceed 6¼ per cent per annum simple interest, that is to say, one pie per rupee per mensem, simple interest, or one anna per rupee per annum simple interest.

Rate of interest payable by agriculturists on new loans.

13. In any proceeding for recovery of a debt, the court shall scale down all interest due on any debt incurred by an agriculturist after the commencement of this Act, so as not to exceed a sum calculated at 6¼ per cent per annum, simple interest, that is to say, one pie per rupee per mensem simple interest, or one anna per rupee per annum simple interest:

Provided that the Provincial Government may, by notification in the Official Gazette, alter and fix any other rate of interest from time to time.

*Explanation.*—For the purposes of this section, the definition of 'agriculturist' in section 3 (ii) shall be read as if—

(i) in proviso (A) to that section, for the expression "the two financial years ending 31st March 1938," the expression "the two financial years ending on the 31st March immediately preceding the date on which the debt is incurred" were substituted; and

(ii) in provisos (B) and (C) to that section, for the expression "the two years immediately preceding the 1st October 1937," the expression "the two years ending on the 31st March or the 30th September (whichever is later) immediately preceding the date on which the debt is incurred" were substituted.

Separation of share of debt in particular cases.

14. Notwithstanding anything contained in section 3 (ii) and subject to the provisions of sections 5 and 6, where in a Hindu family, whether divided or undivided, some of the members liable in respect of a family debt are not agriculturists while others are agriculturists, the creditor shall, notwithstanding any law to the contrary, be entitled to proceed—

(*a*) against the non-agriculturist member or members and his or their share of the family property, to the extent only of his or their proportionate share of the debt; and

(*b*) against the agriculturist member or members and his or their share of the family property, to the extent only of his or their proportionate share of

the debt which shall be scaled down in accordance with the provisions of this Act.

## CHAPTER III.

### ARREARS OF RENT.

Conditional discharge of arrears of rentdue to landholders, etc.

**15.** (1) All rent payable by an agriculturist to a landholder or an under-tenure holder under the Madras Estates Land Act, 1908, or to a janmi or intermediary under the Malabar Tenancy Act, 1929, which has accrued for the fasli year 1345 and prior faslis and which is outstanding on the date of the commencement of this Act shall be deemed to be discharged whether the rent be due as such or whether a decree has been obtained therefor:

Provided that where the person liable to pay rent (hereinafter in this section referred to as 'tenant') does not, on or before the 30th September 1939, pay up all arrears of rent accrued in respect of any holding for faslis 1346 and 1347, the arrears of rent for fasli 1345 and prior faslis which were outstanding in respect of the same holding on the date of the commencement of this Act shall be deemed to be discharged only in the same proportion as the rent due for faslis 1346 and 1347 which is paid up by the ryot or tenant bears to the rent due for those two faslis:

Provided further that no tenant shall be entitled to the benefit of this section unless he shall have paid in respect of the holding, the rent due for fasli 1347 on or before the 30th September 1938.

*Explanation.*—In cases governed by the Malabar Tenancy Act, 1929, any reference to a fasli year in this Chapter shall be deemed to be a reference to the agricultural year as defined in the Malabar Tenancy Act, 1929, which contains the greater part of the fasli year.

*Illustrations.*—(*a*) A ryot or tenant is in arrear at the commencement of this Act in respect of rent for a particular holding for fasli 1345 and prior faslis in the sum of Rs. 500 and is in arrear on that date in respect of rent for the same holding for faslis 1346 and 1347, the rent for each fasli being Rs. 100. Within the 30th September 1938 he pays the rent for fasli 1347 and within 30th September, 1939, he pays the rent for fasli 1346. The arrears of rent of Rs. 500 which were outstanding at the commencement of this Act will be deemed to be discharged.

(*b*) A sum of Rs. 500 representing the arrears of rent in respect of a particular holding for fasli 1345 and prior faslis and the rents for faslis 1346 and 1347 for that holding are in arrear and outstanding at the commencement of this Act, the rent for each fasli being Rs. 100. The ryot or tenant pays the landholder within 30th September 1938 the rent for fasli 1347 but fails to pay within the 30th September 1939 any portion of the rent for fasli 1346. Only a sum of Rs. 250 or one half of the rent of faslis prior to and inclusive of fasli 1345 will be deemed to be discharged.

(*c*) In the same case, the ryot or tenant does not pay the landholder within the 30th September 1938 the whole of the rent for fasli 1347. No portion of the arrears for fasli 1345 and prior faslis is discharged, and the ryot loses the benefit of this section.

(*d*) In the same case, the ryot or tenant pays the landholder within 30th September 1938 the rent for fasli 1347, but pays within 30th September 1939 only Rs. 50, being half the rent for fasli 1346. He has thus paid Rs. 150 out of Rs. 200 being the rent of both the faslis 1346 and 1347, before 30th September 1939. A sum of Rs. 375, or three-fourths of the rent of faslis prior to and inclusive of fasli 1345 will be allowed to be discharged.

(2) Nothing contained in sub-section (1) shall be deemed to effect a discharge of arrears of rent which accrued due for fasli 1345 if proceedings for the recovery of such arrears stood stayed by an Act of the Legislature or

by an order of a Court or if such proceedings, if instituted, would have stood so stayed. But the arrears of rent for fasli 1345 shall not be recoverable until the 30th September 1938 or if the rent for fasli 1347 is paid before that date, until the 30th September 1939.

(3) Notwithstanding anything to the contrary in any agreement or in section 64 of the Madras Estates Land Act, 1908, any payment of rent made by a tenant after the commencement of this Act shall be credited towards the rent due by him for fasli 1347 in the first instance and for fasli 1346 in the next instance, and not towards the rent due for any previous fasli.

(4) Every tenant shall be at liberty to pay into Court any amount towards the rent due or claimed to be due by him for faslis 1347 or 1346 or both and thereupon the Court shall, after notice to the landholder, under-tenure holder, janmi or intermediary, as the case may be, apply the provisions of this Act and determine whether the whole or only a portion of the rent for the faslis aforesaid has been paid by the tenant, and also the extent of the remaining liability, if any, of the tenant for rent under the provisions of this Act.

*Explanation.*—For the purposes of this sub-section, 'Court' shall mean the Collector referred to in section 209 (1) of the Madras Estates Land Act, 1908, or the Court referred to in section 3 (*b*) of the Malabar Tenancy Act, 1929, as the case may be.

Landholder to be entitled to recover land cess and costs.

16. Notwithstanding anything contained in this chapter, a landholder or an under-tenure holder under the Madras Estates Land Act, 1908, or a janmi or intermediary under the Malabar Tenancy Act, 1929, shall be entitled to recover, in addition to any sum recoverable by him under section 15—

(*a*) the land cess, if any, paid by him and recoverable under section 88 of the Madras Local Boards Act, 1920;

(*b*) the land revenue and water cess, if any, paid by him to the Provincial Government which the tenant was bound to pay by virtue of any law, custom, contract or decree of court governing the tenancy; and

(*c*) the costs awarded to him in any decree for rent obtained by him.

Extension of limitation for suits, etc., for rent in certain cases.

17. Notwithstanding anything contained in the Madras Estates Land Act, 1908, or the Malabar Tenancy Act, 1929, or in any law of limitation or procedure in force for the time being, no suit or execution proceedings in respect of arrears of rent accrued for fasli 1345 or any prior fasli which, under the existing law, would become barred between the 1st October 1937 and the 30th September 1938, shall be so barred and the landholder, under-tenure holder, janmi or intermediary, as the case may be, shall be entitled to file a suit or institute execution proceedings for recovery thereof, on or before the 31st December 1938; and in cases where the rent due for fasli 1347 has been paid before the 30th September 1938, the period of limitation for any suit or execution proceedings for the recovery of any arrears of rent which, under the existing law, would become barred between the 1st October 1937 and the 30th September 1939, shall stand extended until the 31st December 1939:

Provided that where on the 31st December 1938 or the 31st December 1939, as the case may be, an application under sub-section (4) of section 15 is pending in any Court, the period of limitation prescribed by this section shall stand extended until the expiry of a period of two months from the date of the order on such application.

## CHAPTER IV.

### PROCEDURE AND MISCELLANEOUS.

Provision as to costs in certain cases.

18. (1) Where a decree is passed against an agriculturist in a suit filed on or after the 1st October 1937, the Court shall allow only such costs as would have been allowable if the suit had been filed for the amount of the debt as scaled down in accordance with the provisions of this Act, and where in any such case a decree has been passed before the commencement of this Act, the Court shall, on application by the agriculturist, amend the decree accordingly.

(2) Nothing in sub-section (1) shall apply to any suit instituted on or after the 1st October 1937 and before the commencement of this Act in respect of a claim which would be barred by limitation before the 1st April 1938.

Amendment of certain decrees.

19. Where before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be:

Provided that all payments made or amounts recovered, whether before or after the commencement of this Act, in respect of any such decree shall first be applied in payment of all costs as originally decreed to the creditor.

Stay of execution proceedings.

20. Every court executing a decree passed against a person entitled to the benefits of this Act, shall on application, stay the proceedings until the court which passed the decree has passed orders on an application made or to be made under section 19:

Provided that where within 60 days after the application for stay has been granted the judgment-debtor does not apply to the court which passed the decree for relief under section 19 or where an application has been so made and is rejected, the decree shall be executed as it stands, notwithstanding anything contained in this Act to the contrary.

*Explanation.*—The expression "the court which passed the decree" shall have the same meaning as in the Code of Civil Procedure, 1908.

Adjudications in insolvency.

21. Nothing contained in this Act shall apply to the debts payable by any person who has been adjudicated an insolvent, if prior to the coming into force of this Act, a dividend has been declared out of his assets. If a dividend has not been so declared, this Act shall apply to the debts payable by such person if he would have been an agriculturist within the meaning of this Act but for his adjudication in insolvency.

Special provision in the case of certain sales of movable property.

22. Where, in execution of any decree, any movable property of an agriculturist has been sold on or after the 1st October 1937, any judgment-debtor may apply to the court for an order that the provisions of section 8 or 9, as the case may be and of sections 11 and 12 be applied to the decree, and the court, shall, if satisfied that the applicant is an agriculturist entitled to the benefits of those sections, apply the same and order the decree-holder to refund any sum received by him on or after the 1st October 1937 in excess of the amount to which he would have been entitled if the property had not been sold:

Provided that no such order shall be made without notice to the decree-holder and without affording him an opportunity to be heard in the matter.

Sales of immovable property to be set aside in certain cases.

23. Where in execution of any decree any immovable property, in which an agriculturist had an interest, has been sold or foreclosed on or after the 1st October 1937, then, notwithstanding anything contained in the Indian Limitation Act, 1908, or in the Code of Civil Procedure, 1908, and notwithstanding that the sale has been confirmed, any judgment-debtor, claiming to be an agriculturist entitled to the benefits of this Act, may apply to the court within 90 days of the commencement of this Act to set aside the sale or foreclosure of the property, and the court shall, if satisfied that the applicant is an agriculturist entitled to the benefits of this Act, order the sale or foreclosure to be set aside, and thereupon the sale shall be deemed not to have taken place at all:

Provided that no such order shall be made without notice to the decree-holder, the auction purchaser, and other persons interested in such sale or foreclosure and without affording them an opportunity to be heard in the matter.

Consequential provision on setting aside of sale.

24. Where a sale is set aside under the preceding section, a purchaser shall be entitled to an order for repayment of any purchase money paid by him against the person to whom it has been paid:

Provided that no poundage shall be payable in respect of any such sale and provided further that where poundage has been collected the court shall direct the same to be refunded.

Alienations by debtor.

25. All alienations of immovable property made by an agriculturist debtor on or after the 1st October 1937 shall be invalid as against every creditor whose sale in execution or foreclosure decree has been set aside under section 23 or who became entitled to rateable distribution of the proceeds of such sale under section 73 of the Code of Civil Procedure, 1908.

District Collector to furnish information as to certain facts.

26. Any creditor may apply to the Collector of the district in which the creditor believes his debtor to have been or to be assessed to income-tax in terms of proviso (A) to section 3 (ii) or to profession, property or house tax under the Cantonments Act, 1924, in terms of provisos (B) and (C) to that section, for information as to the above facts and the Collector shall thereupon ascertain such information and grant to such creditor a memorandum in the prescribed form as to whether the debtor has been so assessed to income-tax or to profession, property or house tax. Such memorandum shall be received in every court as evidence of the facts stated therein.

Executive authorities of local bodies to furnish information as to certain facts.

27. Any creditor may apply to the executive authority of a municipality, the president of a local board or the Revenue Officer of the Corporation of Madras for information as to whether his debtor was or is assessed to profession, property or house tax in terms of provisos (B) and (C) to section (3) (ii), and the executive authority, president or Revenue Officer shall thereupon grant to such creditor a certificate in the prescribed form as to whether the debtor named in the application has been so assessed to profession, property or house tax. Such certificate shall be received in every court as evidence of the facts stated therein.

Power to make rules.

28. (1) The Provincal Government may make rules for carrying into effect the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the Provincial Government may make rules—

(*a*) in regard to any matter which is required to be prescribed by this Act;

(*b*) prescribing the form of, and the fees to be paid in respect of, applications under this Act; and

(*c*) for removing any difficulty in giving effect to the provisions of this Act.

(3) All rules made under this section shall be consistent with the provisions of this Act. They shall be published in the Official Gazette and upon such publication shall have effect as if enacted in this Act.

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## THE MADRAS TRAFFIC CONTROL ACT, 1938.

### ACT No. V OF 1938.

[*28th March, 1938.*

*An Act to provide for the control of traffic in public places in the Province of Madras.*

WHEREAS it is expedient to enable the Provincial Government to make provision for the control of traffic in public places in the Province of Madras, and for that purpose further to amend the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, the Madras Local Boards Act, 1920, the Indian Motor Vehicles Act, 1914, in its application to the Province of Madras, and the Madras Motor Vehicles Taxation Act, 1931; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MADRAS TRAFFIC CONTROL ACT, 1938.

(2) It extends to the whole of the Province of Madras.

(3) This section shall come into force at once, and the rest of this Act shall come into force on such date as the Provincial Government may, by noti-cation, appoint.

Definition.

2. In this Act, 'Public place' means a road, street, way or other place, whether a thoroughfare or not, to which the public are granted access or over which they have a right to pass and includes—

(*a*) in the City of Madras, a public street as defined in clause (20) of section 3 of the Madras City Municipal Act, 1919;

(*b*) in a municipality governed by the Madras District Municipalities Act, 1920, a public street as defined in clause (21) of section 3 of that Act; and

(*c*) in a local area governed by the Madras Local Boards Act, 1920, a public road as defined in clause (18) of section 3 of that Act.

Power of Provincial Government to make rules for the control of traffic.

3. The Provincial Government may, after previous publication, make rules to provide—

(*a*) for the regulation of the use of any public place and the closing thereof or parts thereof; and

(*b*) for the regulation of traffic in any public place or its reservation for particular kinds of traffic.

Penalty for breach of rules.

4. In making any rule under section 3, the Provincial Government may provide that a breach thereof shall be punishable—

(*a*) with fine which may extend to fifty rupees and, in case of a continuing breach, with fine which may extend to fifteen rupees for every day during which the breach continues after conviction for the first breach; or

(*b*) with fine which may extend to ten rupees for every day during which the breach continues after receipt of notice from an officer empowered in that behalf by the Provincial Government, to discontinue such breach.

Amendment of Madras Act IV of 1919.

5. In the Madras City Municipal Act, 1919—

(i) sub-clauses (*b*) and (*c*) of clause (8) of section 349 shall be omitted and sub-clause (*d*) of that clause shall be relettered as sub-clause (*b*); and

(ii) in clause (9) of the same section, after the words "public or municipal places", the following words shall be added, namely:—

"but not including the regulation of traffic therein, the reservation thereof for particular kinds of traffic, or the closing thereof or parts thereof to traffic."

Amendment of Madras Act V of 1920.

6. In the Madras District Municipalities Act, 1920—

(i) section 174-A shall be omitted;

(ii) in section 306, sub-clauses (*b*) and (*c*) of clause (8) shall be omitted and sub-clause (*d*) of that clause shall be relettered as sub-clause (*b*);

(iii) in the same section, in clause (9), after the words "public or municipal places" the following words shall be added, namely:—

"but not including the regulation of traffic therein, the reservation thereof for particular kinds of traffic, or the closing thereof or parts thereof to traffic."; and

(iv) in Schedules VII and VIII, the entries relating to section 174-A shall be omitted.

Amendment of Madras Act XIV of1920.

7. In the Madras Local Boards Act, 1920—

(i) section 166 shall be omitted;

(ii) in section 202, sub-clauses (*a*) and (*b*) of clause (5) shall be omitted and sub-clause (*c*) of that clause shall be renumbered as clause (5);

(iii) in the same section, in clause (6), after the words "places vested in a local board", the following words shall be added, namely:—

"but not including the regulation of traffic therein, the reservation thereof for particular kinds of traffic, or the closing thereof or parts thereof to traffic."; and

(iv) in Schedules VIII and IX, the entries relating to section 166 shall be omitted.

Amendment of Act VIII of 1914 in its application to the Province.

8. The Indian Motor Vehicles Act, 1914, shall in its application to the Province of Madras, be construed as if the rule-making power conferred by section 11 of that Act extended to the following matters, namely:—

"(*a*) The prescription of the conditions subject to which, and the fees (if any) on payment of which, motor vehicles or any class of such vehicles may be used in public places, generally or in any particular public place.

(*b*) The constitution for each district of a transport authority and the prescription of its powers and functions including, in particular, its powers and functions in regard to—

(i) the issue or the authorization of the issue of prescribed permits in respect of motor vehicles or any specified class of motor vehicles, for their use in all, or any, public places in the district;

(ii) the determination of the areas in the district on the routes or public places situated in which, or of the routes or public places in the district on which, motor vehicles or any specified class of motor vehicles may be used; and

(iii) the restriction of the number of motor vehicles or of any specified class of motor vehicles to which permits may be issued in respect of such areas, routes or public places.

(*c*) The constitution of a central transport authority for the Province and the prescription of its powers and functions including, in particular—

(i) its powers and functions in regard to motor traffic extending over the jurisdiction of two or more of the transport authorities referred to in clause (*b*), and the exercise of the powers and functions of, and the control to be exercised over, such authorities in respect of such traffic; and

(ii) its appellate jurisdiction in respect of orders passed by the transport authorities referred to in clause (*b*).

(*d*) The powers of the Provincial Government to control the central transport authority referred to in clause (*c*) and the prescription that the decisions and orders of such authority—

(i) shall not be liable to be questioned in any Civil Court by suit or otherwise; and

(ii) shall be final except in so far as they may be set aside or revised by the Provincial Government.

(*e*) The powers of the Provincial Government to control the transport authorities referred to in clause (*b*) and the prescription that the decisions and orders of such authorities shall not be liable to be questioned in any Civil Court by suit or otherwise.

(*f*) The prescription of a limit of speed in respect of motor vehicles or any specified class of motor vehicles, generally or in any particular public place.

(*g*) The empowering of any authority to limit by general or special order the speed at which motor vehicles or any specified class of motor vehicles may be driven, generally or in any particular public place."

Amendment of Madras Act III of 1931.

9. In the Madras Motor Vehicles Taxation Act, 1931—

(i) in section 2, the following shall be added at the end of clause (iii), namely:—

"and 'motor lorry' includes a goods vehicle, that is to say, a motor vehicle constructed or adapted for use for the carriage of goods or a motor vehicle not so constructed or adapted which is habitually used for the carriage of goods and not of passengers.

*Explanation.*—The expression 'goods' includes merchandise, wares, burden of any description and movable property other than personal luggage."

(ii) in the same section, clause (viii) shall be renumbered as clause (viii-*b*) and the following shall be inserted as clause (viii-*a*), namely:—

"(viii-*a*) 'laden weight' in relation to a motor vehicle means, in case a permit is issued to the vehicle in pursuance of the rules made by the Provincial

Government under the Indian Motor Vehicles Act, 1914, the maximum laden weight specified in such permit, if no such permit is issued, the maximum laden weight specified in the registration certificate of the vehicle, and if such weight is not specified in such certificate, the maximum laden weight of the vehicle determined in such manner as the licensing officer may deem fit.

'laden weight' in relation to a trailer means, in case a permit is issued to the vehicle to which the trailer is attached in pursuance of the rules made by the Provincial Government under the Indian Motor Vehicles Act, 1914, the maximum laden weight specified in such permit in respect of the trailer, if no such permit is issued, the maximum laden weight specified in respect of the trailer in the registration certificate of the vehicle to which the trailer is attached, and if such weight is not specified in such certificate, the maximum laden weight of the trailer determined in such manner as the licensing officer may deem fit.";

(iii) for sub-section (1) of section 10, the following sub-section shall be substituted, namely:—

"(1) (*a*) From the proceeds of the tax collected under this Act every year, the following credits and payments shall be made in the order mentioned below:—

(i) *Firstly*, there shall be credited to the Provincial Government the expenses of collecting the tax.

(ii) *Secondly*, there shall be credited to the Provincial Government the cost incurred by them in exercising their administrative functions in regard to the control of motor vehicles in the Province.

(iii) *Thirdly*, there shall be credited to the Provincial Government a sum equivalent to the average annual income derived by them during the three years ending on the 31st day of March immediately preceding the commencement of the Madras Traffic Control Act, 1938, from additional fees levied under the Indian Motor Vehicles Act, 1914, on motor vehicles plying on Government roads in the Province.

(iv) *Fourthly*, there shall be paid to each district board and to each municipal council a sum equivalent to the average annual income derived by such board or council during the three years ending on the 31st day of March immediately preceding the commencement of the Madras Traffic Control Act, 1938, from fees on licences granted to motor vehicles under section 166 of the Madras Local Boards Act, 1920, or section 174-A of the Madras District Municipalities Act, 1920, as the case may be.

(v) *Fifthly*, there shall be paid to each local body which at the commencement of this Act was levying tolls or vehicle tax on motor vehicles or both, a sum equivalent to the average annual income derived by such local body during the three years ending on the 31st day of March 1931, from such tolls or vehicle tax on motor vehicles, or both, as the case may be, and there shall also be credited to the Provincial Government a sum equivalent to their average annual income during the said three years from all tolls levied by them in the Province.

(*b*) The Provincial Government shall determine the sums which should be credited to themselves or paid to local bodies under sub-clauses (i) to (v) of clause (*a*), and their determination shall be final.";

(iv) in sub-section (2) of the same section, for the expression "sub-section (1)", the expression "sub-clause (v) of clause (*a*) of sub-section (1)" shall be substituted;

(v) for sub-section (3) of the same section, the following sub-section shall be substituted, namely:—

"(3) If in any year the proceeds of the tax after deducting the sums referred to in sub-clauses (i) to (iv) of clause (*a*) of sub-section (1) fall short of the aggregate of the sums payable to local bodies under sub-clause (v) of the said clause (*a*) and the sum creditable to the Provincial Government under the same sub-clause, such proceeds shall be distributed among the local bodies and the Provincial Government proportionately to the sums determined under clause (*b*) of sub-section (1) as payable to each such local body and as creditable to the Provincial Government, under sub-clause (v) aforesaid, and the deficit shall be made good in the same proportion in the earliest subsequent year or years in which there may be a surplus.";

(vi) for items 3 and 4 of Schedule II, the following items shall be substituted, namely:—

| Classes of vehicles. | Maximum quarterly tax — For vehicles fitted with pneumatic tyres. | Maximum quarterly tax — For other vehicles. |
|---|---|---|
| | RS. A. P. | RS. A. P. |
| "3. Motor lorries— | | |
| (*a*) Lorries not exceeding 20 cwt. in weight, laden .. | 50 0 0 | 75 0 0 |
| (*b*) Lorries exceeding 20 cwt. but not exceeding 30 cwt. in weight, laden. | 100 0 0 | 150 0 0 |
| (*c*) Lorries exceeding 30 cwt. but not exceeding 45 cwt. in weight, laden. | 120 0 0 | 180 0 0 |
| (*d*) Lorries exceeding 45 cwt. but not exceeding 60 cwt. in weight, laden. | 150 0 0 | 225 0 0 |
| (*e*) Lorries exceeding 60 cwt. but not exceeding 85 cwt. in weight, laden. | 180 0 0 | 270 0 0 |
| (*f*) Lorries exceeding 85 cwt. but not exceeding 110 cwt. in weight, laden. | 220 0 0 | 330 0 0 |
| (*g*) Lorries exceeding 110 cwt. but not exceeding 150 cwt. in weight, laden. | 270 0 0 | 405 0 0 |
| (*h*) Lorries exceeding 150 cwt. but not exceeding 180 cwt. in weight, laden. | 320 0 0 | 480 0 0 |
| (*i*) Lorries exceeding 180 cwt. in weight, laden .. | 350 0 0 | 525 0 0 |
| (*j*) Additional tax payable in respect of lorries used for drawing trailers— | | |
| (i) for each trailer not exceeding 20 cwt. in weight, laden. | 20 0 0 | 30 0 0 |
| (ii) for each trailer exceeding 20 cwt. but not exceeding 60 cwt. in weight, laden. | 75 0 0 | 112 8 0 |
| (iii) for each trailer exceeding 60 cwt. in weight, laden.. | 150 0 0 | 225 0 0 |
| Provided that two or more lorries shall not be chargeable under this clause in respect of the same trailer. | | |
| 4. Motor vehicles plying for hire and used for the transport of passengers— | | |
| (*a*) Vehicles licensed under the rules made by the Provincial Government under the Indian Motor Vehicles Act, 1914, to carry in all not more than five persons. | 80 0 0 | 120 0 0 |
| (*b*) Vehicles licensed under the rules made by the Provincial Government under the Indian Motor Vehicles Act, 1914, to carry more than five persons—for every person which the vehicle is so licensed to carry excluding the driver and the conductor. | 20 0 0 | 30 0 0 |

(vii) for items 3 and 4 of Schedule III, the following items shall be substituted, namely:—

| Classes of vehicles. (1) | Maximum tax for vehicles fitted with pneumatic tyres. For a period not exceeding seven days. (2) | Maximum tax for vehicles fitted with pneumatic tyres. For a period exceeding seven days but not exceeding thirty days. (3) | Maximum tax for other vehicles. For a period not exceeding seven days. (4) | Maximum tax for other vehicles. For a period exceeding seven days but not exceeding thirty days. (5) |
|---|---|---|---|---|
| | RS. A. P. | RS. A. P. | RS. A. P. | RS. A. P. |
| "3. Motor Lorries— | | | | |
| (*a*) Lorries not exceeding 20 cwt. in weight laden. | 8 8 0 | 25 0 0 | 12 8 0 | 37 8 0 |
| (*b*) Lorries exceeding 20 cwt. but not exceeding 30 cwt. in weight, laden. | 16 12 0 | 50 0 0 | 25 0 0 | 75 0 0 |
| (*c*) Lorries exceeding 30 cwt. but not exceeding 45 cwt. in weight, laden. | 20 0 0 | 60 0 0 | 30 0 0 | 90 0 0 |
| (*d*) Lorries exceeding 45 cwt. but not exceeding 60 cwt. in weight, laden. | 25 0 0 | 75 0 0 | 37 8 0 | 112 8 0 |
| (*e*) Lorries exceeding 60 cwt. but not exceeding 85 cwt. in weight, laden. | 30 0 0 | 90 0 0 | 45 0 0 | 135 0 0 |
| (*f*) Lorries exceeding 85 cwt. but not exceeding 110 cwt. in weight, laden. | 36 12 0 | 110 0 0 | 55 0 0 | 165 0 0 |
| (*g*) Lorries exceeding 110 cwt. but not exceeding 150 cwt. in weight, laden. | 45 0 0 | 135 0 0 | 67 8 0 | 202 8 0 |
| (*h*) Lorries exceeding 150 cwt. but not exceeding 180 cwt. in weight laden. | 53 8 0 | 160 0 0 | 80 0 0 | 240 0 0 |
| (*i*) Lorries exceeding 180 cwt. in weight, laden. | 58 8 0 | 175 0 0 | 87 8 0 | 262 8 0 |
| (*j*) Additional tax payable in respect of lorries used for drawing trailers— | | | | |
| (i) for each trailer not exceeding 20 cwt. in weight, laden. | 3 8 0 | 10 0 0 | 5 0 0 | 15 0 0 |
| (ii) for each trailer exceeding 20 cwt. but not exceeding 60 cwt. in weight laden. | 12 8 0 | 37 8 0 | 18 12 0 | 56 4 0 |
| (iii) for each trailer exceeding 60 cwt. in weight, laden. | 25 0 0 | 75 0 0 | 37 8 0 | 112 8 0 |
| Provided that two or more lorries shall not be chargeable under this clause in respect of the same trailer. | | | | |
| 4. Motor vehicles plying for hire and used for the transport of passengers— | | | | |
| (*a*) Vehicles licensed under the rules made under the Indian Motor Vehicles Act, 1914, to carry in all not more than four persons. | 13 8 0 | 40 0 0 | 20 0 0 | 60 0 0 |
| (*b*) Vehicles licensed under the rules made under the Indian Motor Vehicles Act, 1914, to carry more than four persons—for every person which the vehicle is so licensed to carry. | 3 8 0 | 10 0 0 | 5 0 0 | 15 0 0" |

and

(viii) in item (ii) of sub-section (1) of section 11, after the words 'class of motor vehicles', the words 'or motor vehicles running in any particular area', shall be added.

Existing by-laws to continue.

10. Notwithstanding anything contained in this Act, all by-laws relating to any of the matters mentioned in section 3 of this Act which have been made under the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, or the Madras Local Boards Act, 1920, and are in force at the commencement of this Act shall continue to be valid, but any such by-law may be cancelled or altered by a rule made under section 3 aforesaid.

Repeal of Madras Act V of 1931.

11. The Madras Government Roads Traffic Control Act, 1931, is hereby repealed.

Power to remove difficulties.

12. If any difficulty arises in giving effect to the provisions of this Act or of the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, the Madras Local Boards Act, 1920, the Indian Motor Vehicles Act, 1914, or the Madras Motor Vehicles Taxation Act, 1931, as amended by this Act, the Provincial Government, as occasion may require, may, by order, do anything which appears to them to be necessary for the purpose of removing the difficulty.

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# THE MADRAS TOLLS AND MOTOR VEHICLES TAXATION (AMENDMENT) ACT, 1938.

## ACT No. VI OF 1938.

[*12th April, 1938.*

*An Act further to amend the Indian Tolls Act, 1851, in its application to the Province of Madras and the Madras Motor Vehicles Taxation Act, 1931, for certain purposes.*

WHEREAS it is expedient further to amend the Indian Tolls Act, 1851, in its application to the Province of Madras and the Madras Motor Vehicles Taxation Act, 1931, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS TOLLS AND MOTOR VEHICLES TAXATION (AMENDMENT) ACT, 1938.

Substitution of new section for section 2, Act VIII of 1851.

2. For section 2 of the Indian Tolls Act, 1851 (hereinafter referred to as the said Act), the following section shall be substituted, namely:—

Power of Provincial Government to levy tolls on roads and bridges.

"2. (1) The Provincial Government may levy tolls in respect of—

(*a*) any road or bridge made, improved or repaired at their expense after the 1st April 1931, and

(*b*) any bridge made, improved or repaired after the 1st April 1931, partly at the expense of the Provincial Government and partly at the expense of a local body or bodies or solely at the expense of a local body or bodies, provided that the total expense incurred on the bridge shall not be below such limit, if any, as the Provincial Government may, by rules, determine.

(2) The tolls shall be levied only at such rates and for such period as the Provincial Government may by notification in the Official Gazette declare to be necessary—

(*a*) in the case of tolls levied under clause (*a*) of sub-section (1), for the recovery of the amount expended upon the road or bridge or such portion of such amount as the Provincial Government may determine, together with interest thereon at such rate as they may fix; and

(*b*) in the case of tolls levied under clause (*b*) of sub-section (1), for the recovery of the amounts expended upon the bridge—

(i) by the Provincial Government, and

(ii) by the local body or bodies otherwise than from its or their ordinary revenues,

or such portions of such amounts as the Provincial Government may determine, together with interest on such amounts or such portions, as the case may be, at such rate or rates as they may fix.

(3) Where tolls are levied in respect of any bridge under clause (*b*) of sub-section (1), the receipts from the tolls after deducting the expenses on account of the collection thereof, shall—

(i) in case the bridge is made, improved or repaired solely at the expense of a local body, be paid to that local body, and

(ii) in other cases, be distributed between the local body or bodies concerned and the Provincial Government in proportion to the expenditure respectively incurred by the local bodies otherwise than from their ordinary revenues and by the Government.

(4) All sums payable to local bodies under sub-section (3) shall be charged on the revenues of the Province.

(5) The Provincial Government may place the collection of the tolls levied under sub-section (1) under the management of such persons as may appear to them proper; and all persons employed in the management and collection of such tolls shall be liable to the same responsibilities as would belong to them if employed in the collection of land revenue."

Addition of new section 9 in Act VIII of 1851.

3. After section 8 of the said Act, the following section shall be added, namely:—

Power of Provincial Government to make rules.

"9. The Provincial Government shall have power to make rules regarding the method of collection of the tolls, the manner of distribution of the receipts therefrom, and generally for carrying out the purposes of this Act."

Repeal of section 14, Madras Act III of 1931.

4. Section 14 of the Madras Motor Vehicles Taxation Act, 1931, shall be omitted.

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## THE MADRAS SUPPRESSION OF IMMORAL TRAFFIC (AMENDMENT) ACT, 1938.

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### ACT NO. VII OF 1938.

[*26th April, 1938.*

*An Act further to amend the Madras Suppression of Immoral Traffic Act, 1930, for certain purposes.*

WHEREAS it is expedient further to amend the Madras Suppression of Immoral Traffic Act, 1930, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS SUPPRESSION OF IMMORAL TRAFFIC (AMENDMENT) ACT, 1938.

Insertion of new section 8-A in Madras Act V of 1930.

2. After section 8 of the Madras Suppression of Immoral Traffic Act, 1930 (hereinafter referred to as the said Act), the following section shall be inserted, namely:—

Punishment for living on the earnings of prostitution.

"8-A. (1) Any person not below the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of another person shall be punished with imprisonment which may extend to two years or with fine which may extend to one thousand rupees or with both.

(2) Where any person is proved—

(*a*) to be living with, or to be habitually in the company of, a person living in prostitution, or

(*b*) to have exercised control, direction or influence over the movements of a person living in prostitution in such a manner as to show that such person is aiding, abetting or compelling her prostitution with any other person or generally,

it shall be presumed until the contrary is proved that such person is knowingly living on the earnings of the prostitution of another within the meaning of sub-section (1):

Provided that the mother, or a son or daughter, of a person living in prostitution shall not be punished under sub-section (1) for living on the earnings of such person unless it is proved to the satisfaction of the Court that such mother, son or daughter is aiding, abetting or compelling her prostitution.

(3) Notwithstanding anything contained in section 2, this section shall not be applied except to the City of Madras or a municipality constituted under the Madras District Municipalities Act, 1920, or an area situated within three miles of the limits of such City or municipality."

Substitution of new section for section 13, Madras Act V of 1930.

3. For section 13 of the said Act, the following section shall be substituted, namely:—

Arrest without a warrant.

"13. (1) Any Police officer not below the rank of Inspector may arrest without a warrant any person who has been concerned in any offence punishable under section 5, 8-A, 9, 10, 11 or 12 or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in any such offence:

Provided that a person concerned or alleged or suspected to be concerned in an offence punishable under section 12 shall be arrested under this section only if the name and address of such person be unknown to the Police officer and cannot be ascertained by him then and there, or if he has reason to suspect that a false name and address have been given.

(2) Any Police officer authorized in this behalf in writing by the Commissioner of Police or the Superintendent of Police by special order, may arrest without a warrant any person committing in his view any offence punishable under section 9, 10, 11 or 12, if the name and address of such person be unknown to such Police officer and cannot be ascertained by him then and there, or if he has reason to suspect that a false name and address have been given."

Substitution of new section for section 14, Madras Act V of 1930.

4. For section 14 of the said Act, the following section shall be substituted, namely:—

Power to enter premises.

"14. Notwithstanding anything contained in any other law for the time being in force, any Police officer not below the rank of Inspector, and any other Police officer authorized in this behalf in writing by the Commissioner of Police or the Superintendent of Police by special order, may, for the purpose of ascertaining whether an offence punishable under section 5, 8-A, 9, 10, 11 or 12 has been or is being committed, enter without a warrant any premises in which he has reason to believe that any woman or girl is living in respect of whom an offence punishable under section 5, 8-A, 9, 10, 11 or 12 has been committed."

Amendment of section 15, Madras Act V of 1930.

5. In section 15 of the said Act, after the word and figure "sections 5", the figure and letter "8-A," shall be inserted.

## THE MADRAS LOCAL BOARDS (AMENDMENT) ACT, 1938.

ACT No. VIII OF 1938.

[*26th August, 1938.*

*An Act further to amend the Madras Local Boards Act, 1920, and the Madras Local Boards (Amendment) Act, 1935, for certain purposes.*

WHEREAS it is expedient further to amend the Madras Local Boards Act, 1920, and the Madras Local Boards (Amendment) Act, 1935, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS LOCAL BOARDS (AMENDMENT) ACT, 1938.

Power of Provincial Government to reduce the term of office of the members of certain local boards.

2. (1) Notwithstanding anything contained in the Madras Local Boards Act, 1920, or the Madras Local Boards (Amendment) Act, 1935, the Provincial Government may, by notification, direct that the term of office of the members of all or any of the local boards situated in any of the districts included in Groups II and III of the Schedule to the Madras Local Boards (Amendment) Act, 1935, shall be reduced so that such term may expire on such date as may be specified in the notification, in accordance with the provisions of sub-section (2).

(2) The date specified in a notification issued under sub-section (1) shall not be earlier than—

(*a*) the first day of November 1938, in the case of local boards situated in any of the districts included in Group II aforesaid; and

(*b*) the first day of November 1939, in the case of local boards situated in any of the districts included in Group III aforesaid.

*Explanation.*—The provisions of this section shall also apply to any local board situated in any of the districts included in Groups II and III aforesaid, notwithstanding that the term of office of the members of such board commenced on a day later than the latest date specified in column (3) of the table in clause (*b*) (iii) of section 7 of the Madras Local Boards (Amendment) Act, 1935.

## THE MADRAS FAMINE RELIEF FUND (AMENDMENT) ACT, 1938.

ACT No. IX OF 1938.

[*26th August, 1938.*

*An Act to amend the Madras Famine Relief Fund Act, 1936, for certain purposes.*

WHEREAS it is expedient to amend the Madras Famine Relief Fund Act, 1936, as adapted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS FAMINE RELIEF FUND (AMENDMENT) ACT, 1938.

Amendment of sections 3 and 6, Madras Act XVI of 1936.

2. In clause (iv) of section 3 and section 6 of the Madras Famine Relief Act, 1936 (hereinafter referred to as the said Act), for the words "the securities of the Central Government", the words "the securities of the Central or of the Provincial Government" shall be sustituted.

Amendment of section 7, Madras Act XVI of 1936.

3. In section 7 of the said Act, after sub-section (2) the following sub-section shall be added, namely:—

"(3) All sums payable to the Fund under sub-section (2) shall be expenditure charged on the revenues of the Province."

## THE MADRAS PROHIBITION (AMENDMENT) ACT, 1938.

### ACT No. X OF 1938.

[*30th August, 1938.*

*An Act to amend the Madras Prohibition Act, 1937, for a certain purpose.*

WHEREAS it is expedient to amend the Madras Prohibition Act, 1937, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS PROHIBITION (AMENDMENT) ACT, 1938.

2. In section 6 of the Madras Prohibibition Act, 1937—

(i) in the first paragraph, the words and figures "or specially approved as of medicinal value by the Medical Council established by the Madras Medical Registration Act, 1914" shall be omitted; and

(ii) in the proviso, clauses (*b*) and (*c*) shall be relettered (*c*) and (*d*) respectively, and the following shall be inserted as clause (*b*), namely:—

"(*b*) to advertisements in medical journals, or to notices and literature circulated exclusively to members of the medical profession, if such advertisements, notices or literature relate to any liquor or intoxicating drug which has been specially approved as of medicinal value—

(i) by the Medical Council established by the Madras Medical Registration Act, 1914; or

(ii) by any other Medical Council which has been established under any law for the time being in force in any other Province in British India or in any Indian State, or which has been recognized by the Government of such Province or State; or

(iii) by such authority in respect of Indian Medicine as may be notified by the Provincial Government; or."

## THE MADRAS BORSTAL SCHOOLS (AMENDMENT) ACT, 1938.

### ACT No. XI OF 1938.

[*4th September, 1938.*

*An Act further to amend the Madras Borstal Schools Act, 1925, for certain purposes.*

WHEREAS it is expedient further to amend the Madras Borstal Schools Act, 1925, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS BORSTAL SCHOOLS (AMENDMENT) ACT, 1938.

Amendment of section 6, Madras Act V of 1926.

2. In Section 6 of the Madras Borstal Schools Act, 1925 (hereinafter referred to as the said Act), after the words "a salaried Presidency Magistrate," the words "or any other Presidency Magistrate empowered by the Provincial Government to sit singly" shall be inserted.

Amendment of section 7, Madras Act V of 1926.

3. In section 7 of the said Act—

(i) in sub-section (1), for the words "and forward the adolescent offender to the District Magistrate or Subdivisional Magistrate to whom he is subordinate," the following shall be substituted, namely:—

"and forward the adolescent offender—

(*a*) in case the Magistrate is a Presidency Magistrate, to the Chief Presidency Magistrate or if he has designated a salaried Presidency Magistrate in

this behalf by general or special order, to such salaried Presidency Magistrate; and

(*b*) in other cases, to the District Magistrate or Subdivisional Magistrate to whom he is subordinate"; and

(ii) in sub-section (2), for the words "The District Magistrate or Subdivisional Magistrate to whom the proceedings are so submitted," the words "The Magistrate to whom the proceedings are so submitted" shall be substituted.

## THE MADRAS ESTATES LAND (AMENDMENT) ACT, 1938.

ACT No. XII OF 1938.

[*4th September, 1938.*

*An Act further to amend the Madras Estates Land Act, 1908, for a certain purpose.*

WHEREAS it is expedient further to amend the Madras Estates Land Act, 1908, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS ESTATES LAND (AMENDMENT) ACT, 1938.

Amendment of section 185-A, Madras Act I of 1908.

2. In sub-section (1) of section 185-A of the Madras Estates Land Act, 1908, for the words "within two years," the words "within three years" shall be substituted.

## THE MADRAS REPEALING AND AMENDING ACT, 1938.

ACT No. XIII OF 1938.

[*14th September, 1938.*

*An Act to repeal certain enactments and to amend certain other enactments.*

WHEREAS it is expedient that the enactments specified in the First Schedule which are spent or have otherwise become unnecessary, or have ceased to be in force otherwise than by expressed specific repeal, should be expressly and specifically repealed:

AND WHEREAS it is also expedient that certain amendments should be made in the enactments specified in the Second Schedule:

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS REPEALING AND AMENDING ACT, 1938.

Repeal of certain enactments.

2. The enactments specified in the First Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Saving.

3. Where this Act repeals any enactment—

(*a*) which, while itself repealing another enactment, provided for the saving of rights, privileges, obligations or liabilities, acquired, accrued or incurred under that enactment or provided that references to the enactment by it repealed should be read as if made to the Act or Regulation by which that enactment was repealed, or that acts done under the enactment by it repealed should be deemed to have been done under the Act or Regulation by which that enactment was repealed, or

(*b*) which, while itself amending another enactment, provided that references to the enactment by it amended should be read as if made to that enactment as so amended, or that acts done under the enactment by it amended

should be deemed to have been done under that enactment as so amended or by a new authority substituted in that enactment as so amended for a previously existing authority,

the repeal shall not affect the operation of any such provision as aforesaid.

Amendment of certain enactments.

4. The enactments specified in the Second Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

## THE FIRST SCHEDULE.

### REPEALS.

(*See* Section 2.)

| Year. (1) | Number. (2) | Short title. (3) | Extent of repeal. (4) |
|---|---|---|---|
| 1884 | III | The Madras Revenue Recovery (Amendment) Act, 1884. | The whole. |
| 1885 | II | The Madras Rivers Conservancy (Amendment) Act, 1885. | The whole. |
| 1895 | II | The Madras Canals and Public Ferries (Amendment) Act, 1895. | The whole. |
| 1896 | II | The Madras General Clauses (Amendment) Act, 1896. | The whole. |
| 1897 | I | The Madras Revenue Recovery (Amendment) Act, 1897. | The whole. |
| 1898 | III | The Madras City Police (Amendment) Act, 1898. | The whole. |
| 1905 | I | The Madras Abkari (Amendment) Act, 1905. | The whole in all local areas in the Province where the Act has not been repealed by Madras Act X of 1937. |
| 1905 | IV | The Madras City Police Act Amendment Act, 1905. | The whole. |
| 1909 | I | The Madras Revenue Recovery Amendment Act, 1909. | The whole. |
| 1909 | II | An Act to repeal the Madras Labour and Emigration Act, 1866 (Madras Act V of 1866). | The whole. |
| 1909 | III | The Madras District Police and Towns Nuisances Acts Amendment Act, 1909. | The whole. |
| 1911 | I | The Madras Court of Wards Act, 1902, Amendment Act, 1910. | The whole. |
| 1913 | I | The Madras Abkari (Amendment) Act, 1913. | The whole in all local areas in the Province where the Act has not been repealed by Madras Act X of 1937. |
| 1914 | III | The Madras Proprietary Estates' Village-Service (Amendment) Act, 1914. | Sections 3 to 7 and 9 to 14. |
| 1914 | V | The Canals and Public Ferries (Amendment) Act, 1914. | The whole. |
| 1914 | VIII | The Madras Decentralization Act, 1914. | So much of the Schedule as has not been repealed with the exception of the entries in the Schedule relating to Madras Acts III of 1885 and IV of 1889. |
| 1915 | I | The Madras Abkari Act (Amendment) Act, 1915. | The whole in all local areas in the Province where the Act has not been repealed by Madras Act X of 1937. |

| Year. (1) | Number. (2) | Short title. (3) | Extent of repeal. (4) |
|---|---|---|---|
| 1916 | III | The Madras Civil Courts (Amendment) Act, 1916. | The whole. |
| 1920 | I | The Malabar Land Registration Amendment Act, 1920. | The whole. |
| 1920 | II | The Madras Village Courts (Amendment) Act, 1919. | Sections 3 to 24, 26 and 27 and the Schedule. |
| 1921 | I | The Deputy President's Salary Act, 1921 .. | The whole. |
| 1921 | III | The Madras Cattle Disease (Amendment) Act, 1921. | The whole. |
| 1921 | IV | The Madras City Municipal (Amendment) Act of 1921. | The whole. |
| 1923 | III | The Madras City Municipal (Further Amendment) Act, 1922. | The whole. |
| 1924 | I | The Madras Children (Amendment) Act, 1924. | The whole. |
| 1924 | III | The Madras Stage Carriages and Hackney Carriage (Amendment) Act, 1924. | The whole. |
| 1924 | IV | The Madras City Municipal (Amendment) Act, 1924. | So much as has not been repealed. |
| 1924 | V | The President's Salary Act, 1924 .. | The whole. |
| 1925 | III | The Madras Civil Courts (Amendment) Act, 1925. | The whole. |
| 1925 | IV | The Madras District Municipalities and Local Boards (Further Amendment) Act, 1924. | The whole. |
| 1925 | VI | The Madras City Muuicipal (Amendment) Act, 1924. | The whole. |
| 1925 | VII | The Madras Agricultural Pests and Diseases (Amendment) Act, 1925. | The whole. |
| 1926 | VI | The Madras City Tenants Protection (Amendment) Act, 1926. | The whole. |
| 1927 | I | The Madras Local Boards (Amendment) Act, 1926. | The whole. |
| 1928 | I | The Madras Hindu Religious Endowments (Amendment) Act, 1927. | The whole. |
| 1928 | II | The Madras Prevention of Adulteration (Amendment) Act, 1927. | So much as has not been repealed. |
| 1928 | III | The Tuticorin Port Trust (Amendment) Act, 1927. | The whole. |
| 1928 | VI | The Madras Children (Amendment) Act, 1928. | The whole. |
| 1928 | VIII | The Madras State Aid to Industries (Amendment) Act, 1928. | The whole. |
| 1929 | V | The Madras Hindu Religious Endowments (Amendment) Act, 1929. | The whole. |
| 1929 | X | The Madras Medical Registration (Amendment) Act, 1929. | The whole. |
| 1929 | XIII | The Madras City Police (Amendment) Act, 1929, | The whole. |
| 1929 | XIV | The Madras Medical Registration (Second Amendment) Act, 1929. | So much as has not been repealed. |
| 1929 | XV | The Madras Village Courts (Amendment) Act, 1929. | The whole. |
| 1929 | XVII | The Madras District Municipalities (Amendment) Act, 1929. | The whole. |
| 1929 | XVIII | The Madras Abkari (Amendment) Act, 1929. | The whole in all local areas in the Province where the Act has not been repealed by Madras Act X of 1937. |
| 1930 | I | The Madras District Municipalities and Local Boards (Further Amendment) Act, 1929. | The whole. |
| 1930 | II | The Madras Town-Planning (Amendment) Act, 1930. | The whole. |

| Year. (1) | Number. (2) | Short title. (3) | Extent of repeal. (4) |
|---|---|---|---|
| 1930 | IV | The Madras Hindu Religious Endowments (Amendment) Act, 1930. | The whole. |
| 1930 | VI | The Madras State Aid to Industries (Amendment) Act, 1930. | The whole. |
| 1930 | X | The Madras District Municipalities (Amendment) Act, 1930. | Sections 2 to 178 and the Schedule. |
| 1930 | XI | The Madras Local Boards (Amendment) Act, 1930. | Sections 2 to 245 and rules 6 and 9 of the Schedule. |
| 1931 | II | The Madras Civil Courts (Amendment) Act, 1930. | The whole. |
| 1931 | III | The Madras Motor Vehicles Taxation Act, 1931. | Section 3 and Schedule I. |
| 1931 | VIII | The Madras District Muncipalities (Amendment) Act, 1931. | The whole. |
| 1931 | IX | The Madras Local Boards (Amendment) Act, 1931. | The whole. |
| 1931 | XI | The Madras Hindu Religious Endowments (Amendment) Act, 1931. | The whole. |
| 1932 | I | The Madras Suppression of Immoral Traffic (Amendment) Act, 1931. | The whole. |
| 1932 | II | The Madras Elementary Education (Amendment) Act, 1931. | The whole. |
| 1932 | III | The Madras Prevention of the Adulteration (Amendment) Act, 1932. | The whole. |
| 1932 | IV | The Madras Local Boards (Amendment) Act, 1932. | The whole. |
| 1932 | V | The Madras Motor Vehicles Taxation (Amendment) Act, 1932. | The whole. |
| 1932 | IX | The Madras Medical Registration (Amendment) Act, 1932. | The whole. |
| 1933 | III | The Madras City Municipal (Amendment) Act, 1933. | The whole. |
| 1933 | VI | The Madras City Police (Amendment) Act, 1933. | The whole. |
| 1933 | VII | The Madras Gaming (Amendment) Act, 1933. | The whole. |
| 1933 | VIII | The Madras Co-operative Societies (Amendment) Act, 1933. | The whole. |
| 1933 | X | The Madras Local Authorities Entertainments Tax (Amendment) Act, 1933. | The whole. |
| 1933 | XI | The Madras District Municipalities and Local Boards (Further Amendment) Act, 1933. | The whole. |
| 1933 | XII | The Madras District Municipalities (Third Amendment) Act, 1933. | The whole. |
| 1933 | XIII | The Madras City Police (Second Amendment) Act, 1933. | The whole. |
| 1933 | XIV | The Madras Local Boards (Amendment) Act, 1933. | The whole. |
| 1933 | XV | The Madras District Municipalities (Amendment) Act, 1933. | The whole. |
| 1933 | XVII | The Madras Court of Wards (Amendment) Act, 1933. | The whole. |
| 1933 | XVIII | The Madras Local Boards (Third Amendment) Act, 1933. | The whole. |
| 1933 | XXIII | The Madras Local Boards (Fourth Amendment) Act, 1933. | The whole. |
| 1933 | XXIV | The Madras Wild Elephants' Preservation (Amendment) Act, 1933. | The whole. |
| 1933 | XXV | The Madras District Municipalities and Local Boards (Amendment) Act, 1933. | The whole. |
| 1934 | I | The Madras Forest (Amendment) Act, 1933 | The whole. |
| 1934 | II | The Madras Local Boards and Elementary Education (Amendment) Act, 1934. | Sections 2 to 60. |

| Year. (1) | Number. (2) | Short title. (3) | Extent of repeal. (4) |
|---|---|---|---|
| 1934 | III | The Madras Impartible Estates (Amendment) Act, 1934. | The whole. |
| 1934 | IV | The Madras Town-Planning (Amendment) Act, 1934. | The whole. |
| 1934 | VI | The Madras Co-operative Societies (Amendment) Act, 1934. | The whole. |
| 1934 | VII | The Madras Nurses and Midwives (Amendment) Act, 1934. | The whole. |
| 1934 | VIII | The Madras Estates Land (Amendment) Act, 1934. | Sections 2 to 126 and the Schedule. |
| 1934 | IX | The Madras Local Authorities Entertainments Tax (Amendment) Act, 1934. | The whole. |
| 1934 | XI | The Madras Hindu Religious Endowments (Amendment) Act, 1934. | The whole. |
| 1934 | XII | The Madras Impartible Estates (Second Amendment) Act, 1934. | The whole. |
| 1935 | I | The Madras City Civil Court (Amendment) Act, 1934. | The whole. |
| 1935 | II | The Malabar Land Registration (Amendment) Act, 1934. | The whole. |
| 1935 | III | The Madras Local Boards (Amendment) Act, 1934. | The whole. |
| 1935 | IV | The Madras District Municipalities (Second Amendment) Act, 1934. | The whole. |
| 1935 | V | The Madras Co-operative Societies (Second Amendment) Act, 1934. | The whole. |
| 1935 | IX | The Madras Compulsory Labour (Amendment) Act, 1935. | The whole. |
| 1935 | X | The Madras State Aid to Industries (Amendment) Act, 1935. | The whole. |
| 1935 | XI | The Madras Elementary Education (Amendment) Act, 1935. | Sections 2 to 12. |
| 1935 | XII | The Madras Hindu Religious Endowments (Amendment) Act, 1935. | The whole. |
| 1935 | XIII | The Madras Local Boards (Amendment) Act, 1935. | Sections 2 to 6. |
| 1935 | XV | The Madras Village Courts (Amendment) Act, 1935. | The whole. |
| 1935 | XVII | The Madras Co-operative Land Mortgage Banks (Amendment) Act, 1935. | The whole. |
| 1935 | XVIII | The Madras District Municipalities (Amendment) Act, 1935. | The whole. |
| 1935 | XIX | The Madras Prevention of Adulteration (Amendment) Act, 1935. | The whole. |
| 1935 | XXI | The Madras Medical Registration (Amendment) Act, 1935. | The whole. |

## THE SECOND SCHEDULE.

AMENDMENTS.

(See *section 4.*)

| Year. (1) | Number. (2) | Short title. (3) | Amendments. (4) |
|---|---|---|---|
| | | *Act of the Governor-General in Council.* | |
| 1859 | XXIV | The Madras District Police Act, 1859. | In the Schedule—<br>(i) for the words and figure "in section 1" occurring after the word "conviction" the words and figure "in section 3" shall be substituted; and |

| Year. (1) | Number. (2) | Short title. (3) | Amendments. (4) |
|---|---|---|---|
| | | | (ii) for the words, figures and brackets "(xviii) and (xx) of section 71" the words, figures and brackets "and (xviii) of section 71" shall be substituted. |

*Acts of the Governor of Fort St. George in Council.*

| Year. (1) | Number. (2) | Short title. (3) | Amendments. (4) |
|---|---|---|---|
| 1865 | VII | The Madras Irrigation Cess Act, 1865. | In the first proviso to section 1, the article "the" occurring before the words "the Crown" shall be omitted. |
| 1908 | I | The Madras Estates Land Act, 1908. | In section 190, the word and figures "section 40" shall be omitted. |
| 1919 | IV | The Madras City Municipal Act, 1919. | (1) In section 387, between the words "regulations" and "shall" the words "are due by any person to the Corporation" shall be inserted.<br>(2) In sub-rule (*a*) of rule 15 of Schedule IV, the words and figures "under rule 14" occurring for the second time shall be omitted. |
| 1920 | IV | The Madras Children Act, 1920. | In section 44, sub-section (3) shall be omitted and sub-section (4) shall be renumbered as sub-section (3). |
| 1920 | V | The Madras District Municipalities Act, 1920. | (1) In sub-section (1) of section 41, for the words "his opinion" the words "their opinion" and for the words "he may if he thinks" the words "they may if they think" shall be substituted.<br>(2) In clause (*c*) of sub-section (2) of section 89, for the words "half-year preceding the demolition" the words "half-year succeeding the demolition" shall be substituted.<br>(3) In clause (*b*) of sub-section (2) of section 90, for the words "half-year preceding such date" the words "half year succeeding such date" shall be substituted.<br>(4) In clause (6) of rule 53 of Schedule IV, before the words "any other extraordinary charges" the word "defray" shall be inserted. |
| 1920 | VII | The Madras Town Planning Act, 1920. | In section 44, clause (*p*) of sub-section (2) shall be omitted. |
| 1920 | VIII | The Madras Elementary Education Act, 1920. | In the proviso to the Explanation to sub-section (2) of section 45, for the words 'as he may think fit' the words 'as they may think fit' shall be substituted. |
| 1920 | XIV | The Madras Local Boards Act, 1920. | (1) In sub-clause (i) of clause (*f*) of section 31, for the words 'an servant of the Crown' the words 'a servant of the Crown' shall be substituted.<br>(2) In clause (*c*) of sub-section (2) of section 102, for the words "half-year preceding demolition" the words "half-year succeeding the demolition" shall be substituted.<br>(3) In clause (*b*) of sub-section (2) of section 102-A, for the words "half-year preceding such date" the words "half-year succeeding such date" shall be substituted.<br>(4) In sub-section (2) of section 123, for the words "board" the word "panchayat" shall be substituted.<br>(5) In sub-section (1) of section 195, for the words "as they think fit" the words "as it thinks fit" shall be substituted. |

| Year. (1) | Number. (2) | Short title. (3) | Amendments. (4) |
|---|---|---|---|
| 1920 | XIV | The Madras Local Boards Act, 1920—*Contd.* | (6) In sub-rule (2) of rule 5 of Schedule IV after the words "who pays any tax to the panchayat" the words "or his authorized agent" shall be inserted and the words "or his authorized agent" occurring at the end of the sub-rule shall be omitted. |
| | | *Act of the Madras Legislature.* | |
| 1939 | IV | The Madras Agriculturists Relief Act, 1938. | In section 23 between the words "the sale" and the words "shall be deemed" the words "or foreclosure" shall be inserted. |

# THE PRISONS AND INDIAN LUNACY (MADRAS AMENDMENT) ACT, 1938.

ACT No. XIV OF 1938.

[*3rd October, 1938.*

*An Act further to amend the Prisons Act, 1894, and the Indian Lunacy Act, 1912, in their application to the Province of Madras, for certain purposes.*

WHEREAS it is expedient further to amend the Prisons Act, 1894, and the Indian Lunacy Act, 1912, in their application to the Province of Madras for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE PRISONS AND INDIAN LUNACY (MADRAS AMENDMENT) ACT, 1938.

Insertion of new section 39-A in Act IX of 1894.

2. After section 39 of the Prisons Act, 1894, the following section shall be inserted, namely,

Power of Superintendent to send a prisoner to hospital or asylum for special treatment.

"39-A. The Superintendent may, if in his opinion, a prisoner requires special treatment in a hospital outside the prison or in an asylum as defined in the Indian Lunacy Act, 1912, send him to such hospital or asylum subject to the prisoner or any relative or friend of the prisoner executing such bond and abiding by such other conditions, if any, as the Provincial Government may by rule or order prescribe. Any period during which the prisoner is under-going treatment in such hospital or asylum or spent by him in going thereto or returning therefrom shall be deemed to be part of the period of his detention in the prison.

*Explanation.*—Nothing contained in this section shall be deemed to affect the operation of section 30 of the Prisoners Act, 1900, in cases to which that section applies."

Amendment of section 4, Act IV of 1912.

3. In sub-section (1) of section 4 of the Indian Lunacy Act, 1912, for the words and figures "save as provided by sections 8, 16 and 98", the words, figures and letter "save as provided by sections 8, 16 and 98 of this Act and by section 39-A of the Prisons Act, 1894" shall be substituted.

# THE INDIAN LUNACY (MADRAS AMENDMENT) ACT, 1938.

## ACT No. XV OF 1938.

[*3rd October, 1938.*

*An Act further to amend the Indian Lunacy Act, 1912, in its application to the Province of Madras for certain purposes.*

WHEREAS it is expedient further to amend the Indian Lunacy Act, 1912, in its application to the Province of Madras for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN LUNACY (MADRAS AMENDMENT) ACT, 1938.

Insertion of new section 33-A in Act IV of 1912.

2. After section 33 of the Indian Lunacy Act, 1912 (hereinafter referred to as the said Act), the following section shall be inserted, namely:—

Temporary order of discharge of lunatic in interests of his health.

"33-A. If the person in charge of any asylum in which a lunatic is detained under the provisions of sections 14, 15 or 17, is satisfied that in the interests of the health of the lunatic, it is necessary to discharge him temporarily, the person aforesaid may order such discharge for such period as he may think fit and subject to such conditions as the Provincial Government may by rule prescribe."

Amendment of section 88, Act IV of 1912.

3. In section 88 of the said Act, for the words and figures "on a reception order made under section 14, section 15 or section 17," the words and figures "on a reception order made under sections 7, 10, 14, 15 or 17 or on an order made under sections 8 or 16" and for the words "authority which made the reception order" the words "authority which made the reception or other order aforesaid" shall be substituted.

Amendment of section 89, Act IV of 1912.

4. In sub-section (1) of section 89 of the said Act, for the words "may make an order for the recovery of the cost of maintenance of such lunatic together with the costs of the application out of such estate or from such person," the following words shall be substituted, namely:—

"may make an order for the recovery of the whole or any portion of the cost of maintenance of such lunatic and of the costs of the application, out of such estate or from such person:

Provided that an order directing recovery out of such estate shall be made only after making due allowance for the needs of the wife, children and other dependants, if any, of the lunatic."

Amendment of section 91, Act IV of 1912.

5. In sub-section (1) of section 91 of the said Act, after clause *(c)*, the following clause shall be inserted, namely:—

"*(cc)* to prescribe the conditions subject to which lunatics may be discharged temporarily under section 33-A."

# THE MADRAS MEDICAL REGISTRATION (AMENDMENT) ACT, 1938.

## ACT No. XVI OF 1938.

[*14th October, 1938.*

*An Act further to amend the Madras Medical Registration Act, 1914, for certain purposes.*

WHEREAS it is expedient further to amend the Madras Medical Registration Act, 1914, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS MEDICAL REGISTRATION (AMENDMENT) ACT, 1938.

Substitution of new section for section 5, Madras Act IV of 1914.

2. For section 5 of the Madras Medical Registration Act, 1914 (hereinafter referred to as the said Act), the following section shall be substituted, namely:—

Constitution of Medical Council.

"5. (1) A Medical Council shall be established for the Province of Madras, consisting of the following fifteen members, namely:—

(*a*) one member elected by the Academic Council of the University of Madras from among the members of the Faculty of Medicine of that University;

(*b*) one member elected by the Academic Council of the Andhra University from among the members of the Faculty of Medicine of that University;

(*c*) one member elected from amongst themselves by such members of the staff of the Medical College at Madras, as are registered practitioners;

(*d*) one member elected from amongst themselves by such members of the staff of the Medical College at Vizagapatam, as are registered practitioners;

(*e*) one member elected from amongst themselves by such members of the staff of the Stanley Medical College, Madras, as are registered practitioners;

(*f*) seven members elected by the registered practitioners from amongst themselves; and

(*g*) three members nominated by the Provincial Government.

(2) In making nominations under clause (*g*) of sub-section (1), the Provincial Government shall have due regard to the claims of women, of medical missions, and of other groups of practitioners, representatives of whom have not been elected by the electorates referred to in clauses (*a*) to (*f*) of that sub-section.

(3) The president of the Council shall be elected by the members of the Council from amongst themselves in the prescribed manner:

Provided that for a period of four years from the date of the reconstitution of the Council under the Madras Medical Registration (Amendment) Act, 1938, the president shall be a person nominated by the Provincial Government and holding office during their pleasure, and where he is not already a member, shall *ex officio* be a member of the Council in addition to the members specified in sub-section (1).

(4) The vice-president shall be elected by the members of the Council from amongst themselves in the prescribed manner."

Amendment of section 6, Madras Act IV of 1914.

3. The proviso to section 6 of the said Act shall be omitted.

Substitution of new section for section 7, Madras Act IV of 1914.

4. For section 7 of the said Act, the following section shall be substituted, namely:—

Term of office of elected and nominated members.

"7. A member of the Council, other than a nominated president who is a member *ex officio*, shall hold office for a term of five years from the date of his election or nomination and shall be eligible for re-election or re-nomination."

Amendment of section 8, Madras Act IV of 1914.

5. In clause (7) of section 8 of the said Act, for the expression "clause (*b*) or clause (*bb*)," the expression "clause (*a*) or clause (*b*)" shall be substituted.

Amendment of section 11, Madras Act IV of 1914.

6. In section 11 of the said Act, after the first sentence, the following sentence shall be inserted, namely:—

"The names of the medical practitioners shall be arranged in the register in the alphabetical order, an asterisk being placed against the names of those who are entitled to vote at elections to the Medical Council of India under section 3 (1) (*c*) of the Indian Medical Council Act, 1933."

Amendment of section 24, Madras Act IV of 1914.

7. In sub-section (1) of section 24 of the said Act—

(*a*) in clause (i), for the expression "sections 5 and 6," the expression "section 5" shall be substituted; and

(*b*) in clause (ii), for the words "election of the vice-president," the words "election and term of office of the president and vice-president" shall be substituted.

Transitional provisions.

8. (1) The Provincial Government shall fix a convenient date on which the term of office of the members of the Council holding office at the commencement of this Act shall expire:

Provided that the Provincial Government may, from time to time, postpone any date fixed by them under this sub-section and fix another date in lieu thereof.

(2) The Provincial Government shall cause arrangements to be made for the election of members of the Council, and nominate members thereto, so that the newly elected and nominated members may come into office on the date fixed under sub-section (1) for the expiry of the term of office of members holding office at the commencement of this Act.

(3) No vacancy in the office of any member of the Council which is in existence at the commencement of this Act or which occurs before the date fixed under sub-section (1), shall be filled.

(4) If any difficulty arises as to the reconstitution of the Council in accordance with the provisions of this Act, the Provincial Government, as occasion may require, may by order do anything which appears to them necessary for the purpose of removing the difficulty.

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## THE MADRAS PROHIBITION (SECOND AMENDMENT) ACT, 1938.

### ACT NO. XVII OF 1938.

[*20th December, 1938.*

*An Act further to amend the Madras Prohibition Act, 1937, for certain purposes.*

WHEREAS it is expedient further to amend the Madras Prohibition Act, 1937, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MADRAS PROHIBITION (SECOND AMENDMENT) ACT, 1938.

Amendment of section 3, Madras Act X of 1937.

2. In section 3 of the Madras Prohibition Act, 1937 (hereinafter referred to as the said Act)—

(*i*) in clause (19), the word "and" at the end shall be omitted; and

(*ii*) after clause (20), the following shall be added, namely:—

"; and

(21) any references to a permit generally or to a permit granted under section 18, 19 or 20 shall be construed as including a reference to an 'Authority' issued under section 16-A."

Insertion of new section 16-A in Madras Act X of 1937.

3. After section 16 of the said Act, the following section shall be inserted, namely:—

"16-A. The Provincial Government shall make suitable provision for issuing 'Authorities' to persons and institutions for the possession and use of such liquor as may be required by them for any *bona fide* religious purpose in accordance with ancient custom, under such terms and conditions, and penalties for infringement, as may be prescribed."

Authorities for *bona fide* religious purposes.

Amendment of section 20, Madras Act X of 1937.

4. In section 20 of the said Act, clause (*b*) shall be omitted and clauses (*c*) and (*d*) shall be relettered (*b*) and (*c*) respectivety.

## THE MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1938.

Act No. XVIII of 1938.

[*20th December, 1938.*

*An Act further to amend the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for certain purposes.*

Whereas it is expedient further to amend the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for the purposes hereinafter appearing; It is hereby enacted as follows :—

Short title.

1. This Act may be called The Madras District Municipalities and Local Boards (Amendment) Act, 1938.

Amendment of Madras Act V of 1920.

2. In the Madras District Municipalities Act, 1920—

(i) after section 38, the following section shall be inserted, namely :—

" 38-A. The administration by a municipal Council of any undertaking for the generation, transmission, supply or use of electrical energy shall be subject to such control as may be prescribed, not inconsistent with the Indian Electricity Act, 1910, as in force for the time being, the rules made under that Act, and the terms of the licence granted under it to the municipal council." ;

Control over municipal electrical undertakings.

(ii) in section 71, after sub-section (2), the following sub-section shall be inserted namely :—

" (2-A) Any Municipal Council which has undertaken the generation, transmission, or supply of electrical energy, by special resolution may, and if so required by the Provincial Government shall, sanction a post of Municipal Electrical engineer." ;

(iii) in the same section, in sub-section (4), for the words " or engineer ", the words " engineer or electrical engineer " shall be substituted ;

(iv) in section 72, in sub-section (1), for the words " or engineer ", the words " engineer or electrical engineer " shall be substituted ;

(v) in section 75, for the words " or a municipal engineer," the words " a municipal engineer or a municipal electrical engineer " shall be substituted ;

(vi) in section 76-A, in clause (*a*), for the words " or the municipal engineer " the words " the municipal engineer or the municipal electrical engineer " shall be substituted ;

(vii) in the same section, in clauses (*b*) and (*c*), for the words " or engineer," the words " engineer or electrical engineer " shall be substituted ; and

(viii) in the same section, in clause (*d*), for the words " and engineers," the words " engineers and electrical engineers " shall be substituted.

Amendment of Madras Act XIV of 1920.

3. In the Madras Local Boards Act, 1920—

(i) after section 39, the following section shall be inserted, namely :—

Control over electrical undertakings of local boards.

" 40. The administration by a local board of any undertaking for the generation, transmission, supply or use of electrical energy shall be subject to such control as may be prescribed, not inconsistent with the Indian Electricity Act, 1910, as in force for the time being, the rules made under that Act, and the terms of the licence granted under it to the local board." ;

(ii) in section 68, in sub-section (1), for the words " a post of district engineer," the words " one or more posts of district engineer " and for the words " a post of district panchayat officer," the words " one or more posts of district panchayat officer " shall be substituted ; and

(iii) after section 69-B, the following section shall be inserted, namely :—

Appointment of electrical engineer for local boards.

" 69-C. (1) The Provincial Government may appoint an electrical engineer to any District Board or panchayat which has undertaken the generation, transmission or supply of electrical energy.

(2) The Provincial Government may recover from the local board concerned the whole or such proportion of the salary and allowances paid to any officer appointed under sub-section (1), and such contribution towards his leave allowances, pension and provident fund as the Provincial Government may, by general or special order, determine.

(3) The Provincial Government shall have power to regulate the methods of recruitment, conditions of service, pay and allowances, and discipline and conduct, of the officers appointed under sub-section (1)."

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## THE MADRAS MINOR PORTS FUND ACT, 1938.

### ACT No. XIX OF 1938.

[*4th January 1939.*

*An Act to provide for the disposal of the balance to the credit of the Minor Ports Fund in the Province of Madras.*

WHEREAS under sub-section (6) of section 36 of the Indian Ports Act, 1908, the disposal of the balances from time to time standing to the credit of port fund accounts is subject to the provisions of any local law ;

AND WHEREAS the Provincial Government have directed that all minor ports in the Province of Madras should be regarded as constituting a single port with a common port fund called the Minor Ports Fund ;

AND WHEREAS subsequently the Tuticorin Port Fund has been constituted as a separate fund under the Tuticorin Port Trust Act, 1924 ;

AND WHEREAS it is expedient to provide by an Act of the Provincial Legislature for the disposal of the balance which is now standing and which may from time to time stand to the credit of the said Minor Ports Fund other than that of Tuticorin ;

It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called THE MADRAS MINOR PORTS FUND ACT, 1938.

(2) It extends to the whole of the province of Madras.

Definition of 'Minor Ports Fund.'

2. In this Act, 'Minor Ports Fund' means the Common port fund of all the minor ports situated in the Province of Madras other than Tuticorin.

Disposal of surplus on the 31st March 1939.

3. The balance standing on the 31st day of March 1939 to the credit of the Minor Ports Fund in excess of twenty lakhs of Rupees shall be credited to and shall be disposed of along with the rest of the revenues of the Province.

Disposal of subsequent surpluses.

4. Such portion of the balance standing to the credit of the Minor Ports Fund on the 31st day of March in the year 1940 or in any subsequent year, as the Provincial Government may, with the approval, by resolution, of the Madras Legislative Assembly, determine, shall be credited to and shall be disposed of along with the rest of the revenues of the Province.

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## THE MALABAR TEMPLE ENTRY ACT, 1938.

### ACT NO. XX OF 1938.

[*18th January, 1939.*

*An Act to remove the disabilities of certain classes of Hindus in regard to entry into temples in the district of Malabar.*

WHEREAS the disabilities imposed by custom and usage on certain classes of Hindus in respect of their entry into, and offering worship in, Hindu temples should be removed,

AND WHEREAS, however, doubts have been entertained whether the trustees of such temples have the power in law to make any such innovation in practice,

AND WHEREAS it is just and expedient that these doubts should be removed and the trustees should be empowered by law to extend to all classes of Hindus the right of entry into, and worship in, temples if the Hindus in the locality who are now entitled to such entry are generally in favour of such extension,

AND WHEREAS, further, such extension of rights and privileges in Hindu temples to classes hitherto excluded has been recently ordered and peacefully brought into effect in one part of Kerala, and by reason of common traditions and identity of language, customs, forms of worship and the like, the removal of the disabilities aforesaid has been not only more insistently demanded, but also made more easy of accomplishment in the first instance, in another part of Kerala,

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE MALABAR TEMPLE ENTRY ACT, 1938.

(2) It extends to the whole of the District of Malabar.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context—

(1) 'Board' means the Board of Commissioners constituted under section 10 of the Madras Hindu Religious Endowments Act, 1926, or any other authority in which the powers and functions of the said Board in respect of a temple may for the time being be vested;

(2) 'excluded class' means any caste or class of the Hindu community which, by reason of any established usage or custom, is excluded from entering the temple concerned, or which, though admitted into the precincts of the temple, is not allowed entry into any part of the temple where the bulk of the worshippers are allowed;

(3) 'prescribed' means prescribed by rules made under section 9;

(4) 'temple' means a place, by whatever designation known, which is used as a place of public worship by the Hindu community generally except excluded classes and which was at any time assessed to contribution under section 69 of the Madras Hindu Religious Endowments Act, 1926, on an annual income of not less than Rs. 5,000; and in any context with reference to entry shall mean every part of the temple which is open to the bulk of the worshippers:

Provided that any temple which has been before the 1st of April 1938 declared by final decree or order of a competent court to be private property or accepted by the Board to be private property shall not be a temple for the purposes of this Act:

Provided further that any temple in respect of which a question as to whether it is private property has been already raised in a suit in a court of law or in an application before the Board registered before the 1st of April 1938, the temple shall not be deemed to be a temple for the purposes of this Act until the final decision in such a proceeding, and thereafter, it shall not be, or shall be, a temple for the said purposes according as the final decision declares or accepts the temple to be private property or not.

(5) 'trustee' means a person by whatever designation known, in whom the administration of a temple is vested, whether in a hereditary capacity or not;

(6) 'voters' means the Hindu voters, other than those belonging to excluded classes, on the electoral roll of the Madras Legislative Assembly for the time being in force relating to the general constituency of the revenue taluk in which the temple is situated including the municipal areas therein, who are included in a list prepared under the rules made under section 9; and

(7) 'worship' means such religious service as the bulk of the worshippers participate in, in accordance with the provisions of such regulations as may be made by the trustees for the maintenance of order and cleanliness and the due observance of the religious rites and ceremonies performed in the temple.

Requisition to trustees to throw open temples to excluded classes.

3. (1) On receipt by the trustees of a temple of a requisition in writing signed by not less than fifty voters requesting them to throw open the temple to persons belonging to excluded classes, the trustees shall forward the requisition to the Provincial Government and the Provincial Government shall thereupon direct the trustees to refer the matter to the voters and ascertain their opinion by votes taken by the prescribed method:

Provided that if the Provincial Government are of opinion that the requisition is not made for the furtherance of the objects of this Act, they may direct that no action be taken thereon.

(2) Where on such reference the result is found by a majority of the votes to be in favour of throwing the temple open to persons belonging to excluded classes, the trustees shall publish in the prescribed manner an order to the effect that the temple shall thereafter be open to persons belonging to excluded classes.

Power of trustees to issue notice of proposal to throw open temples to excluded classes.

4. (1) Notwithstanding any law, custom or usage to the contrary, it shall be open to the trustees of a temple to publish in the prescribed manner a notice to the effect that they propose to make an order throwing the temple open to persons belonging to excluded classes. Such notice shall also state that objections to the proposal may be preferred to the trustees at any time within one month from the date of the publication of the notice.

(2) If within one month from the date of the publication of the notice referred to in sub-section (1), written objections to the proposal are preferred

by not less than fifty voters, the same shall be forwerded to the Provincial Government, and thereafter, on a direction from them, the question whether the temple shall or shall not be thrown open to persons belonging to excluded classes shall be referred for the opinion of the voters as if a requisition had been received under sub-section (1) of section 3.

(3) If in any case where action under sub-section (1) is taken by the trustees, no objection as specified in sub-section (2) is preferred, or if on a reference made under sub-section (2), the result is found to be in favour of throwing the temple open to persons belonging to excluded classes, the trustees shall publish in the prescribed manner an order to the effect that the temple shall thereafter be open to persons belonging to excluded classes.

5. The Provincial Government may, at any time, before the results of any reference to the voters are announced, order that all further action in respect of such reference shall be suspended and upon such order all previous proceedings relating thereto shall be deemed to have been cancelled.

Power of trustees to throw open temples to excluded classes without reference to voters in certain cases.

6. Where on a reference made to the voters under sub-section (1) of section 3 or sub-section (2) of section 4 the result is found to be in favour of throwing a temple open to persons belonging to excluded classes, the trustees of any other temple situated in the same revenue taluk, within two years from the date of such reference, may of their own motion and shall on receipt of a requisition in writing signed by not less than fifty voters, publish in the prescribed manner an order to the effect that the temple shall be open to persons belonging to excluded classes.

Effect of order under section 3 (2), 4 (3) or 6

7. Where an order has been published under sub-section (2) of section 3, or sub-section (3) of section 4, or section 6, it shall be lawful, notwithstanding any custom or usage to the contrary, for any person belonging to excluded classes to enter the temple concerned and participate in worship therein.

Fresh proceedings not to be taken in certain cases.

8. Where on a reference made to the voters under sub-section (1) of section 3 or sub-section (2) of section 4, the result is found to be against throwing the temple open to persons belonging to excluded classes, no further proceedings shall be taken either under sub-section (1) of section 3 or under sub-section (1) of section 4 for a period of two years from the date of such reference in respect of such temple or any other temple in the same revenue taluk.

Rules.

9. (1) The Provincial Government may make rules for the purposes of carrying into effect the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power the Provincial Government may make rules—

(*a*) with reference to all matters allowed to be prescribed by this Act;

(*b*) as to the form and presentation of the requisitions and objections referred to in sub-section (1) of section 3, section 4 and section 6;

(*c*) as to the publication of orders and notices by trustees;

(*d*) as to the method by which the opinion of the voters shall be ascertained;

(*e*) as to the preparation and publication of lists of voters, and the decision of all disputes which may arise in connexion therewith; and

(*f*) as to the decision of all disputes which may arise in respect of requisitions and objections from voters under sections 3, 4 and 6 or in respect of references to voters under sections 3 and 4 and the ascertainment and publication of the results of such references.

(3) All rules made under this section shall be published in the official gazette and on such publication shall have effect as if enacted in this Act.

Power to remove difficulties.

10. If any difficulty arises in giving effect to the provisions of this Act the Provincial Government, as occasion requires, may order the doing of anything necessary for the purpose of removing the difficulty.

Power to decide disputes.

11. (1) If any question arises as to whether a place is or is not a temple as defined in this Act the question shall be referred for the decision of the Provincial Government and their decision shall be final.

(2) The Provincial Government shall have power to exempt from the provisions of this Act such institutions as, in their opinion, are in the nature of family temples and may be exempted without prejudice to the objects of this Act.

Amendment of section 40, Madras Act II of 1927.

12. In section 40 of the Madras Hindu Religious Endowments Act, 1926, the words and figures "Subject to the provisions of the Malabar Temple Entry Act, 1938," shall be inserted at the commencement.

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## THE REMOVAL OF CIVIL DISABILITIES ACT, 1938.

### ACT No. XXI OF 1938.

[*24th January, 1939.*

*An Act to provide for the removal of civil disabilities among certain classes of Hindus.*

WHEREAS it is increasingly felt by the Hindu community that the disabilities, which are imposed by social custom and usage on certain classes of Hindus commonly known as Harijans, Untouchables, or Depressed Classes, and which have been in certain matters even legally recognized in the adjudication of rights and duties in civil and criminal proceedings, are repugnant to modern conditions and ideas of justice and social solidarity, and should no longer be recognized by law or otherwise enforced; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE REMOVAL OF CIVIL DISABILITIES ACT, 1938.

(2) It extends to the whole of the Province of Madras.

Social disabilities not to be recognized by law.

2. Notwithstanding any law, custom, usage or prescription to the contrary, no Hindu shall, by reason merely of his belonging to any particular community or class known as Harijans, Untouchables, Depressed Class or the like, be prevented or disabled from being appointed to any public office or enjoying or having access to any public stream, river, well, tank, pathway, sanitary convenience, or means of transport or any secular institution which the general public belonging to all other classes and communities of Hindus have a right to enjoy or have access to or which is dedicated or maintained or licensed for the use of the general public or which is maintained or paid for out of the funds of the State or a local authority; and no Civil, Criminal or Revenue Court in adjudicating any matter or executing any order and no public or local authority in carrying on the affairs entrusted to such authority shall recognize any custom, usage or prescription under which it is sought to impose any civil disability on any person by reason of his belonging to any of the classes or communities aforesaid, or by reason of any acts or omissions on the part of such person which would not furnish grounds for such disability if he did not belong to such class or community.